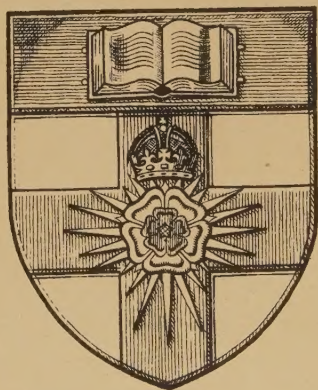


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(INCORPORATING THE
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OF CASES DECIDED IN

THE HOUSE OF LORDS

THE PRIVY COUNCIL

ALL DIVISIONS OF THE SUPREME COURT

AND

COURTS OF SPECIAL JURISDICTION

1952
VOLUME 1

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CORRIGENDA

- [1949] 1 All E.R.
P. 65. *L.P.T.B. v. UPSON*. Line D.6: for "stop within that distance." read "spot within that distance."
[1951] 1 All E.R.
P. 204. *R. v. COHEN*. Case referred to No. (2): for "*R. v. Fitzgerald*, (1948), unrep." read "*R. v. Fitzpatrick*, [1948] 1 All E.R. 769; [1948] 2 K.B. 203; 112 J.P. 251; 2nd Digest Supp." p. 206, line C: for "*R. v. Fitzgerald* (2)" read "*R. v. Fitzpatrick* (2)".
[1951] 2 All E.R.
P. 1036. *Re E. W. SAVORY, LTD.* Counsel: for "*H. H. Monroe*" read "*J. G. Monroe*".
[1952] 1 All E.R.
P. 114. *Re CAMBRIDGE COFFEE ROOM ASSOCN., LTD.* Solicitors: after "*Waterhouse & Co.*" read "agents for *Few & Kester*, Cambridge."
P. 161. *DAVIS COHEN & SONS, LTD., v. HALL*. Line H.7: for "*Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Asscn., Ltd* (3)" read "*Richardson & Son v. Middlesbrough Borough Assessment Committee* (5)".
P. 180. *THRASYVOULOS IOANNOU v. PAPA CHRISTOFOROS DEMETRIOU*. Counsel: for "*Pearson, K.C.*" read "*Karmel, K.C.*"
P. 188. *R. v. GOVERNOR OF BRIXTON PRISON*. Counsel: before "*J. P. Ashworth*" read "*Kenneth Diplock, K.C., and*".
P. 274. *Re MELDRUM'S WILL TRUSTS*. Counsel: for "*H. H. Monroe*" read "*J. G. Monroe*".
P. 305. *CANADA STEAMSHIP LINES, LTD. v. REGEM*. Lines E—G. Read the following instead of as printed:
HELD: if a clause in a contract contains language which expressly exempts the person in whose favour it is made ("the *proferens*") from the consequence of the negligence of his servants, effect must be given to that provision; if there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servant of the *proferens*; if they are wide enough, the court must then consider whether the head of damage may be based on some ground, other than that of negligence, which is not so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it, and the existence of a possible head of damage other than that of negligence is fatal to the *proferens*; on construction, cl. 7 and cl. 17 were not expressed in such clear terms as would exempt the Crown from liability for the negligence of its servants or entitle it to an indemnity from the company for such negligence in the course of carrying out the obligation of the Crown under cl. 8; under the provisions of the Civil Code of Lower Canada the damage might be based on some ground other than negligence; and, therefore, the Crown had failed to establish its defence under cl. 7 or its claim for indemnity under cl. 17.
Dictum of LORD GREENE, M.R., in *Alderslade v. Hendon Laundry, Ltd* ([1945] 1 All E.R. 245), applied.
P. 404. *KUSHNER v. LAW SOCIETY*. Line C.2: for "January 31, 1951" read "January 31, 1952".
P. 492. *PAVIA & CO., S.P.A. v. THURMANN-NIELSEN*. Three lines from bottom of page: delete from "The arbitrators held" to the end of the page, and substitute: "On a consultative Case submitted by the parties for the opinion of the court MCNAIR, J., held that the credit should have been made available,"
P. 709. *ARAB BANK, LTD. v. ROSS*. Line D.6: for "plead" read "prove".
P. 744. *MINISTRY OF HEALTH v. STAFFORD CORPN.* Delete "and Another" from the title of the case.
P. 745, line B.3: after "Stafford Corporation" delete "and the Mid-Staffordshire Joint Hospital Board."
P. 750. *LAWES v. CAULCUTT*. Counsel: for "*Aggs*" read "*Joseph Dean*".

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

TEMPEST *v.* SNOWDEN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Morris, L.JJ.),
November 22, 23, 1951.]

Malicious Prosecution—Honest belief of defendant in plaintiff's guilt—Form of question for jury.

Where, in an action for malicious prosecution which is tried with a jury, the question of honest belief is in issue the form of question to the jury should be: "Did the defendant honestly believe in the plaintiff's guilt?" or "Did the defendant honestly believe in the charges he was preferring?", and should not include any reference to reasonable or probable cause for the action of the defendant as, *e.g.*, in the question: "Did the defendant honestly believe that there were reasonable grounds for instituting the prosecution?"

AS TO MALICE AND WANT OF REASONABLE AND PROBABLE CAUSE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 13-16, paras. 15-20; and FOR CASES, see DIGEST, Vol. 33, pp. 491-497, Nos. 309-379.

Cases referred to:

- (1) *Herniman v. Smith*, [1936] 2 All E.R. 1377; *affd.* H.L., [1938] 1 All E.R. 1; [1938] A.C. 305; 107 L.J.K.B. 225; Digest Supp.
- (2) *Hicks v. Faulkner*, (1881), 8 Q.B.D. 167; 51 L.J.Q.B. 268; 46 L.T. 127; 46 J.P. 420; 33 Digest 467, 18.
- (3) *Abrath v. North Eastern Ry. Co.*, (1883), 11 Q.B.D. 440; 52 L.J.Q.B. 620; 49 L.T. 618; 47 J.P. 692; *affd.* H.L., (1886), 11 App. Cas. 247; 55 L.J.Q.B. 457; 55 L.T. 63; 50 J.P. 659; 33 Digest 500, 418.
- (4) *Tims v. John Lewis & Co., Ltd.*, [1951] 1 All E.R. 814; [1951] 2 K.B. 459; 115 J.P. 265.
- (5) *Musgrove v. Newell*, (1836), 1 M. & W. 582; 5 L.J.Ex. 227; 150 E.R. 567; 33 Digest 488, 267.
- (6) *Broad v. Ham*, (1839), 5 Bing. N.C. 722; 8 L.J.C.P. 357; 132 E.R. 1278; 33 Digest 495, 362.

APPEAL by the defendant in an action for malicious prosecution from a judgment of CASSELS, J., sitting with a jury at Leeds Assizes, dated July 4, 1951.

Granville Sharp, K.C., and *Snowden* for the defendant.
Beyfus, K.C., and *Forrester-Paton* for the plaintiff.

SIR RAYMOND EVERSLED, M.R.: This is an appeal by the defendant from a verdict of the jury and the judgment of CASSELS, J., in an action for

malicious prosecution in which there was judgment for the plaintiff for damages amounting to £205 5s. The only matter which counsel for the defendant relied on before us was the impropriety of the first question put by the judge to the jury. In those circumstances it is right to say that we have heard nothing on the merits from counsel for the plaintiff.

The plaintiff as a salesman had been in the service of a company of which the defendant was at all material times the chairman of the board of directors. The company was concerned in the business of selling such articles as burglar alarms, amplifiers, and the like. In May, 1950, the defendant laid an information before the stipendiary magistrate at Bradford, as a result of which two summonses were served on the plaintiff charging him, on one summons, with larceny as a servant of burglar alarm apparatus, and, on the second summons, with fraudulent conversion of the same articles. After an adjournment the first summons came on for hearing before the magistrate who took the view that there was no evidence to support it, and he, therefore, dismissed the summons without calling on the plaintiff to answer the charge made against him. The second summons for fraudulent conversion was not proceeded with. The plaintiff then issued the writ in the present action for malicious prosecution, claiming general damages and, as special damages, £5 5s. costs which the plaintiff had had to pay to his solicitor in excess of what he recovered from the defendant.

It is clear that in an action of this character a plaintiff must establish *inter alia* the following two propositions:—(i) that the defendant acted without reasonable and probable cause; and (ii) that the defendant acted maliciously. Two questions were submitted by the judge to the jury. Question 1 was: "Did the defendant honestly believe that there were reasonable grounds for instituting the prosecution?" Question 2 was: "Has the plaintiff satisfied you that the defendant was actuated by malice?" The jury answered the first question negatively and the second question affirmatively. The judge held that the defendant had acted without reasonable and probable cause, and judgment for the plaintiff was entered for £205 5s., the sum of £200 being the amount of the general damages.

It must now be taken as clearly established that the first of the two propositions which I have stated, though it may well be a matter of fact, is a question for the judge and not for the jury. The argument of counsel for the defendant may be put in this form. "By inviting the jury to answer the question: 'Did the defendant honestly believe that there were reasonable grounds for instituting the prosecution?' the minds of the jury were directed to, or, at least, were liable to be distracted by, a consideration of the question: 'Were there reasonable and probable grounds for the prosecution?'—the question which is for the judge and not for the jury." Counsel for the defendant argued that, the jury's mind being affected by this difficult problem, they came to the conclusion that there were no reasonable or probable grounds for the prosecution, more particularly, perhaps, because the magistrate dismissed the charge without calling on the plaintiff to answer it. If, said counsel, that was the thing they had in their minds, it would be easy enough for the jury to conclude: "Well, if there really was no reasonable and probable cause the defendant could not honestly have thought that there was," and, therefore, they answered the first question negatively. If they thought the defendant honestly did not think there was a case against the plaintiff, then, again, it would be a very easy step for them—perhaps a necessarily logical step—to conclude that he acted out of malice. Thus, argued counsel for the defendant, the whole verdict is vitiated by the jury's mind having been deflected in the first instance to a consideration of a matter not proper for them to consider.

I turn now to *Herniman v. Smith* (1). The speech of LORD ATKIN had the concurrence of LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD MAUGHAM and LORD ROCHE, none of whom made any addition of his own. I have read and re-read LORD ATKIN's speech, and, with the utmost possible respect, I have

not found it in all respects easy to follow. I say that because in the course of the speech various questions seem to be posed and treated almost as if they were the same questions in a different form. The question is put ([1938] 1 All E.R. 8): "... was there evidence of the want of reasonable and probable cause for the prosecution?" Then the more general question is posed: "was there reasonable and probable cause," and, finally, the question: "did the defendant honestly believe in the plaintiff's guilt?" The questions are not the same. They are not synonymous. The question whether there is any evidence of want of reasonable and probable cause is, I should say, a question of law. The general question: Was there reasonable and probable cause, as LORD ATKIN himself states, is a question of fact, although it is a question which has to be determined by the judge, and not left to the jury. That question was paraphrased by HAWKINS, J., in *Hicks v. Faulkner* (2) and that paraphrase was accepted by LORD ATKIN. It is as follows (8 Q.B.D. 171):

"Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

If that is the meaning of the question: "Was there reasonable and probable cause," it is no wonder that it is a question not to be left to a jury.

However that may be, I think the difficulty that I have experienced depends on the particular circumstances of that case, and it is a trite remark that every judgment must be related to the facts which were before the court. I think, therefore, that it is not taking up time unduly if I refer to this extent to the facts of *Herniman v. Smith* (1). The relevant question which TALBOT, J., had put to the jury was: "Has it been proved that the defendant commenced and proceeded with the prosecution without any honest belief that the plaintiff was guilty of fraud?" The Court of Appeal held that there was no evidence which would justify the judge in leaving that question to the jury. In any case a judge can rule at an appropriate stage that there was no evidence either on which the negative question can be put or no evidence on which the second and affirmative question relating to malice can be put. It is conceivable that the judge in this case, if he had been invited to do so, would have ruled that there was no evidence of want of honest belief in the plaintiff's guilt, but I have no doubt that for a very proper reason he was not asked and was not minded so to rule. It was the gist of the plaintiff's case that the defendant never did have any honest belief in these charges which he preferred, and the defendant has not argued before us that there was no evidence to support the jury's first answer. I think, therefore, that the judge was concerned by the form of question to invite the jury to tell him, in their view, the answer to the question whether the defendant honestly believed in the charges he was preferring—that is, in the guilt of the plaintiff.

The question of the existence or absence of honest belief may not be a relevant question in every case, but that that may be a proper question to put to a jury in some cases appears to be clearly established from a passage in LORD ATKIN's speech. After referring to the statement of HAWKINS, J., and criticising the view which he thought had, perhaps, become prevalent—that the questions which were put by CAVE, J., in *Abrath v. North Eastern Ry. Co.* (3) should be put in all cases—LORD ATKIN said ([1938] 1 All E.R. 8):

"This, it seems to me, would be to take the decision of the issue out of the hands of the judge, to whom, in the interests of prosecutor and accused alike, it has been confided. The jury no doubt have important functions to perform. They are to find for the judge what the relevant facts are, when they are disputed. If there is any evidence of a lack of honest belief in the

guilt of the accused on the part of the prosecutor, the fact whether he honestly believed or not is a disputed but essential fact, on which the judge is to draw his conclusion, and is a question for the jury."

If I have correctly analysed the matter by reference to LORD ATKIN's speech I think the problem in the present case narrows itself down to this: Did the question which was put to the jury have the emphasis, so to speak, put on the initial words: "Did the defendant honestly believe?", or was there so much emphasis on the latter words, "reasonable grounds for instituting the prosecution," that the jury were involved in answering a question which it was not for them to answer. I have found this a difficult matter, but on the whole I do not think that the court is justified in assuming against the jury that they were misled by the latter part of the question. I think the question was intended to be (and I am not satisfied that it was not) treated by the jury as being an invitation to them on all the facts given in evidence to determine the disputed, but essential, fact in the present case: Did the defendant honestly believe in the charges he was making? I am not prepared to make the assumption which counsel for the defendant invited us to make—which, if made, would vitiate the whole verdict.

In case it be of use in future cases it is desirable that, where the question of honest belief is an issue, the form of the question should be: "Did the defendant honestly believe in the plaintiff's guilt?" or "Did the defendant honestly believe in the charges he was preferring?", and that it is better not to include in the question any reference to reasonable grounds. I think counsel for the plaintiff may be correct when he says that, if the answer which the jury give to a question so put is that the defendant did not honestly believe in his charges, it must follow that there could not be reasonable and probable cause. I think that is why CASSELS, J., having had this answer of the jury, proceeded to hold that there was no reasonable or probable cause. The fact that the judge did so decide supports the view that the emphasis in his question was to discover for his assistance whether on the evidence there was an absence of honest belief on the defendant's part. If the jury said in answer to that question: "Yes, he did honestly believe" it would not necessarily follow that there was reasonable and probable cause. That the judge would then have to decide in the light of the expansion of the question enshrined in the judgment of HAWKINS, J. He would have to make up his mind whether there were reasonable grounds for the honest belief which was imputed to the defendant. I am bound to say that since this first question is, so to speak, taken out of the hands of the jury and left to the judge, it is not easy to see what real distinction there is in such a case as the present between the two questions posed. If the jury said that the defendant did not honestly believe in the plaintiff's guilt it is difficult to see how they could possibly answer the second question as to malice otherwise than in the affirmative. That, however, is another matter.

For the reasons I have indicated (though I confess to feeling great difficulty in the matter) I think that on the whole this court ought not to interfere with what I take to be the opinion of the jury that the defendant was not honest in taking the proceedings he did and that he acted out of malice. The jury thought the plaintiff should succeed and I do not think we should deprive him of the fruits of his judgment.

DENNING, L.J.: If the facts were as the defendant described them there would be reasonable and probable cause for the prosecution, but, if the facts were as the plaintiff said, there would not be. That crucial difference on the facts was a matter for the jury to decide. The judge would have to take their decision on it before he could decide whether there was reasonable and probable cause for the prosecution.

In my opinion, to determine the question of reasonable and probable cause, the judge must first find out what were the facts as known to the defendant,

asking the jury to determine any dispute on that matter, and then the judge must ask himself whether those facts amounted to reasonable and probable cause. In *Herniman v. Smith* (1) LORD ATKIN put it quite clearly ([1938] 1 All E.R. 9):

“The facts upon which the prosecutor acted should be ascertained. In principle, other facts upon which he did not act appear to be irrelevant. When the judge knows the facts operating on the prosecutor’s mind, he must then decide whether they afford reasonable or probable cause for prosecuting the accused.”

If these facts do afford reasonable and probable cause, then the prosecution is justified, and it is not as a rule necessary for an inquiry to be made into the prosecutor’s belief. The state of his belief goes to malice, but not, as a rule, to reasonable and probable cause. This view is supported by the observations of LORD GODDARD, C.J., in *Tims v. John Lewis & Co., Ltd.* (4), where he said ([1951] 2 K.B. 472):

“The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively, as has been suggested. It is a question which objectively the court has to decide on the evidence before it.”

It is sometimes said that to have reasonable and probable cause there must be an honest belief in the guilt of the accused. I do not think that should be regarded as a universal proposition applicable to all cases. It depends on the particular case. There are many justifiable prosecutions where the prosecutor has not himself formed any concluded belief as to the guilt of the accused. If he is a very fair-minded man he may well say to himself: “The case is so black against the man that I feel I must prosecute, but I am not going to believe him to be guilty unless the court finds him to be so.” Such a man would, I should have thought, have reasonable and probable cause for instituting a prosecution even though he did not affirmatively believe the man to be guilty. It is also said sometimes that to have reasonable and probable cause there must be an honest belief that there was reasonable ground for prosecuting. This, again, is by no means always necessary. Let me give another illustration. Take a prosecutor, a fair-minded man, who is personally convinced that the man is guilty, but does not himself think the evidence is sufficient to justify a prosecution. His solicitor advises him that the evidence is sufficient. He may well say to himself: “I do not myself believe there is sufficient evidence, but my solicitor says there is, so I feel justified in going on.” If the judge afterwards takes the same view as the solicitor, I should have thought that such a man would have reasonable and probable cause for instituting a prosecution, even though he did not himself affirmatively believe that there were reasonable grounds for it. In support of these views I would refer to *Musgrove v. Newell* (5). In that case the prosecutor had reasonable and probable cause for thinking that certain men had attempted to rob him and for thinking that the accused man was one of them, but, before he launched the prosecution, a constable told him that the accused was a man of good character. This seems to have so shaken the prosecutor’s belief in his guilt that he no longer affirmatively believed that the man was guilty. The court held that this did not take away the reasonable cause which existed. ALDERSON, B. (1 M. & W. 591), made it clear that the prosecutor’s state of belief, after hearing what the constable had to say went only to malice and not to reasonable and probable cause. It has to be remembered that, even though a prosecutor is actuated by the most express malice, nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution. If envy, hatred, malice and all uncharitableness do not deprive him of this defence, I do not see why his state of belief should necessarily do so. The danger of introducing the question of honest belief in all cases, without

considering the circumstances of the particular case, is that it places the decision of reasonable and probable cause in the hands of the jury, whereas the law, for good and sufficient reasons, has placed it in the hands of the judge. I do not say that the prosecutor's belief can never come into the question of reasonable and probable cause. If the prosecutor believed that the man was innocent and preferred the charge simply as a means of inducing him to pay over money to him, there would be no reasonable and probable cause for the prosecution because the cause for the prosecution would be, not the facts known to him, but another cause, and an unreasonable one: see *Broad v. Ham* (6). That is, I think, the sort of case which LORD ATKIN had in mind when he referred to belief in *Herniman v. Smith* (1). Apart from exceptional cases of that kind; however, I think it right to say that, once the facts as known to the prosecutor are ascertained, the state of his belief goes only to malice and not to reasonable and probable cause.

It is for these reasons that I think the form in which the first question was put to the jury in the present case was not strictly correct, but I can well understand how it came to be put. The real issue depended on whether the plaintiff or the defendant was to be believed. The plaintiff was alleging that the defendant was putting forward a false case, knowing it to be untrue. If the defendant did put forward a false case, he clearly would have no reasonable and probable cause for prosecuting. The only reasonable grounds which he had were those which depended on his own testimony. If he did not honestly believe in those grounds he was putting forward a false case. If he did honestly believe them, he was putting forward a true case. Hence the judge put the first question to get that issue decided. I would have preferred it to be put more simply—What were the facts known to the defendant? Were they as told by the plaintiff or as told by the defendant? In the circumstances of this case I think the first question came to practically the same thing. If the jury had believed the defendant, they would have answered the question: "Yes". As the answer is "No," they must have believed the plaintiff. If that is the right interpretation of the verdict, it is not a case in which we should interfere. I agree, therefore, that the appeal should be dismissed.

MORRIS, L.J.: I have found myself in full agreement with the judgment delivered by SIR RAYMOND EVERSLED, M.R., and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Clutton, Moore & Lavington*, agents for *Ralph C. Yablon & Temple-Milnes*, Bradford (for the defendant); *Ward, Bowie & Co.*, agents for *James A. Lee & Priestley*, Bradford (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ATTORNEY-GENERAL v. LEEDS CORPORATION.

[CHANCERY DIVISION (Vaisey, J.), November 12, 13, 28, 1951.]

Water Supply—Non-domestic purposes—Washing motor cars—Charge levied on registered owners of all cars in supply area—Burden on owner to show that no water supplied by undertakers used in respect of his car—Leeds Corporation (Consolidation) Act, 1905 (c. i), s. 24.

Under s. 7 of the Leeds Corporation (Consolidation) Act, 1905, with which, by s. 5, are incorporated the Waterworks Clauses Act, 1847 (with certain immaterial exceptions), and the Waterworks Clauses Act, 1863, the corporation were the water undertakers for the city and county of Leeds. Section 21 of the Act of 1905 provides: "In addition to the purposes set out in s. 12 of the Waterworks Clauses Act, 1863, a supply of water for domestic purposes shall not include a supply of water for washing any carriages." By s. 24: "The corporation may supply water for other than domestic purposes on such terms and conditions as the corporation think fit . . . and may if they think fit enter into agreements with respect to any such supply to any person and the moneys payable for the supply of water under this section shall be recoverable in the same manner as water rates." Two resolutions of the corporation, passed in 1926 and 1935 respectively, provided that the water charges for motor cars and tri-cars were to be 3s. for any quarter for which an excise licence was in force in respect of a car. This charge was levied by the corporation (in addition to the water rate, if any, payable for the ordinary water supply for domestic purposes) on every person registered in Leeds as the owner of a car in respect of which an excise licence was in force, and each quarter a demand note was sent to each registered owner demanding payment of the charge in respect of each car registered in his name, even if he had neither asked for, nor received, a supply of water for non-domestic purposes. Unless the registered owner satisfied the corporation (a) that no water supplied by them would be used in connection with any motor vehicle registered in his name, or (b) that the only water supplied by them which would be used in connection with his car was supplied by meter, and, therefore, separately paid for, he was liable for the charge, wherever the car was kept or washed. In an action to determine the validity of the procedure adopted by the corporation in levying this charge,

HELD: the corporation had not exceeded their statutory powers.

AS TO WATER FOR NON-DOMESTIC PURPOSES, see HALSBURY, Hailsham Edn., Vol. 33, p. 466, para. 762; and FOR CASES, see DIGEST, Vol. 43, p. 1086, Nos. 197-199.

Cases referred to:

- (1) *Harrogate Corpn. v. Mackay*, [1907] 2 K.B. 611; 76 L.J.K.B. 977; 97 L.T. 689; 71 J.P. 458; 43 Digest 1081, 158.
- (2) *Metropolitan Water Board v. New River Co.*, (1904), 20 T.L.R. 687; 43 Digest 1100, 294.

ACTION by the Attorney-General, suing on the relation of Automobile Proprietary, Ltd., for an injunction to restrain the defendants, Leeds Corporation, from levying a water rate of 3s. a quarter on every person registered with them as local taxation authority as being the owner of one or more motor cars (including tri-cars) in respect of each such car for which an excise licence was in force, whether or not such person had requested or been furnished with water for washing the car. It was contended for the Attorney-General that the procedure which the corporation had adopted in levying this charge was in excess of their statutory powers.

Sir Andrew Clark, K.C., and *Skelhorn* for the Attorney-General.
Upjohn, K.C., and *Denys B. Buckley* for the corporation.

Cur. adv. vult.

Nov. 28. **VAISEY, J.**, read the following judgment. The plaintiff in this action is the Attorney-General suing on the relation of Automobile Proprietary, Ltd., the owner of the Royal Automobile Club. The relator is not joined as a co-plaintiff, but it owns and pays rates in respect of premises known as Post Office House, Infirmary Street, in the city and county of Leeds. The defendants are the corporation for that city and county, and are, by virtue of the Leeds Corporation (Consolidation) Act, 1905, s. 7, the water undertakers for the city and county. The question is whether the corporation are or are not exceeding their statutory powers as such water undertakers by acting in a manner which I will presently describe. Those statutory powers are contained in and conferred by the Act of 1905, to which I will refer as the "special Act". It is a comprehensive statute divided into twenty-nine Parts, 383 sections and fifteen schedules. Only very small parts of it affect the present question.

Section 5 of the special Act incorporates with it certain general Acts, including, in particular, the Waterworks Clauses Act, 1847 (with certain immaterial exceptions) and the whole of the Waterworks Clauses Act, 1863. Section 3 of the Act of 1847 defines the expression "water rate" as including

" . . . any rent, reward, or payment to be made to the undertakers for a supply of water."

Section 68 of the same Act reads:

" The water rates, except as herein-after and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices."

Section 74 is in these terms:

" If any person supplied with water by the undertakers, or liable as herein or in the special Act provided to pay the water rate, neglect to pay such water rate at any of the said times of payment thereof, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate . . . "

in the manner therein mentioned.

Two sections of the Act of 1863 seem to be material, namely, s. 12 and s. 18. Section 12 is:

" A supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or for washing carriages, where such horses or carriages are kept for sale or hire or by common carrier, or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose."

Section 18 is:

" If any person—first, not having from the undertakers a supply of water for other than domestic purposes, uses, for other than domestic purposes, any water supplied to him by the undertakers; or secondly, having from the undertakers a supply of water for any other than domestic purposes, uses, for any purposes other than those for which he is entitled to use the same, any water supplied to him by the undertakers,—he shall for every such offence be liable to a penalty not exceeding 40s., without prejudice to the right of the undertakers to recover from him the value of the water misused."

Reverting to the special Act, I think that s. 20, s. 21, s. 22, s. 24 and s. 25 are the only material ones for the present purpose. Section 20 reads:

“The corporation shall at the request of the owner or occupier of any dwelling-house or part of a dwelling-house in any street in which any pipe of the corporation shall be laid or of any person who under the provisions of this Act shall be entitled to demand a supply of water for domestic purposes furnish to such owner or occupier or other person a sufficient supply of water for domestic use at the rates not exceeding those hereinafter specified . . .”

The percentages are enumerated in the section and I need not more particularly refer to them, but I note that in the second proviso to that section a reference is made to the supply of “premises” with water. Section 21 is in these words:

“In addition to the purposes set out in s. 12 of the Waterworks Clauses Act, 1863, a supply of water for domestic purposes shall not include a supply of water for washing any carriages.”

That is contrary to the decision in *Harrogate Corpn. v. Mackay* (1). Section 22 refers to a “house” being supplied with water, and I venture to pose the question: If a house can be supplied, why not a car? Section 24 and s. 25 are:

“24. The corporation may supply water for other than domestic purposes on such terms and conditions as the corporation think fit and may supply water by measure either for domestic or other purposes and may if they think fit enter into agreements with respect to any such supply to any person and the moneys payable for the supply of water under this section shall be recoverable in the same manner as water rates: Provided always that no person shall be entitled to a supply of water for other than domestic purposes if such supply would interfere with the sufficiency of the supply of water for domestic purposes. 25. It shall be lawful for the corporation to enter into contracts with the owner of any tenement or hereditament situate in the neighbourhood of any water main or pipe of the corporation though not within the water limits and also with any local authority or company not within such water limits to take and use the water of the corporation upon such terms and conditions and for such period as may be agreed upon between them: Provided always that the corporation shall not supply water under any contract if and so long as their doing so would prevent them from giving throughout the water limits a sufficient supply for domestic purposes.”

The facts of the case are not in dispute. Two resolutions of the corporation, passed in 1926 and 1935 respectively, provide that the water charges for motor cars and tri-cars are to be 3s. for any quarter or less part of a year for which an excise licence is in force in respect of a car. The procedure which has been adopted to give effect to those resolutions is set out in an agreed statement. What the corporation do is to levy a water charge, in addition to the water rate or charge, if any, payable for the ordinary water supply for domestic purposes, on every person registered in Leeds as being the possessor of one or more motor cars (including tri-cars) in respect of which a road fund licence is in force, which person is referred to in the statement as the registered owner. They do this notwithstanding that the person charged has made no request for a supply of water for non-domestic purposes, and the process of levying such water charge is as follows. Early in each quarter a demand note is sent to each registered owner demanding payment in respect of that quarter of the total water charges claimed from that person whether for domestic or for non-domestic supplies. The demand note gives details of such charges, showing the separate items of which the total charge is composed, and as respects the motor cars of each such person it shows a charge of 3s. in respect of each motor car of which he is the registered owner. Attached to the agreed statement are examples of standard demand notes applicable in the case of (i) a person with a house and motor car in respect of

which he is required to pay domestic and motor car water charges, (ii) a person with a house who is required to pay domestic charges but not a motor car charge, (iii) a person who is required to pay a motor car water charge but not a domestic water charge (*e.g.*, a lodger), (iv) a person who is required to pay a domestic water charge and two or more motor car charges.

It seems that, on the first occasion that the demand note is sent to a registered owner claiming a water charge in respect of a motor car, a printed slip is always attached thereto worded in the following manner:

"A supply of water for any purposes in connection with a motor vehicle including a tri-car is not a domestic use. Therefore, where water from the Leeds Corporation supply is used for this purpose a charge of 3s. is payable for each quarter or less part of a year during which an excise licence is in force. The registered owner is liable whether the water is used by him or on his behalf (by a proprietor of a public garage or any other person) and wherever the vehicle is kept. An allowance will be made upon application in writing in respect of each complete quarter that a vehicle is not licensed."

If, on receipt of the demand note, the registered owner claims, and satisfies the corporation, that no water supplied by the corporation is or will be used by him or on his behalf for any purpose in connection with any motor vehicles registered in his name either at any public or private garage or at any address within the city's waterworks undertaking (area of supply), the corporation withdraw the charge. For this purpose the corporation treat water used at a public garage for the purpose of washing the registered owner's motor car as being used on his behalf, notwithstanding that the motor car is so washed by the proprietor or his servant by virtue of a contract with the registered owner and as an independent contractor, and, save in so far as he himself may be a registered owner, no charge is imposed on the proprietor of a public garage to whom water is supplied for use on motor vehicles unless such proprietor has elected to be provided with a metered supply. If a registered owner wishes to satisfy the corporation that no water is or will be used as aforesaid by or on his behalf, he is normally required to complete and sign a declaration in a certain printed form supplied to him if and when he claims exemption from the charge, and, unless the form is returned duly completed and signed by him (or, occasionally, when he otherwise satisfies the corporation that no water is or will be used as aforesaid), the corporation refuse to withdraw their claim to the charge. If, on receipt of the demand note, the registered owner claims and satisfies the corporation that the only water supplied by them which is or will be used for any purposes in connection with his car is supplied by meter, and, therefore, separately paid for, the corporation withdraw the charge.

Thus, it appears that the corporation have levied these water charges indiscriminately on every person registered with them, in their capacity of local taxation authority, as being the possessor of a motor car in respect of which an excise licence is in force, although such person may neither have asked for, nor been furnished with, a supply of water for purposes other than domestic purposes. I am told that the number of such cars is about twenty thousand. So far as I understand, the only use that can be made of any appreciable quantity of water in connection with a motor car is for washing it, for the amount of water poured into the radiator of a car is, in my judgment, so small as to be negligible. It is to be noted that the charge made by the corporation in respect of a steam wagon which is not only washed but has water put into its boiler is 30s., and not 3s., per quarter. The corporation have, in fact, proceeded on the assumption that, if a car is registered as ordinarily kept at an address in Leeds, it follows, not necessarily but as a matter of strong probability, that it will be washed on one or more occasions in each quarter with the corporation's water and that the probability is so strong as to justify them in requiring its owner to sustain the burden of establishing the contrary. I do not like the principle of levying

a charge on the citizens of Leeds and then requiring them to disprove, if they can, the propriety of it, nor do I like the use which is being made of the records in the possession of the corporation as the local taxation authority to enable them to enforce their claims as water undertakers, nor do I think that their efforts to avoid unfair and unjustified charges have been particularly adroit. I also dislike very much the favour accorded to public garages in which a vast quantity of water must be used for washing cars, not only cars registered in Leeds, but those belonging to visitors to the city of various kinds and remaining there for varying periods. I do not, however, think that the corporation have failed to do their best to avoid making improper and unjustified charges, but I also think there is no doubt that a ratepayer will often rather pay this small charge than challenge it, and that is a thing which is undesirable and ought not to be allowed to occur.

The corporation claim that their way is really the only way in which they can charge for water used for car washing, any alternative involving the employment of a large number of inspectors to see that the water is not being misused. But whether I like or dislike their methods, the sole question is whether the corporation are justified in what they are doing by the very wide and comprehensive terms of s. 24 of the special Act, which authorises them to supply water for other than domestic purposes on such terms and conditions as they think fit, having regard to the differences between the language of that section and the language of the other sections to which I have called attention. It is suggested that a supply of water pre-supposes and requires that there should be a recipient of the supply who can be identified and that the supply of water can only be given and charged for where the recipient of the supply is identified or identifiable, and it is pointed out that in a special Act of Parliament the powers must be construed somewhat strictly: see *Metropolitan Water Board v. New River Co.* (2), per LORD MACNAGHTEN (20 T.L.R. 690). The opposing argument is that water may be supplied for a particular purpose (in this case, car washing), if it is made available for that purpose to those who desire either to use it or to procure that it shall be used for that purpose, and that it matters not whether the water leaves the mains of the corporation and reaches the owner's car by the action or instrumentality of the owner himself, or by that of his agent, a contractor, or a friend, nor does the source from which it happens to emerge from the corporation's reservoirs or mains matter. It is, therefore, said that the payment of the 3s. each quarter makes the car, as it were, free of the corporation's water from whatsoever tap or standpipe or hydrant it may be drawn. Treating the citizens of Leeds as a sort of family party and the city of Leeds as a collection of taps, standpipes and hydrants, the arrangement may be regarded as giving permission to those members of the family who have paid the water charge to have their cars washed with the city's water. I think on the whole that this view of the section is right, and, while I also think that the procedure is not incapable of some improvement, I hold that this action fails and must be dismissed, the relators paying the costs.

Judgment for the defendants.

Solicitors: *Clifford-Turner & Co.* (for the Attorney-General); *Sharpe, Pritchard & Co.*, agents for *O. A. Radley*, town clerk, Leeds (for the corporation).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

BRITISH AND COLONIAL FURNITURE CO., LTD. v.
WILLIAM McILROY, LTD.

[KING'S BENCH DIVISION (Donovan, J.), November 19, 20, 1951.]

Landlord and Tenant—Compensation for goodwill—Failure by tenant to state amount of compensation claimed—Validity of claim—Amendment of claim—Landlord and Tenant Act, 1927 (c. 36), s. 4 (1)—R.S.C., Ord. 53D, r. 1.

Landlord and Tenant—New lease—Claim for compensation bad—Effect on claim for new lease—Landlord and Tenant Act, 1927 (c. 36), s. 5 (1).

On Sept. 27, 1950, the tenants of business premises received three months' notice to quit expiring on Dec. 28, 1950. On Oct. 13, 1950, they served on the landlords two notices under the Landlord and Tenant Act, 1927, the first claiming compensation for goodwill under s. 4 (1) and the second the grant of a new lease under s. 5 (1). The first notice did not state the amount of compensation claimed as required by R.S.C., Ord. 53D, r. 1, but on Nov. 24, 1950, the tenants took out an originating summons to determine the matters at issue and in that summons they stated the amount they claimed.

Held: (i) in view of the omission therein the first notice was not "made in the prescribed manner" as required by s. 4 (1) of the Act of 1927; even if the notice could be read as one document with the originating summons, the latter was taken out more than one month after the notice to quit (the time allowed by s. 4 (1) for making the claim); and, therefore, the tenants were debarred from proceeding with their claim for compensation.

(ii) assuming that the claim in the notice was a "pleading" within R.S.C., Ord. 28, r. 1, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 225, the court would not allow the claim to be amended by the insertion therein of the amount of compensation sought.

(iii) the requirement in s. 5 (3) (a) of the Act of 1927 that the tenant claiming a new lease must show that he "would be entitled to compensation" under s. 4 (1) meant that he would be so entitled if he had complied with the conditions laid down in s. 4 (1), and not that he was in fact entitled to compensation either because he had already claimed it in the prescribed form and proved the supporting facts or was in time to do so, and, therefore, the failure of the tenants to make a valid claim for compensation did not defeat their claim for a new lease.

AS TO COMPENSATION FOR GOODWILL AND RIGHT TO NEW LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 294-301, paras. 333-345; and FOR CASES, see DIGEST, Replacement Volume 31, pp. 629-633, Nos. 7393-7417.

PRELIMINARY ISSUES in an action claiming the grant of a new lease under s. 5 (1) of the Landlord and Tenant Act, 1927, and, alternatively, compensation for the loss of goodwill under s. 4 (1).

On Sept. 27, 1950, the landlords of premises at 2 and 4 Oxford Road and 25, West Street, Reading, gave to the tenants three months' notice to quit. On Oct. 13, 1950, the tenants served on the landlords notices claiming compensation or a new lease of the premises under the Landlord and Tenant Act, 1927, s. 4 (1) and s. 5 (1). On Nov. 24, 1950, the tenants took out an originating summons to determine the matters at issue, and on Jan. 24, 1951, in their answer, the landlords denied that the tenants were entitled either to compensation or to a new lease on the ground that the claim for compensation did not state the amount claimed, as required by R.S.C., Ord. 53D, r. 1. The tenants contended that the notice substantially complied with the rule and that the originating summons stated the amount of compensation claimed and should be read as one document with the claim, thus constituting a claim in proper form, and they asked alternatively that they should be given leave to amend the claim as a pleading under R.S.C., Ord. 28, r. 1.

Weitzman, K.C., and Miss Faith A. Hopkins for the tenants.
Winn for the landlords.

DONOVAN, J.: This case comes before me by virtue of an order made in chambers by SLADE, J., on Feb. 21, 1951. The tenants carry on the trade of house furnishers at 2 and 4, Oxford Road, and 25, West Street, Reading, which premises are, apparently, comprised in a single holding. The tenants held these premises under a tenancy agreement for three years from Mar. 25, 1947, and thereafter, subject to three months' notice. On Sept. 18, 1950, a lease of the premises was granted by the owners—the Reading Corporation—to the landlords for ninety-nine years, subject to the aforesaid tenancy of the tenants. Nine days later—*viz.*, on Sept. 27, 1950—the landlords gave the tenants three months' notice to quit, and the tenancy of the tenants thus expired on Dec. 28, 1950, but they are, I gather, still in possession. On Oct. 13, 1950, the tenants invoked the protection of the Landlord and Tenant Act, 1927, and on that day they served two notices on the landlords. By the first notice they claimed to be entitled at the termination of their tenancy to compensation in respect of the goodwill which had become attached to the premises by reason of the tenants having carried on business there. By the second notice the tenants claimed, alternatively, a new lease of the premises. The first claim was made pursuant to s. 4 (1) of the Act; the second pursuant to s. 5 (1). An originating summons to lead to the determination of these matters was taken out by the tenants on Nov. 24, 1950. In their answer, dated Jan. 24, 1951, the landlords denied that the tenants were entitled either to compensation or to a new lease for the reason that in their claim to compensation the tenants had omitted to state the amount they claimed. It is this preliminary issue which I now have to decide pursuant to the order of SLADE, J., of Feb. 21, 1951.

I deal first with the question of compensation. Section 4 (1) of the Act of 1927, so far as here relevant, provides:

“The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner—(i) in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant; and (ii) in any other case, not more than thirty-six nor less than twelve months before the termination of the tenancy; be entitled, at the termination of the tenancy on quitting the holding, to be paid by his landlord compensation for goodwill if he proves to the satisfaction of the tribunal that by reason of the carrying on by him or his predecessors in title at the premises of a trade or business for a period of not less than five years goodwill has become attached to the premises by reason whereof the premises could be let at a higher rent than they would have realised had no such goodwill attached thereto.”

The manner in which such a claim has to be made is prescribed by Ord. 53D, r. 1 (1), of the Rules of the Supreme Court, which reads:

“A claim under the [Landlord and Tenant Act, 1927] for compensation . . . for goodwill . . . shall be made in writing signed by the claimant, his solicitor or agent, and shall state the name and address of the claimant and of the landlord against whom the claim is made, and shall contain . . . (d) if compensation is claimed, a statement of the amount claimed.”

It is objected on behalf of the landlords that the tenants' claim to compensation omitted, as, indeed, it did, to state the amount of compensation claimed, and that, accordingly, the claim was not made “in the prescribed manner” as s. 4 (1) of the Act requires, with the result, they say, that the tenants cannot now claim compensation, the time limit of one month for doing so having long expired.

The tenants resist this contention on the following grounds:—(i) that the notice claiming compensation substantially complied with Ord. 53D, r. 1 (1) (d);

(ii) that the originating summons stated the amount of compensation (as in fact it did) and that the notice plus the originating summons, read as one document, constitute a claim in the prescribed form. I cannot agree with the first contention. It is material that the landlord shall know the precise amount of compensation being claimed. For example, he can, within two months of receiving the claim, serve a counter-notice on the tenant offering him a renewal of the tenancy on reasonable terms: see s. 4 (1), proviso (b), of the Act. Again, s. 6 of the Act gives the landlord another alternative to the payment of compensation, depending on his serving a counter-notice on the tenant within one month after receiving the tenant's claim. The matter is not, therefore, one of pure technicality. In this case the landlords, reading the original claim for compensation, would not have the least idea how much was being claimed and whether it would be worth their while to avail themselves of their aforesaid rights, and, though I daresay they could have asked what amount of compensation was being claimed, they were not bound to do so. I am unable to take the view that s. 4 (1) and Ord. 53D, r. 1 (1) (d), have been "substantially" complied with, whatever "substantially" may mean in this context. I hold that to bring the claim within the aforesaid provisions the amount of compensation claimed must be contained in the claim, and here it was not. I purposely refrain from saying that it must be stated in figures, for the rule merely requires that the amount of compensation shall be stated, and I can conceive of this being done otherwise than by a figure. I reject the second argument of the tenants for the reason that the originating summons is dated Nov. 24, 1950, which is more than one month after the notice to quit was served on Sept. 27, 1950. Even, therefore, were it legitimate to read the tenants' claim and the originating summons as one document (as to which I say nothing), it would not be right to do so here, where one part of it, being for present purposes the vital part, was made after the statutory time limit had expired.

Alternatively, I was asked by the tenants to give them leave to amend their claim so as to make it comply with Ord. 53D, r. 1, *i.e.*, by insertion of the amount claimed as compensation. Order 28, r. 1, was invoked in this connection. I do not think I ought to do so. If I am right, the omission to state the amount of compensation confers immunity on the landlord from having to pay it, and I do not think I ought to take that immunity away from him by allowing an amendment of the claim. Since I hold this view, I do not decide the question whether, in any event, the claim is a pleading within the meaning of Ord. 28, r. 1, and s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925. For the foregoing reasons, I hold that the tenants have not made a claim in the prescribed manner within the meaning of s. 4 (1) of the Act of 1927, and cannot now do so.

With regard to the alternative claim for a new lease, the provisions of s. 5 (1) of the Act of 1927 are in point. So far as relevant, that section enacts:

"Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him."

Sub-section (3) of the same section provides:

"Where the tenant is the applicant, the grant of a new lease under this section shall not be deemed to be reasonable—(a) unless the tenant proves that he is a suitable tenant and that he would be entitled to compensation under the last foregoing section, but that the sum which could be awarded to him under that section would not compensate him for the loss

he would suffer if he removed to and carried on his trade or business in other premises."

A The landlords wish s. 5 (3) (a) to be construed in such a way as to debar the tenants from claiming a new lease. In other words, not only is their mistake in one claim to deprive them of compensation, but it is also to deprive them of the alternative of a new lease. To give effect to this contention, I must read

B s. 5 (3) (a) as though it prescribed that the tenant must prove that he *is* entitled to compensation either because he has already claimed it in the prescribed form and proved the supporting facts, or is still in time to do so. Such a construction, besides altering the sense of the relevant words, would lead to odd results. For example, the time when the tenant has to prove that he would be

C entitled to compensation is when the tribunal is considering whether to grant him a new lease. In almost every case, I should think, this will be more than one month after the notice terminating the tenancy has been served on the tenant, and it is within that month that the tenant must claim compensation, if he wants it. Suppose he does not, and, therefore, does not claim it, but wants a new lease instead. He will then go before the tribunal, probably some months later, and then, if the landlords' construction of s. 5 (3) (a) be right, be told that

D he cannot have a new lease—which he wants—because he did not claim compensation in time—which he does not want. Another way of putting the matter, according to the landlords, is that, while a tenant cannot have both compensation and a new lease, he cannot have a new lease unless he effectively claims both. If the language of s. 5 (3) (a) clearly produced this odd result, then effect would have to be given to it, but, in my view, it does not. The expression

E "would be entitled to compensation *under* the last foregoing section" obviously means that the tenant would be so entitled if he complied with the conditions therein laid down. I have not heard it disputed in this case that the tenants would, on that hypothesis, be entitled to compensation, *i.e.*, as an alternative to a new lease. But it is said that *in fact* they have lost their right to compensation through not submitting a claim in due form. In my judgment, that is irrelevant

F in relation to the tenants' alternative claim for a new lease. The question which the opening words of s. 5 (3) (a) pose is, in my view, this: Would the tenant, if he submitted a claim in the prescribed form and in due time and proved the supporting facts, be entitled to compensation under s. 4?—and this is merely a step in the inquiry whether he shall be given a new lease. I construe s. 5 (3) (a) accordingly. A number of decisions were quoted to me, but, since the question is one of construction and is free from direct authority, I refrain from examining them. I decide that, while the tenants are debarred from proceeding with a claim for compensation since they did not make the claim in the prescribed manner, that omission nevertheless leaves them free to pursue their claim for a new lease.

Order accordingly.

G Solicitors: *Paisner & Co.* (for the tenants); *Hale, Ringrose & Morrow* (for the landlords).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

JACKSON v. RODGER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
October 23, 24, November 6, 7, 1951.]

Gift—Incomplete gift—Perfecting gift—Appointment of intended donee as executrix of intending donor—Object of gift lent by intending donor to third person.

The principle laid down in *Strong v. Bird* (1874) (L.R. 18 Eq. 315), namely, A
that an imperfect gift may be perfected by the subsequent appointment
of the donee as personal representative of the donor, applies only where
there is an intention to make an immediate gift, and not where there is
merely an intention to make a gift in the future. It is directed to perfecting
gifts complete in all respects except as regards the legal formalities necessary
for the proper transfer of title to the property in question, and is confined B
to cases where nothing remains to be done but the mere formality of transfer
to perfect what is intended by the testator to be an immediate gift *inter*
vivos. Therefore, it cannot apply where there is an intention to give, but
the gift is not completed because the intending donor desires first to apply
the subject-matter of the contemplated or promised gift to some other C
purpose.

Observations of PARKER, J., in *Re Innes* ([1910] 1 Ch. 193), approved.
Headnote in *Re Stewart* ([1908] 2 Ch. 251), criticised.

AS TO APPOINTMENT OF INTENDED DONEE OF INCOMPLETE GIFT AS EXECUTOR,
see HALSBURY, Hailsham Edn., Vol. 15, p. 740, para. 1280; and FOR CASES,
see DIGEST, Vol. 25, pp. 538-540, Nos. 268-280. D

Cases referred to:

- (1) *Strong v. Bird*, (1874), L.R. 18 Eq. 315; 43 L.J.Ch. 814; 30 L.T. 745;
25 Digest 538, 268.
- (2) *Re Stewart*, [1908] 2 Ch. 251; 77 L.J.Ch. 525; 99 L.T. 106; 25 Digest
539, 274.
- (3) *Re Innes*, [1910] 1 Ch. 188; 79 L.J.Ch. 174; 101 L.T. 633; 25 Digest E
540, 275.
- (4) *Re Pink*, [1912] 2 Ch. 528; 81 L.J.Ch. 753; 107 L.T. 241; 25 Digest
539, 270.

APPEAL by the defendant from an order of DANCKWERTS, J., dated July 4,
1951, in an action for (a) a declaration that the plaintiff was the owner of a
certain motor car, (b) the return of the car or its value, (c) damages for its
detention, and (d) all accounts and inquiries necessary for the proper administra- F
tion of the estate of the testatrix, Mrs. Freeland.

The testatrix was the owner of the car and in February or March, 1949, on
being told by the plaintiff that the plaintiff's motor car was leaking, she said
to the plaintiff: "You must have my car." The plaintiff said that she would
buy it, but the testatrix replied: "No. I will give it to you." The plaintiff then G
asked when she could have it, and the testatrix replied that she would let the
plaintiff have it as soon as she "could get it on the road," the car not being
in running order at the time. Nothing, however, was done to the car. Early in
May, 1949, the defendant asked the testatrix to lend her the car. According
to the evidence, the testatrix told her, on that occasion, that she could not let
her have the car as it was already the plaintiff's. On May 5 the testatrix wrote H
to the plaintiff saying: ". . . I wanted to tell you about the car . . . To put
it quickly [the defendant's] car . . . has gone to pieces, and she cannot get
another for the moment and she cannot get on with her job without one, and
wants mine, and will put it in commission if I will let her have it for the time,
say three or six months, but I am not thinking for one instant of selling it so I
hope you will not think I am going back on my word if you really thought you
would like to have it . . ." The plaintiff saw the testatrix after receiving that

letter and signified her willingness that the defendant should use the car. The car was put in running order and the testatrix lent it to the defendant gratuitously, all the formalities in connection with the insurance company and with regard to the registration being dealt with on the footing that the testatrix, as owner, was lending the car to the defendant. The testatrix objected to certain use which the defendant made of the car on the footing that it was for her (the testatrix) to limit the use which the defendant, as borrower, could have of it.

By her will, made on June 30, 1949, the testatrix appointed the plaintiff and the defendant her executrices, but did not refer to the car. The testatrix died on Apr. 8, 1950, and probate of her will was granted on July 12, 1950. The car was still in the possession of the defendant. The plaintiff claimed to be entitled to it on the ground that the imperfect gift to her had been perfected by her appointment as one of the executrices. The defendant contended *inter alia* (a) that she was entitled to use the car indefinitely as it had been lent to her on terms which imposed no limit of time on user, and (b) alternatively, that it belonged to the estate of the testatrix. DANCKWERTS, J., held that there was an imperfect gift to the plaintiff which was perfected by her appointment as executrix and declared that she was the owner of the car.

J. F. Bowyer for the defendant.

N. S. S. Warren for the plaintiff.

SIR RAYMOND EVERSHED, M.R.: The contest in these proceedings has arisen from the amiability of the testatrix towards the plaintiff and the defendant, her two executrices, each of whom has laid claim to a specific chattel, namely, a Hillman motor car. The testatrix died on Apr. 8, 1950, and the plaintiff's allegation is that in February or March, 1949, the testatrix gave to her the car, that is to say, "gave" it in the popular sense of the term, meaning to make then and there a gift of it, such gift being, however, imperfect in the eye of the law because it was not accompanied by actual manual delivery or its equivalent. The plaintiff contends that, by reason of the so-called rule in *Strong v. Bird* (1), the imperfection is cured by the circumstance that she was appointed personal representative of the testatrix. The defendant refutes the plaintiff's claim, and makes affirmative claims to the same chattel. She alleged in the court below that she, rather than the plaintiff, was at some time the donee of the car, and she was in a more fortunate position in that admittedly she had possession of the car at the time of the death of the testatrix and for some little time before that event. That allegation was rejected by DANCKWERTS, J., and there has been no appeal against that part of the judgment. The defendant also said that she was given the right to use the car, that it was lent to her gratuitously on terms which imposed no limit of time on her user, and, therefore, she was entitled now to go on enjoying the use of it until she no longer required it. I propose to deal shortly with that part of the defendant's case, which has been persisted in in this court. It rests on the proposition that, though the bailment is entirely gratuitous and though there be no circumstances such as would entitle the bailee to set up a representation on the faith of which she has altered her own position, nevertheless, the bailor cannot recall the bailment. I find no authority to support a proposition of that character, which seems to me to be in conflict with fundamental principles, and I reject it.

DANCKWERTS, J., found in favour of the plaintiff. He held that an imperfect gift, made in February or March, 1949, was perfected by the plaintiff's appointment as executrix, and the main part of the case before us has concentrated on that matter. Counsel for the defendant has argued that the judgment is incorrect in that regard, being based on a misapprehension, either of the law applicable, or of the true inference to be drawn from the facts, or both. I have found the case exceedingly difficult, and, although I have come to the conclusion that the learned judge did not misdirect himself in the matter of law, I think there is no doubt—and counsel for the plaintiff has barely contended the

contrary—that in relying, as he did, on a particular letter [*viz.*, a letter written by the testatrix to the plaintiff on May 5, 1949], the learned judge has exposed himself to serious challenge. Although, before us, there has been no question between counsel as to the law applicable, it may be useful to refer briefly to it, particularly because the headnote in *Re Stewart* (2) (which was cited by the learned judge) seems to me, unless examined in the light of the judgment in that case, to be liable somewhat to mislead.

The simple proposition which is associated with *Strong v. Bird* (1), namely, that an imperfect gift may be perfected by the subsequent appointment of the donee as personal representative of the donor, disguises an important distinction. In the headnote to *Re Stewart* (2) the principle is stated thus:

“The principle laid down by JESSEL, M.R., in *Strong v. Bird* (1)—that where a testator has expressed in his lifetime an intention to give personal estate belonging to him to one who becomes his executor, the intention to give continuing, the donee is entitled to hold the property for his own benefit—is not confined to the release of a debt; and it is immaterial whether the donee is the only executor or one of several.”

That summary of the decision of SIR GEORGE JESSEL, M.R., seems to me to be equivocal, for the words “an intention to give” may mean either one of two things. They may mean (i) an intention of giving, *i.e.*, an intention to do that which, at the time of doing it, was meant to be a gift out and out, or (ii) an intention to make a gift in the future, which is in effect a promise—not, of course, enforceable in the eyes of the law—to make a gift thereafter. I am satisfied that the doctrine enunciated in *Strong v. Bird* (1) does not apply to the latter of the two types of case. For the application of the doctrine, there must be an intention of giving, as distinct from an intention to give.

That was made quite clear, to my mind, by PARKER, J., in *Re Innes* (3), and, as the point is not without some significance, I may be forgiven if I cite a passage from the learned judge’s judgment in that case. In *Re Innes* (3) a father was alleged to have said to his daughter that, since she had looked after him, she should have a certain income, and, in addition, the interest or dividends in respect of certain shares. After referring to *Strong v. Bird* (1) and *Re Stewart* (2), PARKER, J., said ([1910] 1 Ch. 193):

“It is attempted here to extend the doctrine of those cases still further. In the first place it is attempted to extend it to what, if there was a gift at all, was a gift of money without that money being identified, or sufficiently identified to enable it to be separated from the rest of the estate of the testator; and in the second place it is attempted to extend the principle of the earlier cases not only to an actual attempted gift which as a matter of fact is imperfect, and therefore will not take effect unless it is subsequently perfected, but to a mere promise to give on a future occasion. In my opinion the principle of *Strong v. Bird* (1) and *Re Stewart* (2) and other similar cases ought not to be so extended. What is wanted in order to make that principle applicable is certain definite property which a donor has attempted to give to a donee, but has not succeeded. There must be in every case a present intention of giving, the gift being imperfect for some reason at law, and then a subsequent perfection of that gift by the appointment of the donee to be executor of the donor, so that he takes the legal estate by virtue of the executorship conferred upon him. It seems to me that it would be exceedingly dangerous to try to give effect by the appointment of an executor to what is at most an announcement of what a man intends to do in the future, and is not intended by him as a gift in the present which though failing on technical considerations may be subsequently perfected.”

I am left in no doubt that the distinction to which PARKER, J., alluded is well-founded, and that SIR GEORGE JESSEL, M.R., did not intend to make the principle

which he laid down in *Strong v. Bird* (1) apply to a case where there was a mere intention to give at a future time. Indeed, in *Re Pink* (4) KENNEDY, L.J., said ([1912] 2 Ch. 538):

" . . . it is quite clear that what is spoken of both in the headnote in *Strong v. Bird* (1), and also in *Re Stewart* (2), as a continuing intention on the part of the testator, or the testatrix as the case may be, means a continuing intention that the gift should have been given at the time when it was given."

No point has been taken in the present case, and I am not to be thought to be suggesting that it could be taken, that the principle is not as applicable to a chattel like a motor car as it was to the bearer bonds in *Re Stewart* (2) and the debt in the case of *Strong v. Bird* (1).

The question, then, is whether it is established in this case that the testatrix, at the relevant date, intended to make an absolute gift of the motor car to the plaintiff, a gift which was only imperfect in the eye of the law because of the technicality of the absence of the transfer of possession, manual delivery or its equivalent, which the law requires to perfect such a gift. In a case like this it is necessary to have clearly in mind the nature of the proceedings. In form it is an action between two hostile parties. In truth, it is an action by a claimant against the estate of a deceased person, that claimant being an executrix. It is a trite observation, but nevertheless one which must not be forgotten, that a claimant in such a situation has a heavy onus to discharge. He or she must prove the case against his or her testator's estate clearly and convincingly.

There could, perhaps, be a case in which a gift might be absolute, though immediate possession by the donee might be postponed. To what extent the two conceptions are possible, as a matter of broad general theory, I need not discuss, but *prima facie*, if I make an absolute gift of some chattel, or purport to do so, and then assert a right to use it, not merely to keep it for custody, but to use it for such purposes, on such terms, and for such a time as I think fit, it seems to me that the assertion of that right is not consistent with an absolute gift, though it may well be consistent with a promise to give at some future date and though a person of sensibility and honour would feel that, if he had made a promise to give something in the future, his right to use the article in the meantime would be subject to serious qualification. [HIS LORDSHIP reviewed the evidence, held that the plaintiff had failed to establish her claim, and said that the appeal should be allowed.]

JENKINS, L.J.: I agree. To succeed in this case the plaintiff had to prove that there was on the part of the testatrix a present intention to make an immediate gift to her of the motor car, and that such intention survived until the date of the death of the testatrix.

In *Re Pink* (4), from which my Lord has cited an observation of KENNEDY, L.J., FARWELL, L.J., said ([1912] 2 Ch. 536):

" Since *Strong v. Bird* (1) we must regard the matter in the light given us by that decision. It is plain that a mere intention to give, not carried out during the lifetime, will not do, because that would in effect be to allow a man to dispose after his death of his property by a document not testamentary. It is plain also that a mere intention to give is not enough, because you want an immediate gift. If there is an immediate gift, then the resulting trust for the benefit of the beneficiaries is rebutted."

[HIS LORDSHIP reviewed the evidence and continued:] In my view, the lending of the car to the defendant, albeit with the consent of the plaintiff, is really fatal to the plaintiff's claim that there was a continuing intention to make an immediate gift. In my judgment, the principle of *Strong v. Bird* (1) is directed to perfecting gifts complete in all respects except as regards the legal formalities necessary for the proper transfer of title to the particular property in question.

It is confined, in my view, to cases where nothing remains to be done but the mere formality of transfer in order to perfect what was intended by the testator or testatrix to be an immediate gift *inter vivos*, and surely there can be no room for its application in a case where there is an intention to give, but the gift is not completed because the intending donor desires first to apply the subject-matter of the contemplated or promised gift to some other purpose. In that case the intended donee, when appointed as executor, cannot say: "Nothing remained to complete my title except the transfer," or, in other words: "If the testator had been alive today and I had asked him for a transfer, he would have made it at once without question," for in such circumstances the testator's answer would have been: "I will not transfer the property to you now. My intention is to give it to you after I have used it for the prior purpose I have in view." That state of affairs seems to me necessarily to exclude the application of the principle of *Strong v. Bird* (1). Accordingly, I agree that this appeal should be allowed.

MORRIS, L.J., concurred.

Appeal allowed. Declaration that the motor car formed part of the estate of the testatrix.

Solicitors: *Beaumont, Son & Rigden* (for the defendant); *Gordon Gardiner, Carpenter & Co.*, agents for *F. H. Carpenter & Oldham*, Brighton (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

THE CARSLOGIE. CARSLOGIE STEAMSHIP CO., LTD. v. ROYAL NORWEGIAN GOVERNMENT Represented by the NORWEGIAN SHIPPING AND TRADE MISSION.

[HOUSE OF LORDS (Viscount Jowitt, Lord Normand, Lord Morton of Henryton, Lord Tucker, Lord Asquith of Bishopstone), October 15, 16, 17, 18, November 29, 1951.]

Shipping—Collision—Damages—Detention in port to repair collision damage—Ship rendered unseaworthy by weather damage while proceeding to port for repair.

On Nov. 26, 1941, the respondents' vessel, *Heimgar*, while under time charter to the Ministry of War Transport, suffered damage in a collision with the appellants' vessel, *Carslogie*, for which, it was admitted, the *Carslogie* was solely to blame. After temporary repairs to the *Heimgar* had been effected in England the ship proceeded to a port in the United States where permanent repairs could be carried out. During her voyage across the Atlantic the vessel sustained heavy weather damage which necessitated immediate repair. The vessel remained in dry dock for fifty days during which time the repairs due to the collision and those due to the weather were carried out concurrently, it being agreed that ten days should be allocated to the repair of the collision damage and thirty days to that of the weather damage. The respondents claimed damages for loss of charter hire during the ten days attributable to the collision damage.

HELD: the appellants were only liable for such loss of profit suffered by the respondents as resulted from the appellants' wrongful act; during the time that the *Heimgar* was detained in dock she had ceased to be a profit-earning machine because the heavy weather damage had rendered her unseaworthy; and, therefore, the respondents had sustained no damage by reason of the fact that for ten days the vessel was undergoing repairs in respect of the collision damage.

Vitruvia S.S. Co. v. Ropner Shipping Co. (1925 S.C. (H.L.) 1), *The Hawk* (1927) (30 Lloyd, L.R. 32) and *The Haversham Grange* ([1905] P. 307), applied.

Per curiam: The decision in *The Haversham Grange* ([1905] P. 307) with regard to the apportionment of dock dues incurred in connection with the repair of collision damage was inconsistent with principle.

AS TO MEASURE OF DAMAGES IN COLLISION ACTIONS, see HALSBURY, Hailsham Edn., Vol. 30, pp. 855-863, paras. 1125-1142; and FOR CASES, see DIGEST, Vol. 41, pp. 800-813, Nos. 6613-6745.

Cases referred to:

- (1) *The Haversham Grange*, [1905] P. 307; 74 L.J.P. 115; 93 L.T. 733; 29 Digest 246, 1982.
- (2) *Mersey Docks & Harbour Board v. Marpessa (Owners), The Marpessa*, [1907] A.C. 241; 76 L.J.P. 128; 97 L.T. 1; 41 Digest 808, 6690.
- (3) *The Conqueror*, (1896), 166 U.S. (S.C.) 110.
- (4) *The Kingsway*, [1918] P. 344; 87 L.J.P. 162; 122 L.T. 651; 41 Digest 806, 6671.
- (5) *The York*, [1929] P. 178; 98 L.J.P. 147; 141 L.T. 215; Digest Supp.
- (6) *Admiralty Comrs. v. S.S. Chekiang*, [1926] A.C. 637; 95 L.J.P. 119; *sub nom. The Chekiang*, 135 L.T. 450; 41 Digest 805, 6663.
- (7) *Ruabon S.S. Co. v. London Assurance*, [1900] A.C. 6; 69 L.J.Q.B. 86; 81 L.T. 585; 29 Digest 245, 1981.
- (8) *The Acanthus*, [1902] P. 17; 71 L.J.P. 14; 85 L.T. 696; 41 Digest 807, 6679.
- (9) *Vitruvia S.S. Co. v. Ropner Shipping Co.*, 1925 S.C. (H.L.) 1; 41 Digest 806, 6675.
- (10) *The Hawk*, (1927), 30 Lloyd, L.R. 32; (1928), S.L.T. 71.
- (11) *Bullfa & Merthyr Dare Steam Collieries (1891), Ltd. v. Pontypridd Waterworks Co.*, [1903] A.C. 426; 72 L.J.K.B. 805; 89 L.T. 280; 11 Digest 129, 186.
- (12) *Williamson v. Thornycroft (John I.) & Co., Ltd.*, [1940] 4 All E.R. 61; [1940] 2 K.B. 658; 110 L.J.K.B. 82; 2nd Digest Supp.
- (13) *Kelly v. Glasgow Corpn.*, 1949 S.C. 496; 2nd Digest Supp.
- (14) *The Argentino*, (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; *affd. sub nom. H.L. Gracie (Owners) v. Argentino (Owners), The Argentino*, (1889), 14 App. Cas. 519; 17 Digest 82, 26.
- (15) *The Glenfinlas*, [1918] P. 363, n.; 122 L.T. 655, n.; 41 Digest 806, 6674.

APPEAL by the owners of the steamship *Carslogie* from a decision of the Court of Appeal (BUCKNILL, DENNING, L.JJ., and LLOYD-JACOB, J.), dated July 28, 1950, reversing an order of WILLMER, J., and restoring the decision of the registrar, that the appellants were liable for damages for the detention of the respondents' ship, *Heimgar*, while undergoing repairs.

The registrar held that where a collision had taken place, for which the appellants were admittedly to blame, and the respondents' ship, while on her way to the repairers suffered heavy weather damage necessitating immediate repairs, the detention caused by the heavy weather repairs did not deprive the respondents of their right to recover damages from the appellants for the detention in respect of the collision repairs. For the appellants it was contended that, as a result of the heavy weather damage, which was subsequent to the collision, the respondents had not suffered any damage by reason of the detention of the *Heimgar* since, during the whole time that collision repairs were undertaken, the ship was undergoing repairs to render her seaworthy which were necessitated by the heavy weather. The respondents contended that the case fell within the principle of *The Haversham Grange* (1) and that they were entitled to claim against the appellants as owners of the wrong-doing vessel damages for the detention.

Scott Cairns, K.C., and Rena for the appellants.
Carpmael, K.C., and Vere Hunt for the respondents.

The House took time for consideration.

Nov. 29. The following opinions were read.

VISCOUNT JOWITT: My Lords, on Nov. 26, 1941, the motor vessel Heimgar was lying at anchorage off Oban. She was due to join a convoy to West African ports. While she was so lying at anchor the steamship Carslogie collided with her. It was admitted that the Carslogie was solely to blame for the accident. On Nov. 27 the Heimgar was surveyed at her anchorage for the purpose of ascertaining the nature and extent of damage she had sustained as a result of the collision, and, this having been ascertained, Lloyd's surveyor issued a certificate of seaworthiness enabling the ship to go to a repairing port in the United Kingdom. Accordingly, she proceeded to Greenock on Nov. 28 and arrived there on Nov. 30. Owing to war restrictions all the work required could not be carried out, and temporary repairs were effected at Port Glasgow. In the meantime, and before these temporary repairs had been effected, the representative of the owners of the Heimgar had arranged with the Ministry of War Transport to send the vessel to the United States instead of to West Africa. This change of voyage was made primarily in order that she might go to a port at which permanent repairs could be effected. It was also considered by the owners desirable to take the opportunity of her being in dock to inspect her engines which had been giving some trouble. The port originally suggested was Chester, Pennsylvania, as it was hoped that a firm at Chester who were very experienced with Diesel motors might make any necessary adjustments to the engines. In fact, Chester proved impossible and she was allocated to New York. On the completion of her temporary repairs she was given a certificate of seaworthiness authorising her to be continued in her present class without fresh record of survey subject to certain permanent repairs at the owners' convenience and to her propeller being renewed at the owners' convenience, and she was stated to be fit to carry dry and perishable cargoes. When the vessel sailed for New York after the completion of the temporary repairs she was in a seaworthy condition, but during her crossing of the Atlantic she experienced heavy weather and sustained considerable damage thereby which rendered her unseaworthy. It was, therefore, necessary for her to go into dry dock at New York to have this heavy weather damage repaired apart altogether from the desirability of effecting permanent repairs in respect of the collision damage. The heavy weather damage was not in any sense a consequence of the collision, and must be treated as a supervening event occurring in the course of a normal voyage, during which the Heimgar was on hire. She remained in dry dock in New York from Jan. 2 to Mar. 1, 1942, being thus off hire for a period of approximately fifty days. During her time in dry dock the repairs due to the collision, the engine repairs, and the heavy weather repairs were all done concurrently. It was agreed that ten days out of the fifty should be allocated to the repair of the collision damage and that thirty days would have been required for the heavy weather damage.

The question for decision was whether the owners of the Carslogie were liable to pay, in addition to the cost of the repairs occasioned by the collision, the loss of chartered hire for ten days while the Heimgar was in dock, together with certain items in respect of war risk insurance and war bonus. These three items were considered as all turning on the same principle, and it was agreed that they succeeded or failed together. The registrar allowed the sum claimed by way of damages for detention and allowed the two remaining items as a necessary consequence of allowing the first item. He considered that where a collision had taken place in consequence of which the innocent ship was on her way to the repairers when another casualty occurred which necessitated immediate repairs, the owner was entitled to recover damages for detention

in respect of the collision repairs from the owners of the wrong-doing ship. WILLMER, J., reversed this decision, and the Court of Appeal (BUCKNILL, L.J., DENNING, L.J., and LLOYD-JACOB, J.), reversed this decision of the judge and restored the decision of the registrar. From this decision of the Court of Appeal the appeal is brought to your Lordships' House. For the appellants it was contended that, as a result of the heavy weather damage which was subsequent to the collision, the owners of the *Heimgar* had not suffered any damage by reason of her detention, since during the whole time that the collision repairs were being undertaken the ship was undergoing repairs to render her seaworthy, which repairs were necessitated by heavy weather. It was further contended that, as the heavy weather damage was the only damage which rendered the vessel unseaworthy, this must be regarded as the effective cause of the detention.

A For the respondents it was contended that, as the owners of the *Heimgar* were entitled to have permanent repairs effected as a consequence of the collision and had actually and properly decided to send the ship to New York to have those repairs effected, they had become "necessary," and it was argued that her owners were entitled to claim against the owners of the wrong-doing vessel for damages due to the detention. In support of this contention they relied on the rule laid down in *The Haversham Grange* (1).

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My Lords, at the outset I think it is well to bear in mind the elementary principle that it is for the plaintiff in an action of damages to prove his case to the satisfaction of the court. He has to show affirmatively that damage under any particular head has resulted from the wrongful act of the defendant before he can recover in respect of such damage. This principle applies to maritime collisions as much as it does to collisions on land. MR. ROSCOE in the third edition of his book dealing with the MEASURE OF DAMAGES IN MARITIME COLLISIONS, at p. 10, cites *The Marpessa* (2) as illustrating the proposition that the plaintiffs were only entitled to recover damages by way of demurrage in respect of such money as the court was reasonably satisfied had been lost. He points out that the same principle has been laid down in the United States:

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E "It is equally well settled, however, that demurrage will only be allowed when profits have actually been or may be reasonably supposed to have been lost, and the amount of such profit is proven with reasonable certainty. (*The Conqueror* (3) (1896) (166 U.S. (S.C.) 125.)"

Moreover, it is well established that, in considering the damage occasioned by a wrongful act, all those facts which have actually happened down to the date of the trial must be taken into account: *The Kingsway* (4) ([1918] P. 362) *per* SCRUTTON, L.J. For this reason it is undoubted that, if a collision took place which would have occasioned a time in dock for repairs and the ship is sunk before these repairs can be effected, any claim for loss of time which would have been occupied in such repairs must fail. SCRUTTON, L.J., in *The York* (5)

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G ([1929] P. 185) puts other illustrations showing circumstances which may make it impossible to substantiate a claim for damages for loss of profitable time. A ship may be detained by ice so that she could not trade at all, or possibly by an embargo, and other illustrations can be given. If I may use the expression of BUCKNILL, L.J., who delivered the leading judgment in the Court of Appeal, damages are payable for the detention of a ship because she is a profit-earning

H "machine." If she ceases to be a profit-earning machine it follows that she can sustain no damage from being detained until she again becomes capable of earning profit. In other words, it is not enough to consider whether the ship was detained by the wrongful act of the defendant. It is essential to consider whether damage was caused to the plaintiff by reason of such detention. So considered, it will be seen that the problem is not solved by answering the questions: "Was the ship detained, and, if so, what was the cause of her detention?" It is essential to answer the further question: "Assuming that she was detained and assuming

that she was detained by the wrongful act of the defendant, did the plaintiff sustain damage as a result of such detention ? ”

In the present case the ship having had temporary repairs was in a seaworthy condition when she sailed across the Atlantic. It is, no doubt, the fact that she was sent on this particular voyage in order that permanent repairs might be carried out. At the same time it must be noted that the owners had not entered into any contract to send her for repairs and would have been free, had they been so minded, to send her back from New York without such repairs being effected. I am willing to assume without deciding the question that the collision was a cause of her detention. Still, the fact remains that when she entered the dock at New York she was not a profit-earning machine by reason of the heavy weather damage which had rendered her unseaworthy. If there had been no collision she would have been detained in dock for thirty days to repair this damage. I cannot see that her owners sustained any damage in the nature of demurrage by reason of the fact that for ten days out of the thirty she was also undergoing repairs in respect of the collision.

WILLMER, J., considered that the repairs to the engines would not have prejudiced the owners' claim to recover damages for loss of profitable time. He deals with this question as follows:

“ Although the collision repairs were not immediately necessary, the owners of the *Heimgar* were entitled to have them carried out, and if they did so would be entitled to take advantage of the occasion to carry out such other repairs of their own as they might think fit. The learned registrar has found, rightly in my judgment, that the vessel was diverted to New York for the express purpose of undergoing the collision repairs, and it matters not that, as I have found, there was a subsidiary purpose of carrying out a machinery overhaul at the same time. Had there been no subsequent heavy weather damage necessitating immediate repair, it seems to me that, in accordance with the principles applied by the House of Lords in *Admiralty Comrs. v. S.S. Chekiang* (6), the plaintiffs [respondents] would clearly have been entitled to recover damages in respect of ten days of the detention, notwithstanding the fact that they took advantage of the occasion to proceed with their machinery overhaul.”

My Lords, I am in complete agreement with this view. It is well established that, if a ship goes into dock for repairs of damage occasioned by a collision brought about by the fault of another vessel, the owners of that other vessel must pay for the resulting loss of time, even although her owners take advantage of her presence in the dock to do some repairs which, though not necessary, are advisable. Thus, in *Ruabon S.S. Co. v. London Assurance* (7), the *Ruabon* suffered damage on the voyage which made it necessary for her to be put into dry dock. The owners (without causing delay or increase of dock expenses) took advantage of her being in dry dock to have made the survey of the vessel for renewing her classification, though this survey was not then due. It was decided that the expense of getting the vessel into and out of dock, as well as those incurred in the use of the dock, fell on the underwriters alone. In *The Acanthus* (8), while the vessel was in dry dock to repair collision damage for which the defendants were liable, the owners took advantage of the opportunity to fit her with bilge keels. It was decided that, notwithstanding this fact, the wrong-doers were not entitled to any contribution towards the cost of dry docking. In *Admiralty Comrs. v. S.S. Chekiang* (6) H.M.S. *Cairo* suffered damage in a collision for which the owners of the *Chekiang* were to blame. After being temporarily repaired, she proceeded to Hong Kong for permanent repairs. The Admiralty took advantage of her presence in the dock to undertake her annual refit, though this was not then necessary. It was decided that this fact did not avail the defendants and could not be prayed in aid by them in reduction of their liability. VISCOUNT DUNEDIN points out ([1926] A.C. 642), however, that if

the act of the owner was of necessity, it would have been otherwise. These cases support the view that the time occupied in the engine overhaul which, however desirable it may have been, was not then necessary, could not have been used to reduce any amount which might have been due from the owners of the wrong-doing vessel by way of damages for detention, but they have no bearing on the effect of the heavy weather repairs which had made the Heimgar unseaworthy.

A The case mainly relied on by the respondents as bearing on this latter question was *The Haversham Grange* (1). In that case the Maureen had suffered two collisions, for the first of which she was held partly to blame and for the second of which she was held free of all blame. Each collision made it necessary that she should go into dry dock. The two sets of repairs were carried out together. B Twenty-two days were taken in repairing the damage due to the first collision and six days in repairing the damage due to the second collision, these periods being concurrent and not cumulative and successive. The question arose which of the two wrong-doing vessels should pay for the undoubted damage which the owners of the Maureen had suffered from the delay to their steamship and a separate question arose as to the dock dues which had been incurred. With regard to the demurrage, SIR GORELL BARNES, P., held that, as the Maureen C had already been incapacitated by the first collision before the second collision took place, the repair of the damage done by the second collision did not in any way delay her, and, therefore, the second wrong-doer was not responsible for any part of the damage due to delay. He dealt with the dock dues on the same basis. On appeal, the decision of the President was confirmed with regard to demurrage, but it was decided that the claim for dock dues ought to be dealt D with on a different basis, and it was decided that the amount due in respect of dock dues should be divided between the two wrong-doers.

My Lords, I think that there can be no logical distinction between the claim for damages for delay and for dock dues, and, believing as I do that the decision as to damages for delay was correct, it follows, in my view, that the latter decision in respect of dock dues cannot be supported. I am confirmed in this E view by this further consideration. *Ruabon S.S. Co. v. London Assurance* (7) was a case which was concerned solely with dock expenses. No question as to damages for delay arose in that case. *Admiralty Comrs. v. S.S. Chekiang* (6) was a case which was concerned solely with damages for delay. No question as to dock expenses arose in that case. Yet VISCOUNT DUNEDIN in the latter case ([1926] A.C. 641) regards the decision of the House in the *Ruabon* case (7) F about dock expenses as concluding the question in the *Chekiang* case (6) about damages for delay. This supports the view that in principle the two questions are indistinguishable.

The case from which I have derived most assistance is *Vitruvia S.S. Co. v. Ropner Shipping Co.* (9). The *Vitruvia* had been in collision with the *Carperby*. For this collision the *Carperby* was alone to blame. The damage sustained by the G *Vitruvia* did not render her unseaworthy. She continued to make voyages and it was not until several months after the collision that she came to Glasgow to have the collision damage repaired. When the case first came to the House of Lords the appellants put forward an argument founded on the alleged facts that the *Vitruvia*, before she entered the dock to carry out the collision repairs, was in fact unseaworthy, that the defect rendering her unseaworthy could only H be remedied in a dry dock, and that no dry dock was available until after the collision damage had been repaired. Accordingly, they sought to argue that there had been no damages for delay occasioned by the repair of the collision damage. As this matter had not been properly pleaded and the relevant facts had not been found, the House sent the case back for a further ascertainment of the facts. The further findings established that the *Vitruvia* was, in fact, unseaworthy owing to a small defect which could have been put right in a few hours, and that it was not necessary to obtain a dry dock to remedy this defect. On

these facts LORD DUNEDIN (1925 S.C. (H.L.) 5) was of the opinion that the respondents had not established the defence they sought to make. Had the facts established that the unseaworthiness of the vessel could not have been made good until after the collision repairs had been completed it is plain that he would have decided that the owners of the wrong-doing vessel would not have been liable for any damages for delay while the collision repairs were being carried out. LORD PHILLIMORE put the matter in this way (*ibid.*, 6):

“When this case was before your Lordship’s House on the last occasion, a formidable point was made by the appellants. They said: ‘you must not charge us for the time spent in repairing the damage caused by the collision, for you lost no time by it, because you had to wait for the dry dock into which you could put your ship in order to repair her propeller’.”

LORD PHILLIMORE adds, however, that this case was not proved for it was not necessary for the owners of the *Vitruvia* to wait for a dry dock. They would have been able to do the work by tipping the ship in wet dock, and, accordingly, he decided that the owners of the *Vitruvia* were entitled to be paid for the loss of profitable time during which the repairs were being effected. The case of the *Vitruvia* (9) is not referred to in the judgments of the Court of Appeal, though I feel confident that had the judges considered this case and the grounds on which it was decided they would not in the present case have come to the conclusion to which they in fact came.

A similar question arose in *The Hawk* (10). In that case the *Cameronia* had sustained damages in a collision for which the *Hawk* was to blame, but her seaworthiness was not affected and after temporary repairs she continued her trading. Subsequently, she sustained sea damage to her rudder which rendered her unseaworthy and necessitated immediate repair. The question arose whether the wrong-doing vessel was responsible for any loss of profitable time occasioned during the time the collision repairs were being carried out. LORD CONSTABLE (Lord Ordinary) states his view in the following words (30 Lloyd, L.R. 36):

“... I think it would be difficult to affirm that the collision was not a cause of the detention, though the detention was immediately brought about by the accident to the rudder. But the present question does not seem to me to depend upon whether in strictness the collision or the accident to the rudder was the true cause of the detention. Even on the assumption that the repair of the collision damage was the true cause, the pursuers must also show that the detention of the *Cameronia* for such repair resulted in a loss of profit, and they cannot do so when in fact the *Cameronia* was by reason of the accident to the rudder disabled from earning any profit before she was laid up. The loss of profit was not the direct and natural consequence of the defenders’ wrongful act, nor did it represent what but for the collision the owners would have earned by the use of their ship.”

BUCKNILL, L.J., in his judgment differentiated this case on the ground that if the heavy weather damage was done after the collision damage the rule laid down in *The Haversham Grange* (1) should apply. My Lords, both in *The Hawk* (10) and in the present case the unseaworthiness was caused by an event which happened after the collision, and I see nothing in the rule laid down in *The Haversham Grange* (1) which in any way conflicts with the decision in *The Hawk* (10). That rule, as I have already pointed out, rightly treats the first wrong-doer who renders the vessel unseaworthy as responsible for the consequent delay, notwithstanding the act of a second wrong-doer who also rendered the ship unseaworthy, but the rule is addressed to causation, for it was clear in *The Haversham Grange* (1) that damage had resulted from the detention. In the present case I think that the damage brought about by the collision did not, in the events which happened, cause any loss of profitable time to the owners of the *Heimgar* because when she entered dry dock she was not a profit-earning

machine. This is in substance the ground taken by WILLMER, J., in his judgment when he says:

“The owners of the Heimgar would have had no use of their ship and would have earned nothing by her use for the simple reason that at the time when the collision repairs were executed the ship was completely immobilised as the result of damage received in the heavy weather encountered during the Atlantic voyage.”

My Lords, I agree with this reasoning, and, accordingly, I am in favour of allowing the appeal and restoring the judgment of WILLMER, J.

LORD NORMAND: My Lords, when a plaintiff claims damages from a tortfeasor for the detention of a chattel while it is undergoing repairs he undertakes to prove, not only that the repairs were rendered necessary by the tortious act or negligence and that the period of detention in respect of which he claims was necessary for the execution of the repairs, but also that by the deprivation of the use of the chattel during the detention he suffered pecuniary loss. If the action is raised and the damages have to be assessed before the repairs are executed, the court is perforce dealing with damage which may or may not arise in the future, and it will require proof of sufficient certainty that the plaintiff will suffer measurable damage, making allowance for the chance that by some subsequent casualty the chattel may be destroyed before the repairs are executed or that when the chattel comes to be repaired the deprivation of its use may involve no pecuniary loss: *The Kingsway* (4). In the more usual case, when the damages are assessed after the repairs have been executed, the court has before it the facts as they have occurred. It is dealing, no longer with the future, but with past history, and in the assessment proof of the facts displaces estimates of probabilities. This principle has long been established and has been followed, not only in many claims for collision damage, but also in a wide variety of other cases in which compensation or damages have been assessed. For example, in *Bullfa & Merthyr Dare Steam Collieries* (1891), *Ltd. v. Pontypridd Waterworks Co.* (11) it was applied to a claim for statutory compensation. In *Williamson v. John I. Thornycroft & Co., Ltd.* (12) the Court of Appeal applied it when a widow claiming under Lord Campbell's Act died before the assessment of the damages, and in a recent case this House held that it had been rightly applied by the Court of Session where the pursuer in a claim for *solatium* died before the *solatium* was assessed: *Kelly v. Glasgow Corpn.* (13).

The facts of the present case, which it is unnecessary for me to narrate again in detail, show that the Heimgar, while seaworthy and able for a trading voyage after temporary repairs rendered necessary by a collision with the Carslogie, suffered weather damage so great that immediate repairs were necessary before she could continue trading. She entered dry dock at New York and there three sets of repairs were carried out—the permanent repairs required to make good the collision damage, the repairs immediately necessary to make good the heavy weather damage, and repairs to her auxiliary machinery which were not immediately necessary. These repairs were carried out concurrently. The Heimgar was detained in dock fifty days in all, but the collision repairs alone would not have detained her for more than ten days, whereas the repair of the heavy weather damage alone would have detained her thirty days. On these facts she was, in consequence of the heavy weather damage, a vessel incapable of gainful use during the ten days necessary to complete her collision repairs, and no claim against the Carslogie for deprivation of profits in respect of this detention can be established.

Every case depends on its own facts, but I find the strongest support for this conclusion in *Vitruvia S.S. Co. v. Ropner Shipping Co.* (9). The Vitruvia suffered damage by collision with the Carperby for which the Carperby was alone to blame. This damage did not make her unseaworthy or prevent her from trading.

After several months of profitable trading her owners brought her to Glasgow solely for the purpose of having the collision repairs carried out. She arrived at Glasgow on Aug. 12 and the repairs were completed on Sept. 3. Her owners claimed against the Carperby for loss of earnings during these twenty-two days. On her voyage to Glasgow it had been noticed that her propeller was making a knocking sound and after her arrival the engineer reported that he suspected there was something wrong with the propeller. On Sept. 2 a dry dock became available for the first time since her arrival and she entered it that day for examination of her propeller. It was then found that a nut on the propeller was loose and needed tightening. The repair was completed in a few hours. While this defect existed it would have been imprudent to send the ship to sea. The case came before this House on two occasions. On the first occasion the House allowed the parties an opportunity to amend their pleadings so as to present in clear form the defence that the *Vitruvia* was unseaworthy during the whole period in respect of which damages were claimed and, accordingly, that there was no loss in respect of detention during that period, and the pursuers' reply that the propeller defect would not have prevented her from completing her next voyage because it could have been quickly repaired though no dry dock was available to her. That this House regarded the defence as relevant is clear, for it remitted the case to the Court of Session with a direction to allow the proposed amendments and a proof thereof. As a result of the proof it was found that the propeller defect could have been repaired in a few hours without dry-docking the ship. When the case was reported to the House, LORD DUNEDIN said (1925 S.C. (H.L.) 5):

"If the defenders had been in a position to say, 'your vessel when it arrived on the 12th was in what is admitted to be a practically unseaworthy condition,' and if they had been able to go on to say, 'it would not have been possible for you to get it into a seaworthy condition before the time when you went into dry-dock on Sept. 2,' then they could have added, I think, what always can be said by defenders, 'you were bound to use that time in executing the repairs.' In other words, it would not have been possible for the pursuers to say, 'we will wait until Sept. 2 when we can put our vessel into dry dock, and then we will do our repairs and charge you for demurrage during the time we are doing them.'"

Then his Lordship went on to point out that the defenders could not say that, because the propeller defect could have been remedied and the vessel made seaworthy in a very few hours without the use of a dry dock. That case would have been indistinguishable from the present if dry-docking had been necessary to make good the propeller defect. On that hypothesis the defence would have succeeded. A seaworthy ship had been directed in each case to a repair port. In the *Vitruvia S.S. Co. v. Ropner Shipping Co.* (9) the only purpose in sending the ship to Glasgow was the repair of the collision damage. In the present case the repair of the collision damage was one and the chief of three purposes in sending the ship to New York, the other two being to make a voyage on hire and to carry out repairs to the auxiliary engines. In both cases the ships suffered on the voyage damage rendering them unfit for another voyage. In both cases any period of detention necessary for the completion of the repairs to make the ship seaworthy had, if possible, to be used by her owners to execute the collision repairs, and from that detention no claim for loss of profits as part of the collision damage could arise.

The Hawk (10) is also a case closely resembling the present case. The *Hawk* had suffered damage in a collision with the *Cameronia* for which the *Cameronia* was held liable to the extent of two-thirds. As in the present case, some temporary repairs were carried out. Then, after a period of trading, she suffered storm damage which necessitated her being docked at once for repair. The storm damage repairs and the collision damage repairs were put in hand at the same

time, but the storm damage took longer to repair than the collision damage. The pursuers claimed a sum in the name of loss of profits during detention. The Lord Ordinary, LORD CONSTABLE, disallowed the claim on the ground that, though the collision damage might be a cause of the detention during its repair, the pursuers had failed to show that the vessel could have earned any profit in that period. The Lord Ordinary regarded this case as governed by the *Vitruvia S.S. Co. v. Ropner Shipping Co.* (9) and his judgment is a valuable clarification of the law of damages in such cases as this.

None of the other cases cited conflicts with the decision of WILLMER, J., in the present case, or with *The Vitruvia* (9) or *The Hawk* (10). The decision on demurrage in *The Haversham Grange* (1) is no exception. It is, indeed, another example of the general rule that the owner of a chattel who claims damage for detention from a wrong-doer must show that, apart from the wrongful act of the defendant, the chattel was capable of profitable use during the period of detention. In *The Haversham Grange* (1) the Maureen was in collision with the Caravellas on Dec. 25, 1904, and with the Haversham Grange on Dec. 26. The owners of the Caravellas agreed to a decree of both to blame, and the owners of the Haversham Grange admitted sole liability. Each collision caused damage which it was essentially necessary to repair. The owners of the Maureen recovered fifty per cent. of their loss including loss on account of detention from the owners of the Caravellas and sought to charge the owners of the Haversham Grange with the remaining half-share of demurrage damage. There was also a claim for dock dues, which I pass over in the meantime. One of the proved facts was that the repair of the damage done by the Haversham Grange had not increased the period of detention. SIR GORELL BARNES, P., held that as the Maureen was already incapacitated by the collision with the Caravellas when she collided with the Haversham Grange the claim against the Haversham Grange for loss of earnings during repair failed, and that decision was affirmed by the Court of Appeal. As in that case so in the present the claim fell to be disallowed because the respondents failed to prove that the ship could have earned profits during the period of detention caused by the repairs rendered necessary by the appellants' tort. There has been, I think, some misunderstanding of the decision in *The Haversham Grange* (1). Thus, in his judgment in *The Hawk* (10), LORD CONSTABLE seems to over-emphasise the importance of the fact that the collision with the Caravellas was prior in time to the collision with the Haversham Grange. The emphasis should be on the existing disablement of the Maureen when the Haversham Grange collided with her.

I respectfully think that the Court of Appeal in the present case erred in thinking that the issue could be settled by determining whether there was a causal connection between the collision damage and the detention of the Heimgar for ten days. This particularly appears in the judgment of DENNING, L.J. On this point I am in agreement with the Lord Ordinary's judgment in *The Hawk* (10). It is, I think, difficult to say that the collision damage was not, while it was being made good, a cause of the detention of the ship. But the real issue is whether in these ten days the vessel was a potential profit-earning vessel or not. BUCKNILL, L.J., thought that the fact that the Heimgar was re-routed to New York for the express purpose of having the collision repairs carried out and that it was when she was on this voyage that she suffered the heavy weather damage was a material circumstance which distinguished this case from *The Hawk* (10). So, also, LLOYD-JACOB, J., thought that "the decision to immobilise" the Heimgar for collision repairs was the determining factor. But to make that distinction a ground of judgment is inconsistent with *The Vitruvia* (9) which was, unfortunately, not referred to in any of the judgments. BUCKNILL, L.J., fell into what I humbly think is the error of supposing that *The Haversham Grange* (1) is authority for a rule that liability for detention attaches to a tortfeasor merely because the damage done by his tort is prior in time to a subsequent damage, whether caused by a tort or by some other cause. For example, he says:

"I think it is essential to know whether the heavy weather damage was received before or after the damage by collision."

But, with respect, if the fact is that one of two casualties made the vessel unseaworthy and the other did not, the problem of liability is solved and the time sequence is irrelevant. In *The Haversham Grange* (1) the time sequence was important because the damage suffered by the Maureen in each of the two collisions was enough to make her unseaworthy.

On the view of the case which I have taken it is not necessary to consider the bearing of the repairs to the auxiliary engines, which occupied fifty days, on the claim for damages for detention, but I may be allowed to say that I agree with all that has been said on that point by my noble and learned friend on the Woolsack. For the reasons I have given I would allow the appeal.

My Lords, in this appeal the liability for dock dues is not in issue. We were told that they had been apportioned, and there was no appeal against that. This is in accordance with the decision of the Court of Appeal in *The Haversham Grange* (1) reversing SIR GORELL BARNES, P. In my opinion, the liability for dock dues is the same as the liability for the demurrage, and the decision in *The Haversham Grange* (1) on this point is inconsistent with principle and with a decision of this House. The history of the matter must be shortly set out. In the *Ruabon S.S. Co. v. London Assurance* (7) a vessel was damaged by a peril insured against and was put into dry dock for the necessary repairs. The survey of the vessel for renewing her classification was not due at that time, but the owners took advantage of her being in dry dock to have the survey made without increasing the period of detention. It was held that the liability for the dock dues fell on the underwriters alone. It will be observed that that was a case in which the liabilities of the parties *inter se* rested on contract. But in *The Acanthus* (8), the question of liability, both for dock dues and for demurrage, between the plaintiff and a tortfeasor was decided by SIR FRANCIS JEUNE, P., by applying the rule laid down in *The Ruabon* (7). The facts were that when the vessel was in dry dock for the repair of collision damage the owners took advantage of the opportunity to fit bilge keels without causing increased detention or increase of dock dues. It was held by SIR FRANCIS JEUNE, P., that the tortfeasor was liable for the dock dues and for the demurrage and he made no distinction between them. The next case was *The Haversham Grange* (1), which, as I have already indicated, made a radical distinction between liability for dock dues and liability for demurrage. The last case to which I need refer is *Admiralty Comrs. v. S.S. Chekiang* (6). In that case the Admiralty took the opportunity of the docking of H.M.S. Cairo for collision repairs to do certain refitment repairs not immediately necessary. It was held that the owners of the vessel to blame for the collision were liable in damages for the deprivation of the use of the vessel for the period of the collision repairs. VISCOUNT DUNEDIN in his speech said that the question was concluded by *The Ruabon* (7) and he also approved of the decision in *The Acanthus* (8). LORD PHILLIMORE took the same view of the case, and said that the decision on dock dues in *The Haversham Grange* (1) might have to be re-considered. *The Haversham Grange* (1) decision is not consistent with the *ratio decidendi* of *The Acanthus* (8) and *The Chekiang* (6). I want only to add that I think that the distinction between liability for dock dues and liability for detention is, in principle, unmaintainable. The present case may be taken as an illustration. As regards detention, the question is whether the owners of the detained ship suffered a loss of earnings while she was undergoing the collision repairs. The answer is that they did not, because during the detention the ship, though not disabled from trading by the collision damage, was necessarily disabled from trading by the weather damage. As regards the dock dues, the question is whether any part of the payment of the dues for the period while the collision repairs were executed was a loss suffered as part of the collision damages. The answer is that it was not, because it was a

payment incurred in order to carry out the immediately necessary weather damage repairs. The collision repairs were, therefore, executed in the dock when its use was franked by that necessary payment.

LORD MORTON OF HENRYTON: My Lords, the Heimgar was detained in New York for repairs for nearly fifty days. At an early stage in the speech of counsel for the appellants I asked whether it was common ground between the parties that, if the collision between the Heimgar and the Carslogie had never happened, the Heimgar would have been detained in New York for the same period of fifty days. The answer was in the affirmative. In *The Argentine* (14) BOWEN, L.J., observed (13 P.D. 201):

“A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her.”

WILLMER, J., asked himself that question in the present case and gave this answer:

“The owners of the Heimgar would have had no use of their ship and would have earned nothing by her use, for the simple reason that at the time when the collision repairs were executed the ship was completely immobilised as the result of damage received in the heavy weather encountered during the Atlantic voyage.”

My Lords, I agree with this answer, and, if it is the correct answer, I can see no ground on which the respondents can recover the damages which they claim for the detention of their ship. If the Heimgar had not encountered heavy weather on her voyage across the Atlantic, I entertain no doubt that the respondents could have recovered damages for her detention in New York for the period of ten days which would have been required to repair the collision damage. In that event they would have lost the use of their profit-earning chattel for a period of ten days and the negligence of the appellants would have been the cause of that loss. But in the events which happened the respondents have failed to prove that any loss of the use of their profit-earning chattel resulted from the negligence of the appellants. On this short ground I would allow the appeal, but, as we are differing from a unanimous judgment of the Court of Appeal, and as counsel for the respondents submitted that a decision in favour of the appellants would involve overruling *The Haversham Grange* (1), I shall first make some observations on that case and shall then explain briefly why I cannot accept the reasoning of the Court of Appeal. I shall follow the example of BUCKNILL, L.J., in quoting WILLMER, J.’s statement of the facts in *The Haversham Grange* (1). It is as follows:

“In *The Haversham Grange* (1) . . . the plaintiff’s ship (the Maureen) was involved in two collisions, both necessitating immediate repairs. Both sets of repairs were executed simultaneously, and the repair of the second collision damage did not in any way increase the period of detention which would in any case have been required for the repair of the first collision damage. In respect of the first collision the plaintiff’s ship and the colliding ship were equally to blame. In respect of the second collision the owners of the colliding ship (the Haversham Grange) admitted liability. The plaintiffs in due course recovered from the owners of the first colliding ship fifty per cent. of their claim, including fifty per cent. of the amount lost by reason of the detention of their vessel during repair. They then sought to recover from the owners of the Haversham Grange, *inter alia*, the remaining fifty per cent. of their claim in respect of the detention of their vessel. The learned

President, SIR GORELL BARNES, confirming the report of the registrar, disallowed the claim, holding that, as the vessel was already incapacitated by something which had previously happened before the second wrong-doing ship ran into her, the repair of the damage done by the second collision did not in any way delay her, and, therefore, the second wrong-doer was not responsible for any part of the delay, which he had not in fact caused. In the Court of Appeal the claim for detention was abandoned, but the learned Master of the Rolls, although the matter was no longer before the court, expressed his concurrence with the decision in the court below."

Thus, the decision in *The Haversham Grange* (1) was that the owners of the Maureen could not recover from the owners of the Haversham Grange any part of the loss resulting from the detention of the Maureen during repairs, because no part of that loss resulted from the negligence of that particular wrong-doer. That decision seems to me to be wholly in accordance with the view which I have formed in the present case.

My Lords, I have noticed references in the judgments under appeal and in other cases to "the rule laid down in *The Haversham Grange* (1)." I confess that I can discover no rule which is laid down in that case. It seems to me merely an illustration of the elementary principle, already stated by my noble and learned friend on the Woolsack, that a plaintiff must "show affirmatively that damage under any particular head has resulted from the wrongful act of the defendant before he can recover in respect of such damage." I add that, in agreement with the opinions which have just been delivered I can see no logical reason for the distinction which was drawn in *The Haversham Grange* (1) between the claim for damages for detention and the claim for dock dues.

I think that the reason why I differ from the Court of Appeal can best be explained if I quote three sentences from the judgment of BUCKNILL, L.J., whose wide knowledge of these matters leads me to differ from him with great hesitation. The learned lord justice said:

"When the owners, quite properly, arranged to have their ship sent to the United States of America in order that the collision repairs might be done, I think that the owners of the wrong-doing ship became liable to pay, not only for the prospective cost of the repairs, but also for the loss of time thereby incurred. It is true that, if the Heimgar had been sunk on her way to the United States, the owners of the wrong-doing ship would not have been liable to pay for detention during the repairs. But the reason for that, as explained in *The Glenfinlas* (15) is that, the ship having been lost, she ceased to be a potential money-making machine, and, therefore, her owners did not lose something which did not exist."

With the first of these three sentences I entirely agree, but I would add that, in my view, no loss of time was "thereby incurred," because in the events which happened, the repairs were carried out at a time when the ship was incapacitated for other reasons. As to the third sentence, I would respectfully point out that in the present case the ship ceased to be a potential money-making machine when she became unseaworthy owing to heavy weather, having been seaworthy when she sailed—see the Lloyd's surveyor's certificate of seaworthiness dated Dec. 4, 1941. In these circumstances I find it difficult to distinguish between the present case and the position if the Heimgar had been sunk on her way to the United States. In both cases no loss of time would result from the earlier collision. I agree that this appeal should be allowed with costs.

LORD TUCKER: My Lords, as I have arrived at a conclusion different from that of the Court of Appeal I will state very shortly why I have found myself compelled to disagree with their decision. The gist of the judgment of BUCKNILL, L.J., is that the fundamental difference between the present case and *The Hawk* (10) is that in the latter case the ship was compelled to repair her rudder

and was, therefore, not a profit-earning machine until that repair had been effected. In that condition the collision repairs were also done, and, therefore, it is right to say that she would have earned nothing whilst those collision repairs were being done, whereas in the present case the *Heimgar* was proceeding to New York for the express purpose of having collision damage repaired when she suffered the heavy weather damage and it would be contrary to the decision in *The Haversham Grange* (1) to hold that she could not in any event have earned a profit during the period of detention by reason of the heavy weather damage. But, my Lords, both the *Hauk* and the *Heimgar* were rendered unseaworthy by events which happened after the collision in each case. So far as the claim for demurrage was concerned in *The Haversham Grange* (1), it was rejected not because the collision between the *Maureen* and the *Haversham Grange* was subsequent to the collision with the *Caravellas*, but because it turned out that the *Maureen* must have been and in point of fact was detained the whole time in dock for the repairs which had to be executed in consequence of the damage done by the *Caravellas* which had rendered her unseaworthy. It was immaterial that the damage done by the *Haversham Grange* would also by itself have made the *Maureen* unseaworthy or that it occurred after the first collision.

It seems to me, therefore, with respect, that the decision of WILLMER, J., in the present case was consistent not only with that part of the decision in *The Haversham Grange* (1) which dealt with the claim for demurrage, but with the other authorities, including, in particular, *The Vitruvia* (9) and *The Hauk* (10). I agree, however, with your Lordships in thinking that the other part of the decision of the Court of Appeal in *The Haversham Grange* (1), viz., with regard to dock dues (which is quite immaterial for present purposes) cannot be reconciled with their decision as to demurrage and should be overruled. DENNING, L.J., approached the case from the point of view of the common law, but I venture to think that the error underlying his judgment, if I may respectfully say so, is that he regards the cause of the detention as equivalent to the cause of the loss of profit. The distinction is to be found clearly expressed in the judgment of LORD CONSTABLE in *The Hauk* (10) in the passage which has already been quoted. I am prepared to assume in the present case that the collision was a cause of the detention, but none the less the detention for such repair did not result in any loss of profit. It does not represent what, but for the collision, the owners would have earned by the use of their ship. LLOYD-JACOB, J., treated the time of the decision to immobilise as the decisive factor and this also entered into the reasoning of BUCKNILL, L.J. I do not, however, think that this is consistent with the authorities in which the unseaworthiness of the vessel at the material time has always been regarded as decisive. For these reasons and for those which have been stated by your Lordships I agree that this appeal should be allowed.

My Lords, my noble and learned friend LORD ASQUITH OF BISHOPSTONE, who is unable to be present, has asked me to say that he agrees with the motion proposed from the Woolsack.

Appeal allowed.

Solicitors: *Clyde & Co.* (for the appellants); *Bentleys, Stokes & Lowless* (for the respondents).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

Re LYONS. BARCLAYS BANK, LTD. *v.* LYONS AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), November 8, 9, 12, December 3, 1951.]

Annuity—Annuity free of income tax—Business loss by annuitant—Relief under Income Tax Act, 1918 (c. 40), s. 34 (2)—Repayment to annuitant of tax paid on annuity—Liability of annuitant to account to trustees.

By his will, dated Oct. 8, 1942, the testator directed his trustees out of his residuary estate to pay the sum of £10 a week free of income tax to his son M. during his life on protective trusts. The testator died on Mar. 25, 1946, and after his death the annuity was paid to M. out of dividends received by the trustees as income of the testator's residuary estate on which tax at the standard rate had been deducted at source. In the year 1946-47 M. sustained a business loss of £1,027, in respect of which he claimed relief under the Income Tax Act, 1918, s. 34 (1), and under s. 34 (2) he was repaid payments of tax aggregating £429 19s. 1d., of which £425 9s. 1d. represented the tax deducted at source on the gross annuity. The question arose whether M. was accountable to the trustees for the sum of £425 9s. 1d. or part of it. It was conceded on his behalf that, under the rule in *Re Pettit* ([1922] 2 Ch. 765), he was accountable for so much of that sum as was equivalent to the proportion (referable to the annuity) of what he would have been entitled to recover in respect of his statutory allowances (*viz.*, his personal allowance and allowances in respect of his children and of life assurance premiums paid by him).

HELD: the testator's object in giving M. an annuity free of tax was to provide him with a certain sum, *viz.*, £10 a week, and not to indemnify him out of residue in respect of a business loss; by s. 34 (1) and s. 34 (2) of the Income Tax Act, 1918, M. became entitled, by reason of his business loss in 1946-47, to have his tax liability in respect of that year adjusted by reference, not only to his statutory allowances, but also to his business loss; he was no more entitled to keep what he recovered in respect of a business loss than he was to keep his statutory allowances, the purpose of the testator being satisfied if the net sum specified by him was left in M.'s hands; and, therefore, M., who was a trustee, not only of any sums received by him which were referable to the tax in respect of his annuity, but also of whatever right he had to make a claim for repayment, was accountable to the trustees for so much of the sum recovered by him from the Inland Revenue as represented repayment of tax paid in respect of his annuity for that year.

Re Kingcome ([1936] 1 All E.R. 173), approved.

Decision of ROMER, J. ([1951] 2 All E.R. 507), affirmed.

AS TO EFFECT OF DIRECTION IN WILL TO PAY ANNUITY FREE OF INCOME TAX, see HALSBURY, Hailsham Edn., Vol. 28, pp. 215, 216, paras. 386-388; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.

Cases referred to:

- (1) *Re Pettit*, [1922] 2 Ch. 765; 91 L.J.Ch. 732; 127 L.T. 491; 39 Digest 167, 587.
- (2) *Re Williams*, [1945] 2 All E.R. 102; [1945] Ch. 320; 115 L.J.Ch. 101; 173 L.T. 132; 2nd Digest Supp.
- (3) *Inland Revenue Comrs. v. Cook*, [1945] 2 All E.R. 377; [1946] A.C. 1; 114 L.J.P.C. 69; 173 L.T. 211; 26 Tax Cas. 489; 2nd Digest Supp.
- (4) *Re Tatham*, [1945] 1 All E.R. 29; [1945] Ch. 34; 114 L.J.Ch. 9; 172 L.T. 14; 2nd Digest Supp.
- (5) *Re Kingcome*, [1936] 1 All E.R. 173; [1936] Ch. 566; 105 L.J.Ch. 209; 154 L.T. 462; Digest Supp.
- (6) *Re Jones*, [1933] Ch. 842; 102 L.J.Ch. 303; 149 L.T. 417; Digest Supp.

- (7) *Michelham's Trustees v. Inland Revenue Comrs. Michelham (Executors of Dowager Lady) v. Inland Revenue Comrs.*, (1930), 144 L.T. 163; 15 Tax Cas. 737; Digest Supp.

APPEAL by the first defendant, the annuitant, from an order of ROMER, J., dated July 11, 1951, and reported [1951] 2 All E.R. 507.

By the will of his father the annuitant was given an annuity of £10 a week free of income tax. The annuity was paid to him out of income of residue on which income tax at the standard rate had been deducted at source. In the years 1946-47 and 1947-48 the annuitant suffered business losses in respect of which he obtained relief under the Income Tax Act, 1918, s. 34 (2), being repaid sums paid by him in respect of income tax, including the tax paid in respect of the annuity for those years. On a summons by the trustees to determine, *inter alia*, whether the annuitant was liable to account to them for so much of the sums so repaid to him as were referable to the tax paid on the annuity for the two years, it was contended by the annuitant that he was accountable only for so much of the tax recovered as would be equal to the amounts for which he would have been accountable in respect of the statutory allowances (*i.e.*, his personal allowance and allowances in respect of his children and of life assurance premiums paid by him) attributable to the annuity for those years if he had made no claim under s. 34 (1) of the Act of 1918. ROMER, J., held that the annuitant was accountable to the trustees for the whole of the sums recovered in respect of income tax paid on the annuity for the years 1946-47 and 1947-48.

J. H. Stamp for the annuitant.

Droop for the trustees.

E. G. Wright for infants interested in the residuary estate.

Cur. adv. vult.

Dec. 3. SIR RAYMOND EVERSLED, M.R., read the following judgment of the court. The facts of the present case have been fully stated in the reserved judgment by ROMER, J. ([1951] 2 All E.R. 507), and it is unnecessary to relate them again at length. The question for determination is the extent of the accountability to the trustees of the estate of the testator, Henry Lyons (who died on Mar. 25, 1946) of his son Michael, the appellant (hereinafter called "the annuitant"), in respect of repaid income tax. By the terms of cl. 12 of the testator's will, dated Oct. 8, 1942, the trustees were directed out of his residuary estate

" . . . to pay the sum of £10 each week free of income tax to . . . Michael during his life on protective trusts . . . "

The trustees of the will in proper execution of their duties paid to the annuitant during each of the first two years following his father's death the amount of his annuity out of income in their hands, after accounting to the Commissioners of Inland Revenue for income tax at the standard rate. But, during each of those years, the annuitant had suffered substantial business losses, and, accordingly, he made a claim, pursuant to s. 34 (1) of the Income Tax Act, 1918, for repayment of income tax paid by him or on his account. The question is whether and to what extent, having recovered such tax, he is now accountable to the trustees of his father's will for so much of the amount recovered as represents the tax paid in respect of his annuity.

The material figures for the two years are set out in the judgment of ROMER, J. For present purposes it will suffice to refer to the figures for the first of the two years, the income tax year 1946-47, for in principle there is no difference between the two years. In the year 1946-47 the annuitant's taxable income was, in all, £1,086 1s., of which £945 9s. 1d. represented the gross annuity required to produce the net sum of £10 per week less tax at the standard rate of 9s. in the £. In respect of that income the income tax paid was £429 19s. 1d., of which

£425 9s. 1d. was the amount of tax paid by the trustees in respect of the annuity. In the circumstances of his business loss [which amounted that year to £1,027] the annuitant became entitled to recover, and did recover, the whole amount of £429 19s. 1d. of tax paid as above mentioned, and it was unnecessary to make any calculation of the sums he would, apart from his business loss, have been entitled to reclaim in respect of personal allowances and in respect of his children and life insurance premiums. In fact, however, these various allowances would have been equivalent, as we were told, to about one-half of the total tax paid by him, or on his behalf, and counsel has conceded on his behalf that, having regard to the decision in *Re Pettit* (1) and the cases which have followed that decision, the annuitant is liable to account to the trust estate for so much of the tax recovered as is equivalent to a due proportion (referable to the annuity) of what he would have been entitled to recover in respect of those allowances. In *Re Williams* (2), cited by the learned judge below, UTHWATT, J., drew attention ([1945] 2 All E.R. 104) to the logical and administrative difficulties which, as it seemed to him and as Mr. Stamp (counsel for the annuitant) had himself argued in the leading case of *Re Pettit* (1), might flow from the conclusion at which the court arrived in the last-named case. The present case may well afford an illustration of those difficulties. But since the decision of the House of Lords in *Inland Revenue Comrs. v. Cook* (3), all doubts have been laid at rest and all regrets rendered futile. It is now to be taken as well established that, in the case of an annuity comparable in form to that in *Re Pettit* (1), the annuitant is accountable to the trustees for what in the present case ROMER, J., has conveniently called ([1951] 2 All E.R. 509) "statutory allowances".

But the first question must always remain: What did the testator mean to give? In the passage cited by ROMER, J. ([1951] 2 All E.R. 512) from *Re Williams* (2), UTHWATT, J., noted the distinction between two classes of gift ([1945] 2 All E.R. 104): (i) where the reference to income tax is merely an indication of the arithmetical method whereby the amount of the gift is to be ascertained; and (ii) where it appears that the testator's intention is to relieve his beneficiary of liability for income tax in respect of the benefit concerned so that (and this must be regarded as the main purpose of the gift) the beneficiary may have a clear sum of so much money in hand—to use the phrase of EVERSLED, J. ([1945] 1 All E.R. 33) in *Re Tatham* (4), a clear sum of "spending" money, neither more nor less, or, as VISCOUNT MAUGHAM expressed it ([1945] 2 All E.R. 381) in *Cook's* case (3), a certain sum for his "personal behoof." In the present case it has been conceded by counsel for the annuitant that the annuity given must be regarded as of the second category above mentioned, the category in which fell *Re Pettit* (1) itself. The question, then, is whether the sum of tax refunded to the annuitant under s. 34 (2) of the Act of 1918 is to be regarded as *in pari materia* with the statutory allowances so as to make him accountable for the whole sum received, or whether it is, as counsel for the annuitant contends, something altogether distinct in character from the statutory allowances. We have examined all the cases that have been decided since *Re Pettit* (1), and it must, we think, be conceded that in none of them was the present case ever in the minds of the judges who decided them.

It would be possible to imagine an extreme case in which the Crown placed itself under an obligation to make a payment to some individual or class of individuals, in consideration, say, of services rendered to the State, equivalent to the whole or some part of the income tax which that individual, or class of individuals, had paid. In such a case there would obviously be a strong case for asserting that the sum recovered was not, in fact, tax, and did not in any way affect what had been the true liability for tax. Again, s. 34 (1) of the Income Tax Act, 1918, might have been differently worded so as to make it appear that, in the circumstances in which the annuitant found himself, he was entitled to recover a sum equivalent to the whole or part of the tax for which he had been

properly assessed. But the sub-section is not so worded. The right of the annuitant, according to s. 34 (1), is to have "an adjustment of his liability" for tax in respect of the previous year's income. In the circumstances, the kernel of the matter, as it seems to us, is found in the single sentence of the judgment of ROMER, J. ([1951] 2 All E.R. 512):

"The question is not whether at any particular stage [the annuitant] was liable to tax, but whether he was ultimately liable . . ."

In our judgment, on a true analysis, in respect of the year in question, the annuitant became entitled to have his tax liability adjusted by reference, not only to his "statutory allowances", but also by reference to the fact of his business loss. In the end he was not liable for any tax at all. And, as we interpret the gift, the annuitant was no more entitled to keep what he recovered in respect of business loss than he was to keep his statutory allowances.

Counsel for the annuitant quarrelled somewhat with the learned judge's reference to a windfall ([1951] 2 All E.R. 509), and it is true that, in the circumstances, the persons entitled to residue subject to the annuity may well be said, if the judgment appealed from is right, to have had a windfall attributable to the purely extraneous circumstance that the annuitant incurred a business loss. Still, we cannot see in principle that it is any less a windfall for residue that the persons interested therein are entitled to recover a certain sum by reason of the fact that the annuitant has married or has had one or more children. And we agree with the reasoning of the learned judge when he said ([1951] 2 All E.R. 511):

"I am unable, however, to regard the 'additional gift' as a bequest in the full sense that that word ordinarily bears, for, in my judgment, it is a gift for a particular purpose and for no other, and, if it is not required to answer that purpose, it fails and cannot be applied to some other purpose instead."

It seems to us not to be in accordance with the intention of the testator that his estate should, in effect, provide a sum of money to make good to the annuitant a business loss. The obligation of the estate was, as we have said, on a true interpretation of the gift, to provide the annuitant with a certain sum of spending money, no more, no less.

Counsel for the annuitant also argued, however, that the sum paid out of residue in respect of the annuitant's income tax is no more than a gift for a particular purpose, and does not fail because the purpose for which it was made is not, or has not to be, fulfilled. It is true that (as the authorities have made clear) in the case of an annuity such as the present there is to be found a gift (i) of the amount of the net sum of the annuity, and (ii) of the amount of tax properly exigible in respect of it. That result is achieved because it is not in law possible to make a gift of so much per annum "free of income tax". As LORD MAUGHAM observed ([1945] 2 All E.R. 380) in *Cook's* case (3), "a benevolent construction" must be given to the gift to save it from invalidity, and so it is construed as a gift (a) of the net sum, and (b) of the tax properly exigible in respect of it. But the conclusion for which counsel for the annuitant contends does not, in our judgment, follow from the premise. So to hold would be, as we think, to lose sight of the essential distinction to which UTHWATT, J., drew attention ([1945] 2 All E.R. 104) in *Re Williams* (2), for it would then appear that the reference to income tax was not intended to achieve for the annuitant an indemnity against tax in respect of the annuity given and to allow the annuitant to receive neither more nor less than a clear net sum, but was, in truth, merely an arithmetical factor in quantifying the amount of the gift. In our judgment, once it is determined that the effect of s. 34 (1) of the Act of 1918 is to give to the annuitant a right to reopen his assessment and have his liability for tax in respect of all his income adjusted, then it must follow that the purpose of the testator will have been satisfied so long as any tax properly referable to the

annuity, as ultimately ascertained, is discharged out of the estate and the net sum specified by the testator is left in the hands of the beneficiary.

In his judgment ROMER, J., referred ([1951] 2 All E.R. 511) to the question which had been raised before him: Assuming that residue was entitled to re-claim from the annuitant the sum of tax repaid, then, following the principles laid down by BENNETT, J., in *Re Kingcome* (5), did it not follow that the annuitant must be a trustee, not merely of any sums in fact received and referable to the tax in respect of his annuity, but also of the right to make the necessary claim? In the present case there is the complication that the taxpayer has an option. He may either claim repayment under s. 34 (1) of the Act of 1918 (*i.e.*, have his tax re-adjusted under s. 34 (2) of the Act) or he may carry forward his loss to his next year's tax liability under s. 33 (1) of the Finance Act, 1926. ROMER, J., felt it unnecessary to give any answer to the question posed. We were somewhat troubled in the course of the argument by the point, for, if counsel for the annuitant is wrong, it seems to us that it should follow that the annuitant was a trustee of whatever rights he had as distinct from anything he recovered in respect of them. In so stating, we are assuming that *Re Kingcome* (5) was rightly decided. No doubt has ever been raised in subsequent cases as to the correctness of the decision, and we see no reason to doubt it. If, therefore, it is necessary to give an answer to this question (as we are inclined to think it is) we should not shrink from holding that the annuitant was a trustee of his rights. Strictly, it may follow that he ought to exercise that one of the two alternative rights available which was the more advantageous to the trust estate. We are not, however, satisfied that it is necessary to go to that length. It may well be that the annuitant would be entitled to exercise whichever of the alternatives he preferred, that matter being left to his discretion, but, if he declined to exercise either alternative, then, as it seems to us, the trustees could bring him before the court and obtain an order on him to exercise either that one which was the more beneficial to the estate, or, at least, that one which he, the annuitant, preferred. It might well be possible that in respect of one or more of the statutory allowances Parliament might hereafter give to the taxpayer an option to choose between one of two alternative ways of obtaining a particular benefit. And, if this came to pass, then the present problem would arise almost exactly in reference to that statutory allowance. For the reasons to which we have given brief expression, out of compliment to the argument of counsel for the annuitant, we conclude that the judgment of ROMER, J., was correct, and we agree with and accept the reasoning on which that judgment was based. In our opinion, the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Wright & Webb* (for the annuitant); *Saville & Mannooch* (for the trustees and infants interested in residue).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CHRISTMAS v. GENERAL CLEANING CONTRACTORS, LTD.
AND OTHERS.ed and Distinguished. BATES
ER. [1952] 2 All E.R. 987.Denning and Hodson, L.JJ., and Lloyd-Jacob, J.), November
H.L. [1952] 2 All E.R. 1110.*Negligence—Invitee—Duty of occupier—Protection against unusual danger—Window cleaner—Defective window sash—Window safe for ordinary purposes.*

The plaintiff, a window cleaner, was employed by contractors to clean the windows of a club. While he was standing on the outside sill, cleaning one of the windows and holding on to one sash of the window for support, the other sash came down on his fingers, causing him to let go and fall to the ground, suffering injury. He claimed damages for personal injuries against his employers and against the proprietors of the club as occupiers of the premises. The cause of the fall of the sash was an insufficiency in the weights balancing the window, but the window was quite safe for ordinary purposes, and no complaint had been made about its condition by the staff of the club or by other window cleaners.

HELD: where a window is safe for ordinary purposes a defect in it which may render it dangerous for a window cleaner to hold on to is not an "unusual" danger of which an occupier is bound to warn the window cleaner (he being an invitee), and, therefore, the club were not liable to the plaintiff, but it was for the plaintiff's employers to take reasonable care to see that the premises were safe or else to take proper steps to protect him from the dangers to which he was sent; on the facts they had not taken proper steps so to lay out the work as to protect the plaintiff from the dangers of his employment; and they were liable to him in respect of his injury.

London Graving Dock Co., Ltd. v. Horton ([1951] 2 All E.R. 1), applied.

AS TO DEGREE OF CARE ORDINARILY REQUIRED, see HALSBURY, Hailsham Edn., Vol. 23, pp. 571-587, paras. 825-840; and FOR CASES, see DIGEST, Vol. 36, pp. 16-21, Nos. 68-101.

Cases referred to:

- (1) *Bolton v. Stone*, [1951] 1 All E.R. 1078; [1951] A.C. 850.
- (2) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737.
- (3) *Taylor v. Sims & Sims*, [1942] 2 All E.R. 375; 167 L.T. 414; 2nd Digest Supp.
- (4) *Bowater v. Rowley Regis Corpn.*, [1944] 1 All E.R. 465; [1944] K.B. 476; 113 L.J.K.B. 427; 170 L.T. 314; 108 J.P. 163; 2nd Digest Supp.

APPEAL by the defendants from a decision of JONES, J., dated May 10, 1951, awarding £3,500 damages to the plaintiff for personal injuries. The learned judge found that the second defendants, as occupiers of premises where the plaintiff, a window-cleaner, received his injuries, were guilty of negligence in failing to warn him, as an invitee, of an unusual danger of which they ought to have known, namely, a defective window which did not provide a safe hold for the plaintiff when cleaning the windows. The judge further found that the first defendants, the plaintiff's employers, were also guilty of negligence in failing to take reasonable care to provide a safe system of work.

Nelson, K.C., and *Stephen Chapman* for the first defendants.

Berryman, K.C., and *N. G. L. Richards* for the second defendants.

Fortune for the plaintiff.

Cur. adv. vult.

-Nov. 29. The following judgments were read.

DENNING, L.J.: The plaintiff is a window cleaner employed by General Cleaning Contractors, Ltd., whom I will call the "contractors". On December 8, 1948, they sent him to clean the windows of the Caledonian Club which was

owned by the Caledonian Club Trust, Ltd., whom I will call the "club". The plaintiff was cleaning one of the windows of the club, standing on the outside sill, when he fell twenty-nine feet into the basement below and was injured. He brought this action against the contractors, who were his employers, alleging that his fall was due to a breach of duty on their part. As they said that it was not their fault, but the fault of the club, the plaintiff added the club as defendants also. The judge found that both the contractors and the club were at fault and were equally to blame and he has ordered them to pay £3,500 damages. Each of them now appeals to this court.

The plaintiff was a good workman who had worked for the contractors for twenty years. He was employed on piece-work terms. The contractors had a standing contract to clean the windows of the club, in the course of which they cleaned the windows of the first floor every fortnight. The plaintiff had frequently been one of the men sent to do this work. The men had found some of the windows troublesome and defective and had complained about them to their own manager and to the steward of the club, but they had never had any trouble with the windows of the library. On Dec. 8, 1948, the plaintiff was cleaning one of the windows of the library on the first floor which he believed was quite safe. It was a tall window, 10 feet 5½ inches high and 4 feet 7¾ inches wide, and had two sashes, a top sash and a bottom sash, each with nine panes of glass in it. The plaintiff first cleaned all he could from the inside. He did the inside of the panes and also, from the inside, reached over to do the top panes of the top sash. Then he got outside to do the rest of the top sash. He threw up the bottom sash, and got on the sill, which was only 6¼ inches wide, and stood on it. He did not close the bottom sash because it had a self-locking device. He left it open a few inches so as not to find himself locked out. The top sash was the outer sash, and the plaintiff held on to its bottom edge with his right hand while he cleaned the panes of it with his left hand. To finish the panes, he pushed the top sash up to the top, still holding the bottom edge of it with his right hand, but, as he did so, the bottom sash, which he had left open, came down and closed the window, with the result that the top edge of the bottom sash came close against the bottom edge of the top sash and knocked his hand from the place he was holding, causing him to lose his balance, and he fell. It was probably the jar caused by the pushing up of the top sash which caused the bottom sash to run down as it did and catch his fingers.

A few months later an expert who examined the window found that on some occasions, when pushed up, it did not stay up, but came down of its own accord, and, on others, it stayed up but dropped on being touched with the fingers. His view was that the weights were not heavy enough properly to balance the sash. In short, it ran down rather too easily, but otherwise there was nothing wrong with it. After the accident it was used and cleaned for some months just as it had been before, but later on, when the club was shut for the annual closing, the weights were put right.

The learned judge found that the window was defective in that it was ill balanced and I think that we must accept his finding, but I do not think it follows that the club were guilty of negligence. It is useful first to consider whether the club were in breach of the duty of care which they owed to the members and the servants of the club. I think not, for, despite the defect, the window was safe enough for all ordinary purposes. There was, I suppose, a remote possibility of injury to the members or servants if it ran down too easily, but it was such a remote possibility that it could not form a basis for a charge of negligence: see *Bolton v. Stone* (1). Next, consider whether the club were in breach of their duty to the window cleaners. The defect rendered it a danger for them, but the liability of the club depends on whether it was an unusual danger. The judge says that it was an unusual danger, but I cannot agree with him. The plaintiff himself said that "the weather has a lot of effect on windows if they are not properly balanced, and on several occasions when I was

working outside a window you would find the bottom sash slowly sinking down." Mr. Mahoney, a director of the contractors, who has had thirty-five years' experience, said: "We have had quite a number of accidents with window sash cords breaking and sashes coming down on fingers . . . that is quite a usual accident". He added that on this particular window there was no question of a sash cord breaking, because they were held by chains and balance weights. He also mentioned a case where "a man was cleaning and holding on to the handles underneath and he was picked up dead from Bishopsgate with the handle in his hand. He was depending on the handle which an experienced man would not, as he knows full well they may be rusty and may suddenly go". That evidence shows quite clearly that windows which are safe enough for ordinary purposes may yet have a defect rendering them a danger to window cleaners.

What then is the law on this matter? Is a householder responsible for seeing that windows are safe for window cleaners to hold on to? I think not. The householder is concerned, of course, to see that the windows are safe for his servants to open and close, and, indeed, to clean, but he is not concerned to see that they are safe for a window cleaner to hold on to. The duty which a householder owes to his servants is much higher than that which he owes to a window cleaner who is only an invitee. The householder employs the window cleaner as an independent contractor to clean his windows, and leaves it to him to decide how he shall do it and what safeguards he shall take, whether he shall use ladders or cradles or simply stand on the sill. The householder does not know what strains or stresses the window cleaner is going to put on the window. If the window cleaner chooses to rely on the window for his safety, then it is for him, and not for the householder, to take steps to see that it is safe for his special purposes. The window cleaner has no right to expect the windows to be in perfect condition. Windows, which are often quite serviceable for ordinary purposes, may yet have some minor defect, such as rusty screws or worn sash cords, or ill-balanced weights, making them unsuitable for window cleaners to put their trust in. Such defects are, for window cleaners, common, recognisable dangers of everyday experience and cannot be classed as "unusual". They are, therefore, dangers against which window cleaners must provide their own safeguards. They cannot saddle the householder with damage which results from them: see *London Graving Dock Co., Ltd. v. Horton* (2). In my opinion, therefore, the judge was wrong in finding the club liable, and their appeal should be allowed.

The next question is whether the contractors are liable to their workman, the plaintiff. Counsel for the contractors argued that employers who send their men out to work on the premises of other people, have no responsibility for the safety of those premises. He cited *Taylor v. Sims & Sims* (3) in support of that proposition. He said that it was for the occupier to see that the premises were safe for the workman and not for the employer to do so. I cannot agree with that proposition. Until recently many people thought that an occupier was bound to use reasonable care to see that his premises were safe for workmen he invited on them, but that is no longer true. The decision of the House of Lords in *London Graving Dock Co., Ltd. v. Horton* (2) shows that an occupier can allow his premises to remain defective and dangerous with impunity so long as he gives the men warning of the risk or the danger is so obvious that they must be aware of it. If this is so, I think it must follow that it is for the employer, who sends his men to the premises, to take reasonable care to see that the premises are safe for the men or else take proper steps to protect the men from the dangers to which he sends them. There is a difference between a master-man and a journeyman. A master-man, working on his own account, who knows of the dangers, has a choice before him. He need not do the work if he does not wish to run the risk. But a journeyman, working for another, has no such easy choice. He has been sent to do the work and he may well feel that do it he must, even though he knows that it involves risk. If such a man has no remedy against the occupier—

and *Horton's* case (2) shows that he has none—then it must be the duty of his employer to take reasonable care to protect him. This seems to me implied in the observations of LORD PORTER and LORD NORMAND in *Horton's* case (2) ([1951] 2 All E.R. 5, 11).

The question then is: Did the contractors take reasonable care to protect the plaintiff? The judge has found that they did not, and I find myself in full agreement with him. Window cleaning is a dangerous occupation, and the plaintiff fell owing to one of the dangers usual to it. The employers should have taken proper steps to protect him from the dangers. They should have laid out the work more carefully. One way would have been to do the cleaning from a ladder instead of from a sill. Another way would have been to ask the householder to allow the firm to insert hooks into the brickwork so as to attach a safety belt. It is said by the employers that these suggestions are not practicable, and that it is the usual thing for the men to clean windows by standing on the sill. That answer does not satisfy me. If employers employ men on this dangerous work for their own profit, they must take proper steps to protect them, even if they are expensive. If they cannot afford to provide adequate safeguards, they should not ask them to do the work at all. That seems to be the view of the London County Council, for they have made regulations forbidding a man to stand or kneel on a sill adjoining a highway unless he is hooked on by a safety belt. At the hearing of the appeal it was suggested that the accident might have been avoided if the man had put in a chock to prevent the bottom sash coming right down as it did. This was, in effect, a suggestion of contributory negligence. This was negatived by the judge and I agree with him. You cannot blame the man for not taking every precaution which prudence would suggest. It is only too easy to be wise after the event. He was doing the work in the way which the employers expected him to do it, and, if they had taken proper safeguards, the accident would not have happened. It was suggested also that the man voluntarily took the risk of injury on himself. The judge negatived this and I agree with him. The result is that the appeal of the contractors fails and must be dismissed.

HODSON, L.J.: The plaintiff is a window cleaner. He claims damages from his employers on the grounds that either in breach of their duty to him they have failed to take reasonable care to provide a safe system of work or they were negligent so that he sustained injury. By his amended statement of claim he has also claimed damages from the second defendants who are the occupiers of the premises where he was injured on the ground that the accident was caused by their negligence. At the trial the learned judge found in favour of the plaintiff against both defendants and apportioned the liability equally between them.

He found that the window was defective and that the tendency of the sash to move suddenly because the weights were not heavy enough to balance the sash properly constituted an unusual danger which the club ought to have known if they had exercised reasonable care in having the windows inspected from time to time and repaired when necessary.

I find myself unable to accept the finding that the window constituted such an unusual danger as to impose a duty on the club to warn, so as to prevent damage to, the plaintiff. As the learned judge said in one part of his judgment, window sashes do occasionally move, and, if they move, are liable to cause the hand of a cleaner to be caught between the two sashes or to be knocked off the sash he is holding. The risk of a sash window moving was, I think, clearly recognised by the plaintiff in his evidence. The balance must vary with the position of the window, and, as Mr. Harrington pointed out, the window was suspended by a chain, not an ordinary sash cord, and when the lower sash was near the bottom it was prone to run down. Even if the window can be regarded as defective it cannot, in my view, be regarded as a danger unusual for window cleaners. "... 'unusual' [danger] ... means such danger as is not usually found

in carrying out the task . . . which the invitee has in hand . . .": *per* LORD PORTER in *London Graving Dock Co., Ltd. v. Horton* (2) [1951] 2 All E.R. 5. This was not, in my judgment, such a danger.

So far as knowledge is concerned, assuming the unusual danger to exist, no defect was ever reported to the club. The steward said that the staff and the members regularly used the windows and no complaint had reached him from them. Since the windows were cleaned once a fortnight by expert window cleaners who made no complaint about the running of the windows in the room in question, the club was not under an obligation, in my view, to make any further inspection. I do not think that there was any reason why the club should, even if they had known that the window in question was liable to run down, foresee that there would be an accident and consequent injury occasioned by the method in which the window cleaner performed his work, namely, by standing on the sill outside and holding on to the sash. I would, therefore, allow the appeal of the club.

So far as the plaintiff's employers are concerned, I think that the judgment of the learned judge was right and that they are liable for breach of duty in not taking reasonable care to provide a safe system of working and for negligence. Contributory negligence on the part of the plaintiff was negatived by the learned judge and this finding is not challenged in this court. I reject the argument based on the defence *volenti non fit injuria*. Window cleaning is not, in my opinion, an inherently dangerous occupation of a kind which of necessity exposes employees to risks such as those encountered in this case. The learned judge quoted from a judgment of GODDARD, L.J., in *Bowater v. Rowley Regis Corpn.* (4) ([1944] 1 All E.R. 467):

"A horse-breaker must take the risk of being thrown or injured by a restive or unbroken horse; it is an ordinary risk of his employment. But a man whose occupation is not one of a nature inherently dangerous but who is asked or required to undertake a risky operation is in a different position".

Applying these observations to this case I reach the same conclusion as did the learned judge. [HIS LORDSHIP considered the evidence regarding the system of working and continued:] I would accept the conclusion of the learned judge that the system of work provided was unsafe and that the contractors were negligent, and would dismiss their appeal.

LLOYD-JACOB, J.: By accepting the evidence of a Mr. Harrington the learned judge has found that the lower sash of the window on which the plaintiff was working at the time of his accident was defective in that, by reason of the inadequacy of the sash weights properly to balance the window, it sometimes dropped instead of remaining in position, an occurrence which was more likely to be experienced when the opening was less than one foot. He further found that it was this involuntary closing of the window by a few inches which, by displacing the plaintiff's finger-grip of the bottom sash of the top window, caused the plaintiff to lose his balance and fall to his injury. The learned judge found that this tendency to involuntary closure constituted an unusual danger which the club, with reasonable care, would have known had the window been inspected from time to time. Apart from the normal day-to-day opening and closing of this, among other windows, the evidence established that this particular window was regularly opened and closed for cleaning purposes every fortnight, and that by window cleaners who were never averse from expressing their opinion when any window was found to be troublesome or defective, and at no time was any criticism expressed of its condition. Except on the footing that a householder must be assumed to have knowledge of a defect which has escaped the notice of persons far more expert in the operation of windows than he is, or can fairly be expected to be, the finding, in effect, means that the householder is under a

duty to provide for inspection by an expert of such of his windows as have been regularly operated without complaint. In my judgment, that is to impose a duty on an invitor more onerous than has yet been found appropriate for normal human relations and I would allow the appeal of the club. I agree that the appeal of the contractors should be dismissed.

Appeal of first defendants dismissed.

Appeal of second defendants allowed.

Solicitors: *L. Bingham & Co.* (for the first defendants); *Berrymans* (for the second defendants); *Wedlake, Letts & Birds* (for the plaintiff).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Re KEELE ESTATES.

Re SNEYD'S SETTLEMENTS. Re SNEYD (WALTER) WILL TRUSTS.

Reversed. C.A. [1952] 2 All E.R. 164

AVELING AND ANOTHER v. SNEYD AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), November 23, 27, 28, 29, 1951.]

Estate Duty—Incidence—Portions charged by will on property reversionary at date of testator's death—Duty exigible on death of life tenant—Liability of portioners to be charged with duty—Finance Act, 1894 (c. 30), s. 14 (1).

By his will, dated May 30, 1865, R.S. senior devised real property to the use of W.S. for life and after his death to the use of R.S. junior for life, and after his death on limitations for the sons of R.S. junior in tail, and in default of such issue to the use of W.S. his heirs and assigns for ever. R.S. senior died on July 27, 1870, W.S. on July 2, 1888, and R.S. junior died without leaving issue on Dec. 25, 1949. By his will, dated June 14, 1886, W.S., in case he should become entitled in fee simple to the said real property, devised the same (subject to subsisting prior limitations and to a jointure and certain portions charged by his own will) to the use of his trustees for a term of fifteen hundred years to raise a portion of £20,000 for each of his daughters. Each portion was then settled. On the question of the incidence of estate duty exigible in respect of the settled realty in connection with the death of R.S. junior,

HELD: no part of the estate duty was charged on the portions.

Re Fuchs ([1944] 1 All E.R. 338), applied.

Administration of Estates — Deficiency — Relative priorities of jointuress and portioners.

By his will, dated June 14, 1886, W.S. declared that it should be lawful for every person thereby made tenant for life of the settled estates, either before or after he or she should become entitled in possession, by deed or will (but subject to prior limitations) to appoint to any husband or wife of the person exercising the power for his or her life any yearly rentcharge not exceeding for any one such husband or wife the yearly sum of £1,500, to be charged on all or any of the said premises thereinbefore devised in settlement, and also to charge the premises with payment as portions for his or her children of a sum not exceeding, for four or more children, £25,000, together with certain interest. By a deed dated June 5, 1931, H.S., who was, under the said will, tenant for life of the settled estates, although not then entitled in possession, appointed that such estates should remain and be held in trust for a term of one thousand years to commence from the death of the survivor of himself and R.S. junior in trust after the death of such survivor (or in his lifetime with his consent) to raise £15,000 clear of death duties (or such less sum as should be the maximum principal sum chargeable under the power being exercised) with certain interest and hold the same in trust for such of his

five daughters as should be objects of the said power and should attain the age of twenty-one years or marry in equal shares. H.S. by his will dated Dec. 26, 1949, in exercise of the jointuring power conferred on him by the will of W.S., appointed to his wife J. in case she survived him (which happened) a yearly rentcharge of £1,800 or the maximum annual sum of money which he could so appoint by way of jointure to be issuing out of or to be charged on all the property which at his death should be subject to subsisting limitations of the will of W.S. and to commence from the death of H.S. (R.S. junior having died on Dec. 25, 1949) and to be paid without any deduction except income tax and legacy duty. It was common ground that the latter appointment only operated so as to entitle J. to £1,500 a year. J. was the second wife of H.S. and was not the mother of the portioners. In the event of the settled estates proving insufficient to pay the portions and the jointure in full,

HELD: in the absence of any indication in the deed of 1931 or in the will of H.S. as to priority as between the portions and the jointure, they must rank *pari passu*.

AS TO BY WHOM ESTATE DUTY IS PAYABLE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 279-285, paras. 290-299; and FOR CASES, see DIGEST, Vol. 21, pp. 27, 28, Nos. 148-166.

Cases referred to:

- (1) *Re Fuchs*, [1944] 1 All E.R. 338; [1944] Ch. 200; 113 L.J.Ch. 97; 170 L.T. 191; 2nd Digest Supp.
- (2) *Berry v. Gaukroger*, [1903] 2 Ch. 116; 72 L.J.Ch. 435; 88 L.T. 521; 21 Digest 27, 155.
- (3) *Re Hicklin*, [1914] 2 Ch. 278; 86 L.J.Ch. 740; 117 L.T. 403; 21 Digest 28, 157.

ADJOURNED SUMMONS to determine *inter alia* (i) as to the portions of £20,000 each appointed by the will of Walter Sneyd, deceased, in favour of his daughters, whether each such portion ought to be charged with a rateable, or some and what part of the estate duty payable on the death of Colonel Ralph Sneyd junior in respect of certain settled real property; and (ii) as to the portions appointed to the daughters of Henry Ralph Mowbray Sneyd by a deed dated June 5, 1931, whether such portions ranked in priority to the jointure rentcharge appointed by the said Henry Sneyd by his will to his wife, and, if not, what were the relative priorities of such portions and jointure.

Wilfrid Hunt for the plaintiffs, the trustees of both the will of Ralph Sneyd, senior, and the will of Walter Sneyd.

S. Pascoe Hayward, K.C., and *Duthie* for the first defendant, the widow of Henry Ralph Mowbray Howard Sneyd, the jointress under his will.

J. A. Wolfe for the second to the fifth defendants and the fifteenth defendant, those entitled (or their representatives) to the portions under the will of Walter Sneyd.

Cross, K.C., and *Wigglesworth* for the sixth to the eighth defendants, interested in portions appointed under the will of Walter Sneyd.

E. G. Wright for the ninth to the thirteenth defendants, the portioners under the deed of June 5, 1931.

Salt, K.C., and *H. E. Francis* for the fourteenth defendant, an infant, the tenant in tail male in possession of the settled estate.

ROXBURGH, J.: The question to be determined is whether, as to the portions of £20,000 each appointed by the will of the testator, Walter Sneyd, in favour of his daughters, each such portion ought to be charged with a rateable, or some and what, part of the estate duty payable on the death of Colonel Ralph Sneyd junior in respect of the settled estate. The property with which we are concerned is real property in strict settlement, which was originally

settled by Ralph Sneyd senior, who died on July 27, 1870. By his will, dated May 30, 1865, Ralph Sneyd senior devised the said settled estates to the use of his brother Walter Sneyd for life, and after his death to the use of Colonel Sneyd for life, and after the decease of Colonel Sneyd on limitations for the sons of Colonel Sneyd in tail—he had none—and in default of such issue to the use of Walter Sneyd, his heirs and assigns for ever. Walter Sneyd died on July 2, 1888, *i.e.*, before the passing of the Finance Act, 1894, but Colonel Sneyd survived until Christmas Day, 1949, and, therefore, when Walter Sneyd died he (Walter Sneyd) had a vested defeasible remainder in fee simple in the settled estates. Heavy estate duty became payable on the death of Colonel Sneyd. By his will, dated June 14, 1886, Walter Sneyd, in case he should become entitled in fee simple to the real estate being freeholds of inheritance devised by the will of Ralph Sneyd senior, devised the same (subject to any estates or interests prior to the ultimate limitation to himself and also subject to a certain jointure and portions charged by his own will) and all his own real estate to the use of his trustees for a term of fifteen hundred years to commence from his decease on the trusts thereafter declared and from and after the expiration or determination of the said term of years and in the meantime subject thereto to various uses. The trusts of the term were to raise as and for the portion of each of his daughters (other than the eldest or any other daughter or daughters entitled as tenant for life in possession) the sum of £20,000 together with certain interest. The portion of each daughter was settled.

A decision of SIMONDS, J., in *Re Fuchs* (1), bears a close similarity to the present case, although the cases are not identical. In particular, *Re Fuchs* (1) was concerned with a fund of personality, while this case is concerned with freeholds of inheritance. *Re Fuchs* (1) turned on the Finance Act, 1894, s. 8 (4), which provides:

“Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property . . . ”

Dealing with that sub-section SIMONDS, J., said ([1944] 1 All E.R. 340):

“The sub-section contemplates the passing of property from A to B upon the death of A under circumstances in which the executor of A is not liable for duty. Where, under a disposition made by C, a trust fund becomes distributable upon the death of the life tenant A to the reversioner B, it is sufficiently accurate to say that the property in the trust fund passes to B and if B represents more than one person then the several reversioners will bear the duty rateably. But where the reversioner B dies before the reversion falls in and, when it does fall in, it is distributable under his will, or (it may be) upon his intestacy, it is, in my judgment, too great a strain even of popular language, in which admittedly the Finance Act is couched, to say that the property, that is the trust fund, passes from A, the tenant for life, to the persons who take either under B's disposition or in default of such disposition. The right of such a person is not a right in or to any property but solely a right to have the estate of the reversioner including this asset administered in due course. Upon this footing the primary condition of the application of the sub-section is not present and it is in this respect that *Berry v. Gaukroger* (2) and *Re Hicklin* (3), upon which counsel for the residuary legatees relied, are to be distinguished. In both cases the deceased

upon whose death duty was exigible and the persons who disputed their rateable liability claimed under the same disposition and it could be fairly predicated of them that the same property which the deceased enjoyed during his life passed to them after his death according to their respective interests. They were accordingly liable for a rateable part of the duty . . . But as I have already pointed out, it is just this element which is absent from such a case as the present one where the contest is between several beneficiaries who claim not under the original disposition but under a testator who was himself absolutely entitled in reversion under that disposition. In my judgment, there is no room for the application of the principle . . . ”

I have embarked on an obscure and difficult journey and there is no doubt that there is much to be said for each of the different points of view, but in *Re Fuchs* (1) I have a broad statement of principle. What is my duty ? Is it to apply the same principle *mutatis mutandis* to the present case, or is it to evolve some further distinction based on the differences between real and personal property and between the treatments of each of those kinds of property, in particular at the date when Walter Sneyd died ? My view is that I should not attempt to introduce distinctions, but should endeavour to assimilate the two cases, leaving it for some other court which is untrammelled by authority to re-survey the whole field. I shall, therefore, approach this case in that frame of mind.

Counsel for the infant defendant, faced with *Re Fuchs* (1), addressed no argument to me on s. 8 (4). His submissions were two. The first was that somehow the property which passed on the death of Colonel Sneyd by-passed the estate of Walter Sneyd. His second argument was that the effect of s. 14 (1) of the Act of 1894 was to throw a rateable part of the duty on the portioners. Section 14 (1) provides:

“ In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise,) under a disposition not containing any express provision to the contrary.”

I will deal with those two arguments *seriatim*. I find myself unable to accept counsel's first submission for two reasons. First, it was only by virtue of an indefeasible estate in fee simple in possession that Walter Sneyd could effectively make the testamentary dispositions in question. Secondly, in his lifetime Walter Sneyd had been entitled to a defeasible vested estate in fee simple in remainder which on his death became an asset of his estate and could only be enlarged into an indefeasible estate in possession in the bosom of that estate. On those two grounds I find myself unable to accept counsel's first argument. The point as to s. 14 (1) is, I think, undoubtedly a matter of difficulty, but my view is that the portioners have no charge on the property which passed on the death of Colonel Sneyd. Their charge was on so much, if any, as emerged from the estate of the testator, Walter Sneyd, in due course of administration. What in fact emerged was an equity of redemption—that is to say, the freehold property subject to a charge for estate duty. But it might have been partially, or even wholly, applied in the payment of the debts of Walter Sneyd if he had left debts of a sufficient amount. Or it is possible to look at it in another way. The trustees of the leasehold term were not entitled to a lease of all the freehold properties which passed on the death of Colonel Sneyd, but they were entitled to a lease of mixed real properties—that is to say, the testator, Walter Sneyd's, own real estate and so much of the real estate passing on the death of Colonel Sneyd as was not required for the purpose of administration and for the payment of the estate duty in question. The security of the portioners extended so far, but not

farther. Accordingly, in my judgment, no part of the estate duty can be thrown on the portioners.

[HIS LORDSHIP heard argument on the question secondly stated above.]

ROXBURGH, J.: The will of Walter Sneyd conferred on Major Henry as tenant for life powers of jointuring and of charging portions. Major Henry married first a Miss Helen Millicent James, and by that marriage had five children. That marriage was dissolved and he married Janet Emma Jameson Howard Duthie as his second wife. By his second marriage he had a son who is the present tenant in tail. He exercised both his power of charging portions and his power of jointuring his second wife. So far as the latter power was concerned, he exercised it excessively, but it is common ground that it only operated to the full extent of his power, *viz.*, £1,500 a year. He also exercised his power to the full as regards the children. As the estate is heavily charged with estate duty, there is a possibility of a deficiency. If there is a deficiency, there is a very serious question as to the position between the jointuress and the portioners. It is at present a hypothetical question, but I was anxious to decide it now rather than put the parties to the expense of a new construction summons.

There are three possible contentions. One is that the jointuress takes precedence over the portioners. The second is that the portioners take precedence over the jointuress. The third is that they rank *pari passu*. These powers were not exercised at the same time. The portions were appointed by a deed-poll of June 5, 1931. The appointor had then re-married. The deed provides:

"This appointment is made by the appointor in exercise of the power for this purpose given to him by the will of the testator [Ralph Sneyd senior] and of every or any other power enabling him in this behalf (but only if and so far as such powers respectively prove in the events which shall happen to be exercisable by him) and is made subject and without prejudice to his life interest under the said will and to the uses estates and powers preceding or overriding such life estate and to the uses and estates limited or created in exercise of such powers . . . The appointor hereby irrevocably charges the Keele Estates with the payment of the principal sums and interest and other money to be raised under the trusts of the term hereinafter limited."

That charge makes no reference to the so far unexercised power of jointuring. He charges these portions on the estates. If he was intending to reserve the power of over-reaching this charge by the subsequent jointuring of a wife, surely he would have been expected to reserve that over-reaching power when he was dealing with priorities, as indeed he was in the paragraph which I have read. Subsequently, by his will dated Dec. 26, 1949, he jointured his second wife.

The sheet anchor of counsel for the jointuress is the great name of LORD ST. LEONARDS. In FARWELL ON POWERS, 3rd ed., p. 577, LORD ST. LEONARDS is cited as saying (in SUGDEN ON POWERS, 8th ed., p. 487):

"If the rule is universally in favour of portions, there is no distinction between a jointure and portions; but either, when raised by means of a power, will prevail over the other, if actually created by the settlement itself. There would, however, be no difficulty in drawing a distinction between the two charges, which is pointed out by their nature. Where they come into competition, the jointure should precede the portions. Where both are created by powers, and although the portions are first charged, a jointure would, it is apprehended, prevail over portions."

They are both here created by the exercise of powers and the portions were first charged. But, says LORD ST. LEONARDS, a jointure would, it is apprehended, prevail over portions. I must confess I do not quite know to what situation LORD ST. LEONARDS was referring when he said that. Was he referring to the

case of a jointure in favour of a widow after the life interest of her husband as compared with portions in favour of the children of the marriage, or was he speaking in entirely general terms so as to comprehend in his statement the relative positions of the children of the first marriage and the widow of the second marriage, and, therefore, not the mother of the children? I really do not know. Moreover, I feel that broad statements of that character made without any regard to the circumstances of a particular case might be dangerous. The basis, I understand, of LORD ST. LEONARDS' observations is a surmise as to the intention of the person exercising the powers, but, if it is permissible to surmise at all, it is better to surmise in the light of the circumstances of the particular case. Even then surmise is a most unruly horse. In this particular case I think it is easy to make equal and opposite surmises at almost every point. I cannot but think that, if a person subjects property to charges which are to take effect at the same time and nothing is said directly or indirectly about priority, on the general principle of equity—that, if there is a deficiency which nobody who drafts these documents expects, the only thing you can do is to apportion the burden of the deficiency—they ought to rank *pari passu*. In this deed of appointment I think that there is a clear indication that a widow is not to have priority over the portions. I think that the form of the document itself by implication shows that. Counsel for the portioners asks me to go further and say that that document also shows that the portioners were to have priority over the jointuress. I do not think so. It is not like a mortgagor mortgaging his house in favour of a number of different mortgagees. It is a person exercising a power in a family settlement, and I should need strong words to convince me that merely because the appointor did not reserve the right to create in favour of his widow a jointure ranking *pari passu* with portions he was to be deemed to have surrendered that right. Therefore, I arrive at the conclusion that, if there is a deficiency, the jointuress and the portioners rank *pari passu*.

Declarations accordingly.

Solicitors: *Cunliffe & Airy*, agents for *Knight & Sons*, Newcastle, Staffordshire (for the plaintiffs); *Hunters* (for the first, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth defendants); *Nicholl, Manisty, Few & Co.* (for the second, third, fourth, fifth and fifteenth defendants); *Royds, Rawstorne & Co.* (for the sixth, seventh and eighth defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re SHAW'S WILL TRUSTS. NATIONAL PROVINCIAL BANK, LTD. v. NATIONAL CITY BANK, LTD. AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), November 30, December 3, 1951.]

Charity—Education—Gift for the teaching, promotion, and encouragement of appreciation of the fine arts, and also of self-control, elocution, oratory, deportment, and the arts of personal contact, social intercourse, and public, private, professional and business life.

By her will a testatrix constituted a trust fund and directed her trustee to pay or apply the net income thereof in perpetuity in or towards the appreciation of the fine arts and all or any one or more of the following objects (*inter alia*): "The teaching promotion and encouragement in Ireland of self-control elocution oratory deportment the arts of personal contact of social intercourse and the other arts of public private professional and business life. The establishment and endowment within the special period [thereinafter mentioned] either solely or jointly with any person or persons or any other corporation of any educational institution or any



chair or readership in any university college or educational institution now existing or coming into existence within the special period in Ireland for the purpose of giving instruction in or promoting the study by the general public of the subjects mentioned in this clause . . . or any of them provided that no such college or educational institution has for its sole object the exclusive or complete training in any single profession or calling."

HELD: the trust was of an educational nature and beneficial to the community, and, therefore, it constituted a valid charitable gift.

AS TO TRUST FOR EDUCATIONAL PURPOSES, see **HALSBURY**, Hailsham Edn., Vol. 4, pp. 116-118, paras. 153, 154; and **FOR CASES**, see **DIGEST**, Vol. 8, pp. 245-248, Nos. 51-73.

Cases referred to:

- (1) *Re De Noailles*, (1916), 85 L.J.Ch. 807; 114 L.T. 1089; 8 Digest 341, 1321.
- (2) *Re Hummeltenberg*, [1923] 1 Ch. 237; 92 L.J.Ch. 326; 129 L.T. 124; Digest Supp.
- (3) *Re Corelli*, [1943] 2 All E.R. 519; [1943] Ch. 332; 112 L.J.Ch. 348; 169 L.T. 265; 2nd Digest Supp.
- (4) *Re Price*, [1943] 2 All E.R. 505; [1943] Ch. 422; 112 L.J.Ch. 273; 169 L.T. 121; 2nd Digest Supp.
- (5) *Royal Choral Society v. Inland Revenue Comrs.*, [1943] 2 All E.R. 101; 112 L.J.K.B. 648; 169 L.T. 100; 25 Tax Cas. 263; 2nd Digest Supp.
- (6) *Re Central Employment Bureau for Women & Students' Careers Asscn. (Incorporated)*, [1942] 1 All E.R. 232; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether the trusts declared in the will of Charlotte Frances Shaw, deceased, concerning her ultimate trust fund were valid, or were void as contravening the rule against perpetuities or for uncertainty or for any other reason.

K. J. T. Elphinstone for the plaintiffs, the general trustees of the deceased's will.

Russell, K.C., and *M. Browne* for the first defendants, the National City Bank, Ltd., the special trustees of the deceased's will.

Wilfrid Hunt for the second defendant, the Public Trustee, the executor of the will of the deceased's husband.

S. Pascoe Hayward, K.C., and *J. Monckton* for the third defendant, interested on intestacy.

Denys B. Buckley for the Attorney-General.

VAISEY, J.: By cl. 11 to 16 of her will, dated Sept. 2, 1937, the testatrix, Charlotte Frances Shaw, constituted a residuary trust fund, of which, by cl. 16, she provided that her husband, if he survived her, should receive the income during his life. Clause 17 directs that, subject to such life interest, a sum of £20,000 should be raised out of the trust fund and held on the trusts therein mentioned. Clause 18 provides that, subject to the preceding trusts, her trustees should stand possessed of the said trust fund or the residue thereof, defined as the ultimate trust fund, on trust as soon as conveniently might be after the death of her husband (in the event which happened of his surviving her) to transfer the same to and vest the same in the National City Bank, Ltd., in Ireland. The testatrix died on Sept. 12, 1943, and thereafter her will and codicil were proved by her husband and the National Provincial Bank, Ltd., in the Principal Probate Registry. The husband of the testatrix died on Nov. 2, 1950. The ultimate trust fund now consists of investments and cash of an approximate value of £72,990 with a reversion to a fund retained to provide for the payment of certain annuities consisting of investments of an approximate value of £21,750. The present proceedings have been instituted by the National Provincial Bank, Ltd., the surviving general trustee of the will, as plaintiffs, against the Irish bank, the Public Trustee (as legal personal representative of

the testatrix's husband), the niece of the testatrix (Mrs. Cecily Charlotte Colthurst), and the Attorney-General, as defendants.

The relevant clauses of the will do not err on the side of brevity, but, in saying that, I would also say that they give an interesting insight into the mind of the testatrix, and may, indeed, be described as very good reading. I must state them almost in full, and it is from them that I have to extract the proper answer to a very simple question: Are the trusts declared by those clauses charitable trusts or not? Unless they are, in the legal sense of the word, charitable, they are admittedly void for perpetuity. They can only be brought within the purview of "charity" as being either for the advancement of education or for the general benefit of the community or a part of it. The clause on which the question chiefly turns, cl. 19, is divided into three sub-clauses, of which the first two are subdivided into lettered paragraphs. This elaboration is, no doubt, intended to clarify, but it has also the unfortunate effect of obscuring, the intentions of the testatrix whose meaning is in many respects exceedingly elusive.

The first of the three sub-clauses of cl. 19 is in the form of recitals. It reads thus:

"(i) Whereas: (a) I am desirous of promoting and encouraging in Ireland the bringing of the masterpieces of fine art within the reach of the Irish people of all classes so that they may have increased opportunity of studying such masterpieces and of acquiring a fuller and wider knowledge thereof, and (b) in the course of a long life I have had many opportunities of observing the extent to which the most highly instructed and capable persons have their efficiency defeated and their influence limited for want of any organised instruction and training for the personal contacts whether with individuals or popular audiences without which their knowledge is incommunicable (except through books) and how the authority which their abilities should give them is made derisory by their awkward manners and how their employment in positions for which they have valuable qualifications is made socially impossible by vulgarities of speech and other defects as easily corrigible by teaching and training as simple illiteracy and whereas my experience and observation have convinced me that the lack of such training produces not only much social friction but grave pathological results which seem quite unconnected with it and that social intercourse is a fine art with a technique which everybody can and should acquire."

The second sub-clause begins with a reference to the objects which the testatrix asserts that she had at heart, which I construe as an allusion to the preceding recitals. Paragraph (a) of the second sub-clause is merely an investment clause. Paragraphs (b), (c), (d) and (e) provide:

"(b) The Irish bank shall pay or apply the net income of the ultimate trust fund in perpetuity to in or towards all or any one or more of the following objects and in such proportions and in such manner as the Irish bank shall in its absolute discretion from time to time think fit that is to say: (c) The making of grants contributions and payments to any foundation corporate body institution association or fund now existing or hereafter coming into existence within the special period hereinafter defined having for its object the bringing of the masterpieces of fine art within the reach of the people of Ireland of all classes in their own country provided that no such foundation corporate body institution association or fund shall be eligible as an object of this trust if (i) It is not of a public character or (ii) In the case of a foundation corporate body institution or association it is at liberty to pay or distribute any profits to or among any of its members subscribers contributors or benefactors or the fund or any part thereof or any income therefrom may be so paid or applied or (iii) Any of the members subscribers contributors or benefactors would have any right to participate in the assets or in the fund in the event of its dissolution or distribution.

(d) The teaching promotion and encouragement in Ireland of self control elocution oratory deportment the arts of personal contact of social intercourse and the other arts of public private professional and business life. (e) The establishment and endowment within the special period either solely or jointly with any person or persons or any other corporation of any educational institution or any chair or readership in any university college or educational institution now existing or coming into existence within the special period in Ireland for the purpose of giving instruction in or promoting the study by the general public of the subjects mentioned in this cl. 19 or any of them provided that no such college or educational institution has for its sole object the exclusive or complete training in any single profession or calling."

The third and last sub-clause of cl. 19 says:

"I declare that for the purpose of this my will the expression 'masterpieces of fine art' means and includes works of the highest class in the fields of orchestral and classical music painting sculpture fine printing and literature produced or originating not in any one country exclusively but in any country in the world and by or among people in any age period or date whether ancient or modern."

By cl. 20 of the will the "special period" is defined as meaning the lives of the issue now living of his late Majesty King George V and the life of the survivor of them and twenty-one years after the death of the survivor of them.

Clause 21 reads as follows:

"Notwithstanding anything herein contained I empower the Irish bank for any of the foregoing purposes or objects in its absolute discretion to expend or lay out the capital of the ultimate trust fund or any part thereof in paying or transferring the same to the trustees or other governing body of any such foundation corporate body institution association fund educational institution (whether or not established by the Irish bank under the power in that behalf hereinbefore contained) university or college as hereinbefore mentioned either absolutely or by way of loan and if by way of loan either at such rate of interest as the Irish bank shall think fit or without charging any interest."

Clause 22 of the will places certain restrictions on the activities of the Irish bank as trustees, and prohibits the use of the fund in erecting new buildings. Finally, cl. 23 defines the expression "Ireland" wherever used in the will as denoting the existing Irish Free State and any future extension of it that may take place.

The long and short of this problem is this: Can I extract from this welter of words the intention of promoting the education of Irish men and women and children to be better citizens in the various departments of secular life, or has the verbosity of the testatrix vitiated her good intentions by including objects which are either too vague or too fanciful to be made effective? It is para. (d) of the second sub-clause of cl. 19 which gives the most difficulty. It will be remembered that it reads as follows:

"The teaching promotion and encouragement in Ireland of self control elocution oratory deportment the arts of personal contact of social intercourse and the other arts of public private professional and business life."

It was suggested in argument that the purposes which the testatrix had in mind were those of a sort of finishing school for the Irish people, and, on the whole, I think that this is the right view to take. Clause 19 of the will provides excellent material for the allocation of a somewhat pragmatical headmistress at an annual speech day or other ceremonial occurrence, with its judicious admixture of criticism of awkward manners, vulgarities of speech, and so on, and admonitions

to a higher degree of self-control, improved deportment, and so on. Indeed, there is, in my judgment, nothing in cl. 19 of this will which lies outside the purely secular curriculum of an educational establishment of a somewhat pedantic and precious type. How the people of Ireland will react to such intensive treatment as the testatrix appears to envisage, I ought not to speculate, nor am I concerned to consider how far its application to them will be considered to be, or be in fact, beneficial. Education is not always successful in improving the characters and capabilities of those who are subjected to it, but such is its aim and purpose. There may be some who obtain high marks (for example) in such subjects as elocution, oratory, and deportment, and yet in the process lose something of greater value in the qualities of simplicity, spontaneity, and singleness of heart. But the court ought not to weigh the respective merits of particular educational methods. It will suffice if the purposes are genuinely educational in their aim and scope. In cl. 19 there are obviously many ways in which the trust income could be most usefully applied within the terms laid down in the clause, and it is not, in my view, admissible to test the matter by pre-supposing perverse and unreasonable methods of applying it, as, for example, the method of devoting it entirely to the teaching and encouragement of "deportment," for, after all, that word means nothing except "manners," however much its significance has been debased by its connection with the character of Mr. Turveydrop in BLEAK HOUSE, in which the word is usually printed with a capital "D".

Certain cases have been cited to me and I have obtained a good deal of assistance from them. First, there is *Re De Noailles* (1) in which there are some observations of EVE, J., which seem to me to be very relevant to this kind of problem. EVE, J., said (114 L.T. 1094):

"Here again I think that one must have regard to the main object of education. I know that there are a large number of purists who tell you that the only object of education is to get information, but that is a class of person who I think might be asked what is the use of information unless you turn it to some practical use. The mere stuffing of information into a boy or girl may make them very priggish, but it does not make them of much use in life, unless they know how to apply that information for the purpose of becoming useful citizens. Having regard to the course of education that is contemplated here, and remembering always that these are persons who will have to fight their way through life, and that one condition is that otherwise they will have to pay for their education without assistance, I cannot help thinking that, having regard to these points, it is abundantly necessary, in order to put the privileges of education within the grasp of those who will be educated at this institution, that there should be conferred upon those who are responsible for its management a power to see that the education is completed, and completed in the manner and at the place where it could be completed most advantageously."

My attention was then called to *Re Hummeltenberg* (2). That is, I think, important from the point of view that it contains certain statements of RUSSELL, J., which have recently received very clear and strong approval in the House of Lords. The headnote is:

"To be valid a charitable bequest must be for the public benefit, and the trust must be capable of being administered and controlled by the court. The opinion of the donor of a gift or the creator of a trust that the gift or trust is for the public benefit does not make it so, the matter is one to be determined by the court on the evidence before it."

The passage in RUSSELL, J.'s, judgment ([1923] 1 Ch. 242) from which that headnote is extracted deals really with two points. It says that the donor of a gift or the creator of a trust is not himself to be the judge of what is charitable

or of the essential quality of being for the benefit of the public, and it further says that the private opinions of the judge who tries the case are equally irrelevant. RUSSELL, J., goes on to say, in the words quoted in the headnote, that the question whether a gift may be operative for the public benefit is to be answered by the court by forming an opinion on the evidence before it. In *Re Hummeltenberg* (2) there was a trust for the establishment of a college for the training of spiritualistic mediums. That was a matter on which evidence was obviously required because it was an unfamiliar subject.

There are many cases on this question of "charitable" or "non-charitable" purpose where the purpose is so obviously beneficial to the community that to call evidence on the matter would be absurd. When once it can be derived from the terms of this will that this trust is, in substance, a trust of an educational character—that is to say, in the words of EVE, J. (in *Re De Noailles* (1)), for completing an education which is incomplete—it seems to me that the matter speaks for itself. If I think, as I do think, that the main object of the testatrix, as expressed by her at such great length and in such great detail, is really to promote education and to improve, both for their own benefit and for the benefit of the community in which they live, the personal qualities and characteristics of Irish men and women and so train them to be better citizens in the various departments of secular life, it seems to me there is nothing in the statement of RUSSELL, J., in *Re Hummeltenberg* (2) which requires me to call for evidence that those purposes are beneficial to the community. I think that no such evidence could be sought from any quarter, and it is a matter on which the court, relying, I would stress, not on any personal view of the judge who decides the case, but on the general judicial knowledge of the conditions under which people live both in this country and in the Republic of Ireland, should come to a conclusion. I come to the conclusion that the trusts declared are not only educational, but are educational in the sense that they benefit the public.

Other cases were cited to me which I might mention. In *Re Corelli* (3) the testatrix placed the residue of her estate and effects in the hands of trustees to enclose certain land as a breathing space and air zone for the health of the town of Stratford-on-Avon. Then she made some further trusts for allowing her house to be used for the benefit of distinguished visitors from overseas. It was held that:

"although the directions for the establishment of an air zone and for the promotion of science, literature and music might have constituted a valid charitable bequest, the dominant motive of the testatrix was to be found in the trust for the establishment of a hotel for the entertainment of distinguished visitors from far countries, and that that trust was void for remoteness."

Here, as distinct from that case, I find that the dominant, and, indeed, the exclusive, intention of the testatrix was the betterment of those who required education by giving them facilities of education in the various directions and for the various purposes which she indicated in her will, and I think there is not in the will of this testatrix any such offensive or extraneous or non-charitable purpose as would vitiate the whole of the gift. I mention in passing, without further allusion to it, as it was cited to me, *Re Price* (4).

I gain some assistance from *Royal Choral Society v. Inland Revenue Comrs.* (5), because there LORD GREENE, M.R., said ([1943] 2 All E.R. 104):

"Dealing with the educational aspect from the point of view of the public who hear music, the Solicitor-General argued that nothing could be educational which did not involve teaching—as I understood him, teaching in the sense of a master teaching a class. He said that in the domain of art the only thing that could be educational in a charitable sense would be the education of the executants: the teaching of the painter, the training of the musician, and so forth. I protest against that narrow conception of education when one is dealing with aesthetic education. Very few people can become

executants, or at any rate executants who can give pleasure either to themselves or to others; but a very large number of people can become instructed listeners with a trained and cultivated taste. In my opinion, a body of persons established for the purpose of raising the artistic taste of the country and established by an appropriate document which confines them to that purpose, is established for educational purposes, because the education of artistic taste is one of the most important things in the development of a civilised human being."

That case has a direct reference to the first of the objects which are indicated by the testatrix—the bringing of the masterpieces of fine art within the reach of the Irish people, "masterpieces of fine art" being defined as "works of the highest class in the fields of orchestral and classical music painting sculpture," and so forth. Although I do not think anyone could question that that part of the gift was charitable in itself, regard being had to the case to which I have just alluded, I feel it is important in throwing some light and colour on the other part of the trust as showing the aesthetic education which is properly to be regarded as a branch of education, and that the whole scheme of the will, the improvement of the mind of those subjected to that influence, is educational in the best sense.

In addition to those cases, I was referred to certain observations of SIMONDS, J., in *Re Central Employment Bureau for Women & Students' Careers Assn. [Incorporated]* (6), where he said ([1942] 1 All E.R. 233):

"It is clear that, so far as it is educational, it is a good charity, because I cannot distinguish between a gift for the advancement of education in general terms and a gift for the purpose of educating individuals in such manner as will be most conducive to their earning their living, as, for instance, if this had been a gift for apprenticeships."

The kind of education which is envisaged by the testatrix in this case is that which is best conducive to the recipients earning their living and also to living a happy and contented life in the social society in which they are placed. I strongly dissent, as did the learned Master of the Rolls in *Royal Choral Society v. Inland Revenue Comrs.* (5) ([1943] 2 All E.R. 105), from the statement that the only education worth having is the education given by a master or mistress in class. I think "education" includes in the terms of that sub-clause to which I have already alluded, not only teaching, but also the promotion or encouragement of those arts and graces of life which are, perhaps, the finest and best part of the human character. With regard to the reference to the arts of personal contact and social intercourse, and the other arts of public, private, professional and business life, I read the words "the other arts" as being properly to be taken *ejusdem generis*, i.e., arts of the same sort and kind as the arts and graces of personal contact and of social intercourse—in other words, teaching people how to behave better. Whatever my own personal views about this type of education may be, they have nothing to do with the case. It may be, I think, that it is a rather superficial, top-heavy, or unbalanced kind of education, but it is education of a kind which is desirable, and an education which, if corrected, augmented, and amplified by other kinds of teaching and instruction, might have most beneficial results. I think that the testatrix—possibly by rather a narrow margin—has kept herself within the necessary limits. I think that, if she had said rather less, it would have been easier to discover her meaning, but I am prepared to declare that the trusts in question are valid charitable trusts.

Order accordingly.

Solicitors: *Lawrence, Graham & Co.* (for the plaintiffs and the third defendant); *Young, Jackson, Beard & King* (for the first defendant); *J. N. Mason & Co.* (for the second defendant); *Treasury Solicitor.*

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

BENN v. KAMM & CO., LTD.

[KING'S BENCH DIVISION (Parker, J.), December 6, 7, 1951.]

Factory—Dangerous machinery—Duty to fence—Compliance with regulation, but not with Factories Act, 1937 (c. 67), s. 14 (1)—Horizontal Milling Machines Regulations, 1928 (S.R. & O., 1928, No. 548), reg. 3.

A workman was injured while adjusting a stop on a horizontal milling machine. The part of the machine where the stop worked was found to be a "dangerous part" which was not "securely fenced" in accordance with the requirements of s. 14 (1) of the Factories Act, 1937, but the machine complied with the requirements as to fencing of the Horizontal Milling Machines Regulations, 1928, reg. 3, which were deemed to be made under s. 60 (1) of the Act.

HELD: the regulations were in substitution for the provisions relating to fencing in s. 14 (1) of the Act of 1937 and contained the sole obligation with regard to fencing of the employers, who were, therefore, not liable for any breach of statutory duty.

AS TO ABSOLUTE DUTY TO FENCE DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, p. 594, para. 1130, and 1951 Supplement; and FOR CASES, see DIGEST, Vol. 24, pp. 908-910, Nos. 65-76, and Digest Supps.

Cases referred to:

- (1) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.
- (2) *Nicholls v. Austin (Leyton), Ltd.*, [1944] 2 All E.R. 485; [1945] K.B. 50; *affd.* H.L., [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.
- (3) *Franklin v. Gramophone Co., Ltd.*, [1948] 1 All E.R. 353; [1948] 1 K.B. 542; [1948] L.J.R. 870; 2nd Digest Supp.

ACTION for damages for negligence and breach of statutory duty.

The plaintiff was an employee of the defendants, working at their factory at Powell Street, London, E.C.1. While he was adjusting a stop on the side of a horizontal milling machine in the factory his left index finger was caught in the machine and injured. He submitted *inter alia* that the defendants were in breach of their duty under s. 14 (1) of the Factories Act, 1937, to provide proper fencing of a dangerous part of the machine. The defendants contended that their sole statutory obligation to fence was not under s. 14 (1) of the Act of 1937, but was under reg. 3 of the Horizontal Milling Machines Regulations, 1928, relating to fencing such machines, with which they had complied, such regulations being deemed to be made under s. 60 (1) of the Act of 1937, and being, they submitted, in substitution for the provision relating to fencing in s. 14 (1).

F. Donald McIntyre for the plaintiff.

Marven Everett for the defendants.

PARKER, J., stated the facts, found that the place where the stop came in front of the base of the pedestal of the machine was a dangerous part of the machine which was not fenced and that a form of guard to protect the operator against accident from it was practicable, and continued: But it is said on behalf of the defendants that s. 14 (1) of the Factories Act, 1937, does not apply because of the provisions of the Horizontal Milling Machines Regulations, 1928, made by the Secretary of State under s. 79 of the Factory and Workshop Act, 1901, and now deemed to have been made under s. 60 (1) of the Act of 1937. This machine is a horizontal milling machine to which those regulations apply. With regard to fencing reg. 3 provides:

"(i) The cutter or cutters of every horizontal milling machine shall be fenced by a strong guard, properly adjusted to the work, which shall

enclose the whole cutting surface except such part as is necessarily exposed for the milling operations."

The regulation then specifies what the guard shall consist of. The regulations provide that nothing in reg. 3 shall apply to eight "exemptions,"

"Provided that these exemptions shall not prejudice the application of s. 10 of the Factory and Workshop Act, 1901, in regard to fencing of such machinery."

For that section of the Act of 1901 one now reads s. 14 of the Act of 1937. Though not very happily worded it seems to me that that proviso is saying in effect that, as regards those exemptions, the ordinary liabilities and obligations under s. 14 (1) of the Act remain in force. The argument, however, is that, there being now a special code dealing with, *inter alia*, the fencing of horizontal milling machines, the employer has no obligations except under that code, and none under s. 14 (1) except in regard to the exemptions. I certainly would not accept this point unless I was driven to it. To take an extreme case, a machine may have ten dangerous parts and the regulations may deal with only one of them. If, then, a workman is injured through one of the others, it seems at first glance an extraordinary proposition that, because the regulations have said that dangerous part A shall be guarded in a particular way, there is no obligation to guard dangerous parts B, C, D and E. But one has to look at the principle to be applied. Is the true view in such cases that the regulations are in substitution for the obligations under the Act in respect of the particular subject-matter involved, *e.g.*, fencing, or do they only modify the obligations under the Act, leaving them in force in so far as they are not modified?

The matter is, in my mind, almost concluded by authority, by *Miller v. William Boothman & Sons, Ltd.* (1), *Nicholls v. Austin (Leyton), Ltd.* (2) and *Franklin v. Gramophone Co., Ltd.* (3). Those cases were dealing with other regulations, but from the judgments it seems to me the principle is clear. There are passages in *Nicholls v. Austin (Leyton), Ltd.* (2), which seem to me to be almost conclusive on this matter. STABLE, J., had held in effect that the particular code there was not a substitution for the obligations under the Act but a mere modification. MACKINNON, L.J., says ([1944] 2 All E.R. 488):

"It seems to me clear, so far as the statement of claim in this case alleges breaches of the statutory duty imposed by the Act of 1937, it being admitted that the defendants fully complied with the requirements of the regulations of 1922, any attempt to say that there was any surviving or additional duty upon them by s. 14 is erroneous and is not justified having regard to that decision of this court."

That was a reference to *Miller v. William Boothman & Sons, Ltd.* (1). LAWRENCE, L.J., says (*ibid.*, 489):

"I am of the same opinion. On the question of common law negligence, it seems to me that in addition to the fact that there was no evidence of any previous accident and no evidence of any previous complaint and no finding by the judge that there was common law negligence, one must also have regard to the fact that the Secretary of State has made, in the regulations to which my Lord has alluded, most specific provisions as to the protection which could be given to this saw and has made no regulations under the last paragraph of s. 14 requiring the fencing of materials or articles which are dangerous while in motion in the machine. In those circumstances, I cannot think that any reasonable user of such a machine as this could have thought that he was under any further obligation to fence the machine."

In the last case of *Franklin v. Gramophone Co., Ltd.* (3), the injured man was injured as a result of a matter which fell within the exemptions. It was a case, not

of fencing, but under s. 47 (1) of the Factories Act, 1937. There was an exemption provision saying that the regulations should not apply in certain cases, but no words were added, as in this case, that in respect of the exemptions the statutory duty under the Act was in full force. The Court of Appeal held that even as regards an injury caused by one of the matters in the exemptions there was no claim under s. 47 (1). That, it seems to me, could only be on the basis that the regulations were a self-contained code which was in complete substitution for the corresponding obligations under the Act.

In these circumstances I reluctantly feel bound to hold that the defendants' obligation in this case in regard to fencing is the obligation laid down in reg. 3 of the Horizontal Milling Machine Regulations, 1928, and that they were under no other obligation in relation to fencing. No complaint is made that they have failed to comply with reg. 3, and, accordingly, any claim in respect of failure to fence must fail.

Judgment for the defendants.

Solicitors: *Bryan O'Connor & Co.* (for the plaintiff); *Stanley & Co.* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

NOTE.

R. v. BURROWS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Barry, JJ.), December 11, 1951.]

Criminal Law—Gross indecency—Boy told to commit indecent act—Criminal Law Amendment Act, 1885 (c. 69), s. 11.

APPEAL against conviction and sentence.

The appellant was convicted at Ipswich Quarter Sessions of indecent assault on a boy of fourteen and was sentenced to six months' imprisonment. Evidence was given that the appellant exposed himself to the boy and told the boy to handle his, the appellant's, person.

Cases referred to:

(1) *Fairclough v. Whipp*, [1951] 2 All E.R. 834; 115 J.P. 612.

(2) *R. v. Pearce*, [1951] 1 All E.R. 493; 115 J.P. 157.

W. H. Hughes for the appellant.

Jellinek for the Crown.

THE COURT held that, in the absence of a hostile act against the boy, the appellant should not have been convicted of indecent assault: *Fairclough v. Whipp* (1) followed, but that, in the circumstances, the proper charge was one of committing an act of gross indecency.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Gotelee & Goldsmith*, Ipswich (for the Crown).

J.D.P.

STROMDALE AND BALL, LTD. v. BURDEN.

CHANCERY DIVISION (Danckwerts, J.), November 5, 6, 26, 29, 1951.]

Sale of Land—Option to purchase leasehold reversion expectant on term of years granted by tenancy agreement—“Agreement respecting land”—“Interest in land”—Option contained in deed of licence to assign term and exercisable only by assignee—Assignee not party to deed—Law of Property Act, 1925 (c. 20), s. 56 (1).

Deed—Execution—Sealing.

Specific Performance—Option to purchase land.

The defendant was the tenant of a house the ground floor of which she had let to D. and R. by a tenancy agreement, dated Oct. 25, 1946, for a term of three years. By a deed, dated Mar. 16, 1948, made between the defendant, of the first part, D. and R., of the second part, and the directors of the plaintiff company, as sureties, of the third part, the defendant granted to D. and R. licence to assign all their estate and interest under the tenancy agreement to the plaintiff company. By cl. 4 of the deed the defendant granted an option to the plaintiff company to purchase her leasehold interest in the whole house at the price of £1,250, on giving fourteen days' notice to the defendant at any time during the term granted by the agreement. On Aug. 19, 1948, the plaintiff company gave notice in writing to the defendant of its intention to exercise the option, but the defendant refused to proceed in the matter. In an action by the company for specific performance,

HELD: (i) an option to purchase land was an “agreement . . . respecting land” within the meaning of s. 56 (1) of the Law of Property Act, 1925; as the object of cl. 4 of the deed of Mar. 16, 1948, was to enable the plaintiff company to purchase the defendant's leasehold interest in the house in question, the option contained in the clause gave to the company an “interest in land,” within the meaning of s. 56 (1); and, therefore, the sub-section enabled the company to enforce the option notwithstanding the fact that the company was not a party to the deed.

Dictum of SIMONDS, J., in White v. Bijou Mansions, Ltd. ([1937] 3 All E.R. 277) and of SIR WILFRID GREENE, M.R., ibid. ([1938] 1 All E.R. 554), applied.

(ii) the option contained in cl. 4 was an offer made to the plaintiff company and was intended to be communicated to the company, and, as the company had accepted the offer by the notice of Aug. 19, 1948, there was a complete contract which the company was entitled to enforce by action.

Per DANCKWERTS, J.: Time was when the placing of the party's seal was the essence of due execution. Signature was not, indeed, necessary to make a deed valid: see NORTON ON DEEDS, 2nd ed., p. 7. But with the spread of education, the signature became of importance for the authentication of documents and since 1925 it has become essential by reason of the provisions of the Law of Property Act, 1925, s. 73 (1). Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to me that at the present day if a party signs a document bearing wax or wafer or other indication of a seal, with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed.

AS TO PROCEEDINGS FOR SPECIFIC PERFORMANCE BY STRANGER TO CONTRACT, see HALSBURY, Hailsham Edn., Vol. 31, pp. 417-419, paras. 497, 499; and FOR CASES, see DIGEST, Vol. 42, pp. 543-547, Nos. 1035-1073.

Cases referred to:

- (1) *Howatson v. Webb*, [1907] 1 Ch. 537; *affd.* C.A., [1908] 1 Ch. 1; 77 L.J.Ch. 32; 97 L.T. 730; 35 Digest 632, 3646.

- (2) *Tamplin v. James*, (1880), 15 Ch.D. 215; 43 L.T. 520; 35 Digest 101, 84.
- (3) *Re Sandilands*, (1871), L.R. 6 C.P. 411; *sub nom. Re Mayer*, 40 L.J.C.P. 201; 24 L.T. 273; 17 Digest 202, 132.
- (4) *Re Smith*, (1892), 67 L.T. 64; 17 Digest 203, 135.
- (5) *Re Miller's Agreement*, [1947] 2 All E.R. 78; [1947] Ch. 615; [1948] L.J.R. 567; 177 L.T. 129; 2nd Digest Supp.
- (6) *Chelsea & Waltham Green Building Society v. Armstrong*, [1951] 2 All E.R. 250; [1951] Ch. 853.
- (7) *Forster v. Elvet Colliery Co., Ltd.*, *Quinn v. Same*, *Seed v. Same*, *Morgan v. Same*, [1908] 1 K.B. 629; *affd. H.L. sub nom. Dyson v. Forster*, *Dyson v. Seed*, *Quinn*, *Morgan*, *etc.*, [1909] A.C. 98; 78 L.J.K.B. 246; 99 L.T. 942; 34 Digest 686, 799.
- (8) *Grant v. Edmondson*, [1931] 1 Ch. 1; 100 L.J.Ch. 1; 143 L.T. 749; Digest Supp.
- (9) *Woodall v. Clifton*, [1905] 2 Ch. 257; 74 L.J.Ch. 555; 93 L.T. 257; 30 Digest, Replacement, 495, 1395.
- (10) *Sherwood v. Tucker*, [1924] 2 Ch. 440; 94 L.J.Ch. 66; 132 L.T. 86; 30 Digest, Replacement, 495, 1399.
- (11) *Re Adams & Kensington Vestry*, (1884), 27 Ch.D. 394; 54 L.J.Ch. 87; 51 L.T. 382; 20 Digest 357, 961.
- (12) *Friary, Holroyd & Healey's Breweries, Ltd. v. Singleton*, [1899] 1 Ch. 86; *reversed on the facts*, [1899] 2 Ch. 261; 68 L.J.Ch. 622; 81 L.T. 101; 21 Digest 395, 1571.
- (13) *London & South Western Ry. Co. v. Gomm*, (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 11 Digest 286, 2141.
- (14) *White v. Bijou Mansions, Ltd.*, [1937] 3 All E.R. 269; *affd. C.A.*, [1938] 1 All E.R. 546; [1938] Ch. 351; 107 L.J.Ch. 212; 158 L.T. 338; Digest Supp.
- (15) *Re Foster*, [1938] 3 All E.R. 357; 159 L.T. 279; Digest Supp.
- (16) *Reynolds v. Atherton*, (1922), 127 L.T. 189; 12 Digest, Replacement, 69, 389.

ACTION for specific performance of an agreement for the sale of leasehold premises contained in an option to purchase leasehold premises in a deed of licence, dated Mar. 16, 1948, and a notice, dated Aug. 19, 1948.

In 1946 the defendant was the tenant of premises known as No. 40, Romford Road, Stratford, under an underlease, dated Mar. 25, 1895, for a term of ninety-nine years (less one day) from Sept. 29, 1892, at a rent of £12 per annum. The underlease contained full repairing covenants. There was no restriction on assignment, but the lessee was required to register any assignment, underlease, or other assurance, with the landlords, and to pay a registration fee of £1 1s. In 1946 the defendant, who had been carrying on a café business on the ground floor of the premises, sold the goodwill of the business to William Dennison and William John Rosengrave, and on Oct. 25, 1946, by an agreement in writing, she granted them a tenancy of the ground floor for the term of three years from Oct. 25, 1946, at a weekly rent of £2 inclusive of rates. The tenancy agreement conferred on the tenants an option, exercisable by notice in writing at any time before the expiration of the term thereby granted, to take a full repairing lease of the same premises for a further term of seven years. Clause 5 purported to give to the tenant, William Dennison, the right to have the first chance of purchasing the fee simple of the demised premises (*i.e.*, the ground floor) for the sum of £1,250, if he gave written notice to the defendant during the term granted by the agreement or during the term created by the lease. On Feb. 4, 1948, the tenants' solicitors wrote to the defendant's solicitors saying that they proposed to sell the business to the plaintiff company and asking for a licence to assign to the company the term granted by the agreement of Oct. 25, 1946. The defendant's solicitors replied that the directors of the company would be required

to guarantee the rent, and a deed of licence was agreed and engrossed and was executed (according to the statements appearing on it) on Mar. 16, 1948. This document was made between the defendant (the landlord), of the first part, Dennison and Rosengrave (the tenants), of the second part, and Charles William Stromdale and Stanley Ball, directors of the plaintiff company ("the sureties"), of the third part. The document recited the agreement of Oct. 25, 1946, and that the tenants desired to assign all their estate and interest in the demised premises to the plaintiff company, and it then contained (i) a licence to assign by the defendant, (ii) a joint and several covenant by the directors guaranteeing payment of the rent so long as the term granted by the agreement should be vested in the company, and (iii) a restriction limiting the licence to the single occasion in question. By cl. 4 the following provision was substituted for cl. 5 of the tenancy agreement:

"If during the continuance of the agreement the company shall be desirous of purchasing the unexpired residue of the term of years in the premises granted by the lease dated Mar. 25, 1895 . . . (hereinafter called 'the lease') subject to the payment of the rent thereby reserved and the lessee's covenants therein contained at the price of £1,250 and shall at any time during the term granted by the agreement give to the landlord fourteen days' notice in writing of such desire the landlord hereby covenants that she will at the expiration of such notice and upon the payment of the said sum of £1,250 together with all rent reserved by the agreement up to the actual date of completion assign all her interest in the residue of the term granted by the lease unto the company."

On Mar. 19, 1948, the defendant granted to her nephew a lease of the two upper floors of the premises for a term of twenty-one years at an annual rent of £125 and took a lease from him of the first floor for a term of fourteen years at an annual rent of £52. By a document, dated June 9, 1948, in consideration of £2,250 paid by the company, the tenants, Dennison and Rosengrave, assigned to the company (i) all the property comprised in the agreement of Oct. 25, 1946, and (ii) all the goodwill of the café business. The document contained no express reference to the option or to the benefit of the covenants on the landlord's part, the habendum being:

"unto the company for all the residue of the term created by the said agreement subject to the rents thereby secured and the tenants' covenants and conditions therein contained and as to all other premises hereby assigned unto the company absolutely."

On June 25, 1948, the deed of Mar. 16, 1948, was registered under the Land Charges Act, 1925, as an "estate contract." On Aug. 19, 1948, the plaintiff company's solicitors gave notice in writing of the company's intention to exercise the option conferred by the deed of licence of Mar. 16, 1948, to acquire the defendant's leasehold interest in the house. The defendant refused to proceed in the matter, and on Dec. 16, 1949, the company began an action for specific performance. The defendant contended *inter alia* (a) that she did not know that the deed of licence contained an option to the company to purchase her leasehold property, (b) that the document of Mar. 16, 1948, was not effectively executed as a deed, as she never sealed it, (c) that the plaintiff company was not in a position to exercise the option as it was not a party to the document of Mar. 16, 1948, and (d) that an order for specific performance should be refused on the ground of hardship, and she counterclaimed for possession of the ground floor as the term of three years under the agreement of Oct. 25, 1946, had expired.

J. A. Brightman for the plaintiff company.

A. L. Bray for the defendant.

Cur. adv. vult.

Nov. 29. **DANCKWERTS, J.**, read a judgment in which he stated the facts and continued: The main defence involving questions of fact is an allegation that, if the defendant executed the deed of licence, she did so believing that she was only signing a licence to assign and that she never knew that the document contained an option to the company to purchase her leasehold property. This mistake is attributed, in the alternative, to all the parties to the deed of licence and to the defendant alone. Evidence of any mutual mistake by the parties is entirely absent. The defence really is, therefore, based on a mistake by the defendant. There is no doubt that the defendant knew that the document was one which dealt with her property, and, therefore, it would appear that, even if there was contained in it a provision of which she was unaware or which she did not understand, the facts are insufficient to support a defence of *non est factum*, and it is not a mistake for which the plaintiff company can be made to accept responsibility: see *Howatson v. Webb* (1) and *Tamplin v. James* (2) per BAGGALLAY, L.J. (15 Ch.D. 217). However, it is not necessary to decide this question on any legal rule or principle if I am not satisfied that there was any lack of knowledge of the insertion of the option on the defendant's part. [His LORDSHIP reviewed the evidence on this point and came to the conclusion of fact that when the defendant signed the deed of licence she knew and appreciated that the deed contained a clause containing an option to purchase her leasehold interest in No. 40, Romford Road. He continued:]

Another point is taken which also depends on the defendant's evidence. It is said that, as she merely signed the document called "deed of licence" and never did any act amounting to sealing, it was not effectively executed as a deed. I was referred by counsel for the defendant to NORTON ON DEEDS, 2nd ed., pp. 7, 8, where the formalities required for the execution of deeds are discussed, and it is said there (at p. 8), quoting MONTAGUE SMITH, J. (L.R. 6 C.P. 413) in *Re Sandilands* (3), that "... some act must be done 'with the intention of sealing'." Reliance was also placed on *Re Smith* (4), in which the document intended to be a bond bore the words "sealed with my seal" and was stated in the attestation clause to have been "signed, sealed, and delivered," but there was no mark, wafer, or seal visible on the face of the document. It was held in that case that the document could not be treated as having been sealed. In the present case the defendant's evidence is very vague as to whether the wafer seal was on the document when she signed it, and I think it is unlikely that the wafer seal had not been placed on it before she was asked by the solicitors' clerk to sign. If it was there when she signed, it seems to me that the document was effectively executed as a deed. Time was when the placing of the party's seal was the essence of due execution. Signature was not, indeed, necessary to make a deed valid: see NORTON ON DEEDS, 2nd ed., p. 7. But with the spread of education the signature became of importance for the authentication of documents and since 1925 it has become essential by reason of the provisions of the Law of Property Act, 1925, s. 73 (1). Meticulous persons executing a deed may still place their finger on the wax seal or wafer on the document, but it appears to me that at the present day if a party signs a document bearing wax or wafer or other indication of a seal with the intention of executing the document as a deed, that is sufficient adoption or recognition of the seal to amount to due execution as a deed. Further, in the present case there is no doubt that, when the document was sent by the defendant's solicitors to the solicitors of the plaintiff company, it bore the description: "deed of licence," and also stated: "This deed witnesseth . . ." It stated that the parties to it had thereunto "set their hands and seals," it bore a red wafer seal opposite the defendant's signature, and it was attested by her solicitors' clerk, who stated that it was signed, sealed and delivered by the defendant. I am unable to see how the defendant can now be allowed to say that she did not seal the document and execute it as a deed. It seems to me the clearest case of estoppel possible.

The next point which is taken for the defence involves some legal questions of difficulty or, at any rate, obscurity. It is pointed out that the plaintiff company were not a party to the deed of licence, though the option of purchase thereby conferred was to be exercised by the plaintiff company and by no one else. It is argued, therefore, that the deed of licence and the option are *res inter alios acta* and the plaintiff company is not in a position to enforce the option in an action: see *Re Miller's Agreement* (5). In *Chelsea & Walham Green Building Society v. Armstrong* (6) the building society were held by VAISEY, J., to be entitled to enforce a covenant contained in a registered transfer to which the society was not a party, because the registered transfer, though a deed, was not a deed *inter partes*. In the present case, it is clear that the deed of licence is a deed *inter partes*.

Section 56 (1) of the Law of Property Act, 1925, was referred to in *Armstrong's* case (6), but was not dealt with by VAISEY, J. Section 56 replaces s. 5 of the Real Property Act, 1845, and s. 56 (1) provides:

"A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."

The true effect of this sub-section, and of s. 5 of the Real Property Act, 1845, which it replaces, has not yet been fully elucidated, and counsel for the defendant argued that it would not assist the plaintiff company in the present case for the following reasons. He says, first, that the authorities show that this section applies only to covenants "which run with the land," and he referred to *Forster v. Elvet Colliery Co., Ltd.* (7). In that case, the owners of surface lands were held entitled, by virtue of the Real Property Act, 1845, s. 5, to enforce a covenant to pay compensation for damage caused by working coal mines, though they were not parties to the lease containing the covenant. The Court of Appeal thought that s. 5 of the Act of 1845 applied only to covenants that ran with the land. But on appeal, *sub nom. Dyson v. Forster* (7), though the decision of the Court of Appeal was affirmed by the House of Lords, LORD MACNAGHTEN, who was the only one of the Lords who stated reasons, said ([1909] A.C. 102):

"Whether the section must be confined to covenants running with the land may perhaps be doubted."

In *Grant v. Edmondson* (8) it was held by the Court of Appeal that the benefit of a covenant to pay a rentcharge did not run with the rentcharge at law, and the Court of Appeal expressed the view that s. 5 of the Real Property Act, 1845, and s. 56 of the Law of Property Act, 1925, did not affect the question, as those sections applied only to covenants which ran with the land or the property. Counsel for the defendant then relied on *Woodall v. Clifton* (9) and *Sherwood v. Tucker* (10), which establish that a covenant or proviso conferring on a lessee the right to purchase the freehold reversion is not a provision which directly affects or concerns the land, regarded as the subject-matter of the lease, and, consequently, such a covenant does not run with the leasehold interest in the land so as to bind heirs or assigns under the provisions of the statute 32 Hen. 8, c. 34. Accordingly, counsel for the defendant argues that the provision conferring the option in the present case is not one which runs with the land and the provisions of s. 56 (1) of the Law of Property Act, 1925, do not assist the plaintiff company.

Re Adams & Kensington Vestry (11) and *Friary, Holroyd & Healey's Breweries, Ltd. v. Singleton* (12), on which counsel for the plaintiff company relied to dispose of this argument, do not really assist him, because it appears that the question of covenants running with the land, as discussed in *Woodall v. Clifton* (9), was not considered in these cases, which, in any event, were before the decision of the Court of Appeal in *Woodall v. Clifton* (9). Counsel for the plaintiff company

was, however, correct in pointing out that in *Woodall v. Clifton* (9) the action was an attempt to enforce the option to purchase the freehold reversion against assigns of the reversion, whereas in the present case the defendant is the actual person who gave the option. Counsel for the plaintiff company admitted that there is no assignment expressly to the company of the benefit of the option in the assignment of June 9, 1948, but he said that the benefit of the option would pass automatically with the assignment of the term. In support of this he pointed out that the option was provided in substitution for the provisions of cl. 5 of the original tenancy agreement. I am not satisfied, however, that these considerations are sufficient to get over the difficulties of the plaintiff company. But counsel for the plaintiff company relies on s. 56 (1) of the Law of Property Act, 1925, in a way which is somewhat different from that in which the sub-section has been considered by me so far. He referred me to *London & South Western Ry. Co. v. Gomm* (13) as an authority showing that an option to purchase in equity creates an interest in land. SIR GEORGE JESSEL, M.R., said (20 Ch.D. 581):

"The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for re-purchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

It should be added that in the present case there is no difficulty under the rule against perpetuities, as there was in *Gomm's* case (13). Counsel for the plaintiff company argues from the decision in *Gomm's* case (13) that s. 56 (1) of the Law of Property Act, 1925, enables the plaintiff company to take such an interest in land as is created by an option to purchase, though it is not a party to the document conferring the option. In support of this argument, he referred me to certain decisions in which the provisions of the sub-section were considered.

In *White v. Bijou Mansions, Ltd.* (14), which was concerned with covenants restricting the use of land, SIMONDS, J., referring to s. 5 of the Real Property Act, 1845, after saying that the section had a limited operation, said ([1937] 3 All E.R. 276):

"It is intended to confer a benefit only upon those persons . . . with whom there purports to be a covenant or agreement."

He went on to say that s. 5 did not create a benefit in favour of any persons who might like to avail themselves of it. In regard to s. 56 (1) of the Law of Property Act, 1925, SIMONDS, J., said (*ibid.*, 277):

"It appears to one at once that, so far as any other interest in land is concerned [*i.e.*, any interest other than an immediate interest], the section is superfluous, because a person always could take another interest in land, though not a party. It is at least a question how far such a provision is necessary at all in the case of personalty. Without deciding it, I should be disposed to think that equitable estates, even in land, were not subject to the old artificial rule, and it is very doubtful if an interest in personalty was ever so subject. However that may be, for the purposes of the present case I think I am concerned with only one aspect of this question. Just as, under s. 5 of the Act of 1845, only that person could call it in aid who, although not a party, yet was a grantee or covenantee, so, under s. 56 of this Act, only that person can call it in aid who, although not named as a party to the conveyance or other instrument, is yet a person to whom that conveyance or other instrument purports to grant something, or by which some agreement or covenant is purported to be in his favour."

In the same case in the Court of Appeal SIR WILFRID GREENE, M.R., said ([1938] 1 All E.R. 554):

“ . . . whatever else s. 56 (1) may mean, it is, I think, confined to cases where the person seeking to take advantage of it is a person within the benefit of the covenant in question, if I may use that phrase.”

It seems to me that those statements of the limited effect of s. 56 (1) of the Law of Property Act, 1925, do, none the less, exactly cover the situation of the plaintiff company in the present case. I have not overlooked *Re Foster* (15), in which CROSSMAN, J. ([1938] 3 All E.R. 365) expressly declined to treat s. 56 (1) as creating “such an enormous change” in the law as to enable an agreement by A with B to pay money to C to be enforced by C. But it seems to me that in the present case the intention of cl. 4 of the deed of licence is to enable the person therein named, the plaintiff company, and no one else, to obtain the leasehold interest of the defendant in No. 40, Romford Road. In the language of SIMONDS, J., in *White v. Bijou Mansions, Ltd.* (14) ([1937] 3 All E.R. 277), the plaintiff company is a person to whom the

“ . . . instrument purports to grant something, or by which some agreement or covenant is purported to be in his favour.”

Section 56 (1) says:

“ A person may take an immediate or other interest in land . . . or the benefit of any . . . covenant or agreement over or respecting land . . . although he may not be named as a party to the . . . instrument.”

It is difficult to see what the intention of cl. 4 of the deed of licence was if it was not to confer on the plaintiff company an interest in No. 40, Romford Road, and to give to the plaintiff company the benefit of the covenant or agreement conferring an option to acquire the defendant's leasehold interest. The question decided in *Woodall v. Clifton* (9), namely, whether an option to acquire the reversion in fee simple on a leasehold term ran with the leasehold term in the hands of an assignee of the term so as to make the liability to perform the covenant run with the reversion, seems to me to be a different matter. In the present case, for the purposes of s. 56 (1), the “land” is No. 40, Romford Road and an option to purchase a leasehold interest in that land seems to me to create an interest in it and to be an agreement respecting it, and so to be within the precise words of the sub-section. I do not understand why the words “agreement . . . respecting land” should not be given their plain meaning. An option to purchase land is an agreement respecting land. Accordingly, I reach the conclusion that the provisions of s. 56 (1) of the Law of Property Act, 1925, enable the plaintiff company to enforce the option in the present case.

Counsel for the plaintiff company, however, also rested his case on another argument which seems to me to be attractive. He said, and, as it seems to me, correctly, that an option is no more than an offer, which, if given for consideration or contained in a deed, may be irrevocable, but in any case remains open for acceptance until it is revoked. It is plain that the defendant never had taken any steps to revoke the offer contained in the option in the present case before it was accepted by the plaintiff company on Aug. 19, 1948 (even assuming, of course, that any such revocation was open to her). An offer must, of course, be accepted by the person to whom the offer is made and not by any other person: see *Reynolds v. Atherton* (16), a decision of the House of Lords. It is quite clear that the offer in the present case was made to the plaintiff company and was intended to be communicated to the plaintiff company, and it was accepted by the plaintiff company. There is, therefore, a complete contract which the plaintiff company is entitled to enforce by action.

Counsel for the defendant argued that an order for specific performance should be refused on the ground of the hardship which would be caused to the defendant by compelling her to perform a contract which he claimed was financially

disadvantageous to her. He submitted that the plaintiff company had obtained an unexpectedly favourable bargain because, under the substituted option, they were able to compel the defendant to sell for £1,250 her leasehold interest in the whole of No. 40, Romford Road, whereas under the original tenancy agreement Dennison, under the right of first refusal, would acquire the fee simple in the ground floor only at the same price of £1,250. The value of property is what it will fetch, and many considerations may affect the price named. In comparing a purchase of the fee simple in the ground floor with a leasehold interest in the whole property, it seemed to me that too little attention had been paid to the condition of the property and the onerous repairing covenants contained in the underlease under which the defendant was the tenant. Moreover, the paragraphs in *FRY ON SPECIFIC PERFORMANCE*, 6th ed., ch. VII, on which counsel for the defendant relied, do not bear out the interpretation which he sought to put on them. In particular, in para. 446 the impossibility of making the adequacy of the consideration (in the absence of fraud) the test of enforceability of a contract is pointed out. In the view which I take, the defendant entered into a business arrangement giving to the plaintiff company an option to acquire her leasehold interest in No. 40, Romford Road, with a knowledge of what she was doing, and I see no reason why she should not be compelled to carry out her obligations. There will, therefore, be an order for specific performance.

Judgment for the plaintiff.

Solicitors: *Gustavus Thompson & Sons*, agents for *Herrington & Carmichael*, Aldershot (for the plaintiff company); *Scott, Bell & Co.* (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

R. v. HALL.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Barry, JJ.), December 10, 1951.]

Criminal Law—Separate trials—Eight counts alleging gross indecency with three men—Evidence on all counts admissible on each count.

The appellant was convicted on an indictment containing eight counts charging him with committing acts of gross indecency with three men. An application for the separate trial of each group of counts relating to one of the men was refused on the ground that all the witnesses to be called on all the counts could have been called on any one count. In his defence the appellant stated, in respect of two of the men, that when he did the acts complained of he was giving them medical treatment, and, in the case of the third man, that there had been a mistake in identity.

HELD: (i) as soon as it became clear that the defence of the appellant was that the acts alleged against him had an innocent and not a guilty complexion, or that he relied on mistake or accident as a defence, the prosecution could call evidence of similar acts, and such evidence was not inadmissible because it tended to show that the appellant had committed other offences, and, therefore, the evidence of each of the first two men was admissible on the counts relating to the other of those two men.

Dictum of LORD GODDARD, C.J., in R. v. Sims ([1946] 1 All E.R. 701), not followed.

(ii) in the case of the third man the evidence was admissible on the issue of identity.

Thompson v. R. ([1918] A.C. 221), applied.

(iii) therefore, the evidence of each of the men was admissible on the trial of the counts relating to the others, and the application for separate trials was rightly refused.

AS TO JOINDER OF SEVERAL OFFENCES ON ONE INDICTMENT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 137, 138, paras. 179, 180; and FOR CASES, see DIGEST, Vol. 14, pp. 226-231, Nos. 2111-2174 and Digest Supps.

Cases referred to:

- (1) *R. v. Sims*, [1946] 1 All E.R. 697; [1946] K.B. 531; [1947] L.J.R. 160; 175 L.T. 72; 2nd Digest Supp.
- (2) *Noor Mohamed v. R.*, [1949] 1 All E.R. 365; [1949] A.C. 182; 2nd Digest Supp.
- (3) *Thompson v. R.*, [1918] A.C. 221; 87 L.J.K.B. 478; 118 L.T. 418; 82 J.P. 145; 14 Digest 360, 3810.
- (4) *R. v. Cole*, (1941), 165 L.T. 125; 105 J.P. 279; 2nd Digest Supp.

APPEAL against a conviction of gross indecency before LYNSEY, J., at the Central Criminal Court.

E. V. Falk for the appellant.

R. E. Seaton for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before LYNSEY, J., at the Central Criminal Court on an indictment containing eight counts. The charge in each count was gross indecency, three different young men being involved. Charges relating to one young man were contained in counts 1, 2, and 4; charges relating to the second young man were contained in counts 3, 5, 7, and 8; while the charge relating to the third man, one Ritchie, was in count 6. At the outset of the case an application was made to the judge asking him to order separate trials of the groups of counts relating to each young man.

That the indictment was good in form and complied with s. 3 (1) of the Indictments Act, 1915, there can be no doubt. Rule 3, which is contained in sched. I to the Act, provides:

“Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.”

There is no doubt in the present case that the facts on which the charges were founded were of a startlingly similar character.

That being so, it became a matter of discretion in the judge whether he would allow the charges to be tried together or whether he would order separate trials. That is a judicial discretion with the exercise of which this court has said on more than one occasion it will not interfere unless it is compelled by some overwhelming fact. If the judge, or recorder, or chairman of quarter sessions, has given a reason which is obviously a bad reason, the court may review its decision, although it is not certain that it would if it were of opinion that in all the circumstances the charges might well have been tried together though the reason given by the judge was wrong. In the present case LYNSEY, J., gave as his reason that he was of opinion that all the witnesses who were to be called on all the counts could have been called on any one of the counts. That was because the judge had seen from the conduct of the case when it was before the examining magistrate what was the nature of the defence.

The appellant, who was masquerading as a medical man, was attached to some sort of society or institution which, it was suggested, was concerned, *inter alia*, with the occult. Young men used to go to this institution. In the case of one young man, the moment he got there the appellant began to talk to him about homosexual matters and to behave with him in a disgusting way. Another young man alleged that as soon as he visited this society the appellant began to talk to him about homosexuality and to behave indecently. Later he invited him to his home where indecent acts took place. In the third case the appellant met a young man at Bournemouth and did exactly the same thing

to him as he had done with the other two young men. When the appellant was charged he said that he had never seen this young man before.

It is said that the provisions in the Indictments Act, 1915, and the rules thereunder by which charges can be included in one indictment and tried together are always subject to the principle that, if the evidence on one count is not admissible on the other counts and is of a highly prejudicial character, the judge ought to refuse to try all the counts together and should try them one by one. Counsel for the appellant desired to challenge the ruling in *R. v. Sims* (1) in which this court, consisting of five judges, decided that certain counts could all be tried together. That case also was concerned with homosexual offences. In that case there were several young farm labourers with whom the prisoner, an elderly man, was alleged to have committed the offence of buggery. The court, in effect, said that it was right of the judge to try all the four cases together, because all the men, who admittedly had gone to the prisoner's house to spend the evening on different occasions, said that exactly the same advances had been made to them by the prisoner and exactly the same acts had been committed on them, which tended to show that the association of the prisoner with these men was a guilty and not an innocent one. His defence was that he used to invite these men to have a game of cards and sit with him in his cottage. The answer the prosecution made was: "Although you say A.B. came to you innocently, whereas he says you committed these filthy offences on him, exactly the same thing happened in the case of C.D., who you say came innocently, and also in the case of E.F." On those grounds the court held that the evidence was admissible. In the course of the judgment two lines of approach were suggested, and I think it should be taken, in view of a criticism by the Privy Council in *Noor Mohamed v. R.* (2)—criticism, be it noted, not of the decision, but of a passage in the judgment—that that judgment went too far. Giving the judgment of the court, I said ([1946] 1 All E.R. 700):

"It has often been said that the admissibility of evidence of this kind depends on the nature of the defence raised by the accused: see, for instance, the observations of LORD SUMNER in *Thompson v. R.* (3) ([1918] A.C. 232), and of this court in *R. v. Cole* (4). We think that that view is the result of a different approach to the subject. If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view."

Their Lordships in the Judicial Committee doubted the correctness of the second proposition contained in that passage, but they thought that the first proposition was correct. Therefore, this matter may be viewed on the footing: "If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused." One objection taken in the present case is that that would be tantamount to saying that in every case where the prisoner pleads Not Guilty the evidence must be open. I do not think that is right, and LORD SUMNER in *Thompson v. R.* (3) said it was not. In criminal cases, with certain immaterial exceptions, the prisoner does not plead in writing. He pleads orally, and a plea of Not Guilty is a plea to the general issue. As soon as the general issue is pleaded all defences are open. It would not, therefore, be right at once in all cases to assume that a prisoner is going to set up a certain defence, but he may have shown perfectly clearly, by what he has said at the time of arrest or by the conduct of his case before the justices, the defence which he is going to raise.

It may be that some particular defence does not emerge until some cross-examination takes place in the court of trial, from which it can be seen that the prisoner is going to set up the defence of mistake or accident, or, as in the present case, innocent conduct. As soon as it becomes clear that the prisoner's defence is that the facts alleged by the prosecution have an innocent, and not a guilty, complexion, evidence may be given which otherwise might be inadmissible, and it is not the less admissible because it shows, or tends to show, that the prisoner has been guilty of another offence. That was made clear in *Thompson v. R.* (3).

In the present case *LYNSKEY, J.*, pointed out to the jury that if the appellant was genuinely doing the acts in question with a view to giving medical advice, even if he was not a qualified medical man, that would be a defence, because he would not be doing them with an indecent mind and they would cease to be indecent acts. Therefore, in my opinion, this matter was dealt with in a proper way. The reasons given by *LYNSKEY, J.*, were right and the evidence was clearly admissible. When one witness gave evidence of the suggestion made to him about medical treatment, it was material to show that the intention of the appellant was indecent and that he was doing almost the same thing in the case of another witness.

The only count which for a moment gave the court concern was that charging offences against the man whom the appellant met at Bournemouth, because there the appellant's defence was: "I had never seen this man before in my life." But there the evidence of the other men became material on the very ground on which the House of Lords upheld the admission of evidence in *Thompson v. R.* (3), because it went to identity. The expression "identity" means that the evidence goes to show that the witness for the prosecution is speaking the truth when he says: "That is the man who did these indecent things to me," and the evidence of the other men shows that the prisoner is a man addicted to unnatural practices. It was open to the jury to say that Ritchie was a liar, but they were surely entitled to take into account the evidence which the other two young men had given, because Ritchie told the jury that the appellant had talked to him in exactly the same way as he did to the other men. That tended to show that the appellant was the man who Ritchie said performed disgusting acts on him. I cannot see that it makes any difference that in *Thompson v. R.* (3) the defence was an *alibi*. That simply means: "I am not the man. It was somebody else who committed the offence." Whereas the appellant says, without saying that he was not there: "I have never seen the man before in my life." That was a flat denial that he was engaged in these practices and whether it was because he was not in the town or because, being in the town, he had never seen the man, seems to me not to matter in the least. He was giving the same denial to Ritchie's evidence as was given in *Thompson v. R.* (3), and the House of Lords held that the evidence was admissible on the grounds which I have indicated.

In future it would be desirable that a court which has to deal with a case of this kind should remember that the criticism which was passed on *R. v. Sims* (1) was passed on one passage only in a long judgment, and remember that no court has yet thrown any doubt on this passage in that case, which, I think, sums up the matter ([1946] 1 All E.R. 701):

"In this case the matter can be put in another and very simple way; the visits of the men to the prisoner's house were either for a guilty or innocent purpose; that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls; that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust."

For the words "paternal or friendly nature" one could put "a medical nature."
Appeal dismissed.

Solicitors: Pollard, Stallabrass & George Martin (for the appellant); Director of Public Prosecutions (for the Crown).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

SHELLEY v. SHELLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), November 16, 23, 1951; (Lord Merriman, P.), November 30, 1951.]

Infant—Maintenance—Order of High Court—Enforcement—Summons by wife as infant's next friend—Debtors Act, 1869 (c. 62), s. 5—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 64 (1).

Where a maintenance order directing payment by the husband to the children of the marriage is not complied with, a judgment summons under s. 5 of the Debtors Act, 1869, will not be issued in the name of the wife since she administers the money merely as agent for the children and on their behalf and is not herself a principal as against the debtor. The children are persons "in whose favour an order had been made" within the meaning of R.S.C., Ord. 42, r. 26, and, under the Matrimonial Causes Rules, 1950, r. 64 (1), the wife is entitled to issue the summons as their next friend.

AS TO THE MEANING OF CREDITOR, see HALSBURY, Hailsham Edn., Vol. 2, p. 33, para. 45; and FOR CASES, see DIGEST, Vol. 5, pp. 1033, 1034, Nos. 8445-8460.

FOR THE DEBTORS ACT, 1869, s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 2, p. 294.

Cases referred to:

- (1) *Re Cox-Sinclair. Ex p. Jones*, [1913] W.N. 263; 5 Digest 1033, 8449.
- (2) *Re A Debtor* (No. 76 of 1929), [1929] 2 Ch. 146; 98 L.J.Ch. 334; 141 L.T. 250; Digest Supp.
- (3) *Ex p. Muirhead. Re Muirhead*, (1876), 2 Ch.D. 22; 45 L.J.Bey. 65; 34 L.T. 303; 4 Digest 124, 1127.
- (4) *Hewitson v. Sherwin*, (1870), L.R. 10 Eq. 53; 22 L.T. 576; 5 Digest 1034, 8458.

CORAM PEARCE, J.

APPLICATION *ex parte* by a wife for leave to issue a judgment summons in her own name against the husband in respect of his failure to comply with an order for the payment of maintenance to two children of the marriage.

L. F. Sturge for the wife.

Cur. adv. vult.

Nov. 23. PEARCE, J., read the following judgment. In this case the wife petitioner wishes to issue a judgment summons in her name in respect of an order for payment of maintenance to two children of the marriage. For tax purposes the order was made in a form directing payment, not to the wife, but to the children. Such orders are not infrequent. Counsel for the wife relies on *Re Cox-Sinclair. Ex p. Jones* (1). In that case an order for costs was made in favour of the petitioner's solicitor. The solicitor issued a judgment summons in his own name. Objection was taken that the judgment summons should have been issued in the petitioner's name. PHILLIMORE, J., held that the objection was fatal, and dismissed the summons, but gave leave to issue a fresh summons. That judgment clearly implied that a judgment summons could have been issued by the petitioner. The basis of that decision was explained in *Re A Debtor* (No. 76 of 1929) (2) by LORD HANWORTH, M.R., where he said ([1929] 2 Ch. 152):

"The principle raised seems to me to have been the basis of the judgment of PHILLIMORE, J., in *Ex p. Jones* (1), where he pointed out that the right

party had not been put forward as principal to initiate proceedings against the debtor. Also, in *Ex p. Muirhead. Re Muirhead* (3), I think that in the judgment of COCKBURN, C.J., there is the same intention to indicate that the person at whose suit proceedings are taken must be the principal, the person in whose interest those proceedings are necessary. In my opinion the petitioning husband in this case was the person who was really the principal, for whose indemnity legal proceedings were necessary. The solicitors were merely acting as a necessary part of the machinery, under which the sum enured for the benefit of the petitioner; but they were not the principals as against the debtor."

LORD HANWORTH, M.R., was there dealing with the question whether a solicitor who had an order for costs could come within the meaning of "a creditor" under the Bankruptcy Act, 1914, but his reasoning as to the principle underlying the brief report of the judgment in *Re Cox-Sinclair. Ex p. Jones* (1) is equally applicable to the case before me which comes under s. 5 of the Debtors Act, 1869.

That section regulates, so far as monetary orders are concerned, the old remedy by writ of attachment for contumacious refusal to carry out an order: see *Hewitson v. Sherwin* (4). The words of the section do not expressly state who is entitled to apply to enforce the order, nor say that only the recipient may do so, but the section is expressed to be subject to the prescribed rules. Rule 4 of the General Rules under the Debtors Act, 1869, made in Michaelmas Term, 1869, states that the order for committal "may be in the Form A in the schedule, or to the like effect." Form A is headed:

"Upon hearing, etc., [*Christian and surname of the debtor and of the party claiming*]."

It continues:

"I do order that the said A.B. be for default in payment of the debt hereinafter mentioned committed to prison . . . or until he shall pay £ . . . being the amount of [*an instalment due to the said C.D. upon*] [*or a judgment of the court of . . .*] [*or an order made by . . .*] . . ."

Rule 5 says that on payment of the sum mentioned in the order the debtor shall be entitled to a certificate of satisfaction in the Form B in the schedule or to the like effect signed by the attorney in the cause of the creditor or signed by the creditor. The jurisdiction and powers of the High Court under s. 5 of the Debtors Act, 1869, so far as they relate to default in payment in pursuance of any order or judgment made or given by a judge exercising jurisdiction in matrimonial causes, were assigned to the Divorce Division by the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932 (S.R. & O., 1932, No. 503).

It is clear that the rules under the Debtors Act, 1869, anticipate that the application will be made by the party in whose favour the order is made, and, in my view, that was their intention. Moreover, from a practical point of view, if the wife were to issue this summons, there would be no one who could give the husband the valid certificate of satisfaction to which he is entitled under r. 5. *Re Cox-Sinclair. Ex p. Jones* (1), as explained by LORD HANWORTH, M.R., does not help the wife. There the petitioner was entitled to apply because, in the words of LORD HANWORTH, M.R. (*ibid.*), he was

"the person in whose interest those proceedings are necessary . . . the person who was really the principal, for whose indemnity legal proceedings were necessary,"

whereas the solicitors in whose favour the order was made

"were merely acting as a necessary part of the machinery, under which the sum enured for the benefit of the petitioner; but they were not the principals as against the debtor."

In the case before me it cannot be said that the wife is the principal and the children are acting as a necessary part of the machinery under which the sums enure for the benefit of the petitioner. The whole basis and object of an order directing payment of the money to the children direct is that the money should be their income and belong to them. It is only on that basis that a benefit is obtained in respect of tax. It may be that in practice the wife administers it for their benefit, but, if so, she does so only as agent for them and on their behalf. She has no legal right to touch the money. Although it would be preferable on technical and social grounds if the judgment summons in respect of this order could be issued by the wife rather than the children, I am bound regretfully to hold that it cannot. The application is, therefore, refused.

Application dismissed.

CORAM LORD MERRIMAN, P.

APPLICATION *ex parte* by the wife as next friend of the children of the marriage for leave to issue a summons against the husband in respect of the arrears of payments under the order for the maintenance of the children.

L. F. Sturge for the wife.

LORD MERRIMAN, P.: This is an *ex parte* application by a wife, who has obtained a decree absolute against her husband, for leave to issue, as next friend of the children of the marriage, a summons under s. 5 of the Debtors Act, 1869, against her former husband in respect of arrears of maintenance payable to them.

By r. 375 of the Bankruptcy Rules it is necessary to obtain the leave of a judge for the issue of the summons. The order in respect of which it is desired to proceed is an order made under what is now s. 26 (1) of the Matrimonial Causes Act, 1950, which reproduces s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, and provides:

"In any proceedings for divorce . . . the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children [of the marriage] . . ."

By an order of Nov. 22, 1949, made at the instance of the wife Mr. Registrar LONG ordered maintenance for the wife at the token rate of 1s. per annum, payable monthly, and he ordered the husband to pay to each of the two children of the marriage the sum of £1 per week, payable weekly, until each child should attain the age of sixteen. It was also ordered that the wife and the husband should share the income tax relief in respect of the children. The order is often in this form to avoid the income payable under the order being included with other income which the wife may have. That is clearly shown on the face of the order by the provision for sharing the income tax relief. The order in this form has the disadvantage that difficulties may arise with regard to its enforcement where the husband makes default in payment. In the present case the wife applied to PEARCE, J., for leave to issue a summons, she herself being the applicant, and PEARCE, J., decided that she was not entitled to make the application. He took the view that the whole framework of the Debtors Act, 1869, and the rules under that Act made it clear that the person to make the application was the person who was entitled to the fruit of the judgment, namely, the children. The wife is now applying to be allowed to issue this summons as next friend of the two children in whose favour the order was made.

I know nothing about the merits of the case, but on the face of the summons there is a statement that a very considerable sum is due under the order to these two children. There is no doubt that arrears of maintenance are the proper subject of proceedings under s. 5 of the Debtors Act, 1869. Rule 61 of the Matrimonial Causes Rules, 1950, provides:

"An application for . . . committal shall be made to a judge . . ."

It does not, however, specify how, or by whom, it should be made. By r. 80, it is provided:

"Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply."

Since neither the method of application nor the party to apply is defined in the Matrimonial Causes Rules, 1947, R.S.C., Ord. 42, r. 26, is brought into play. By that rule:

"Any person not being a party to a cause or matter, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to such cause or matter . . ."

I think those words are wide enough to cover the case of these two infants. They did not, it is true, obtain the order. The wife, being the petitioner, was the proper party to obtain the order, but plainly the children are persons in whose favour the order was made. Therefore, *prima facie*, they come within this rule, and it is clear from the footnote to the rule that the rule (and its predecessors) has been treated for many years as being applicable to orders made in this Division in connection with maintenance.

There remains the question: How are these children, being persons in whose favour this order has been made, to make the application? Here the Matrimonial Causes Rules, 1950, are quite clear, for by r. 64 (1) of those rules, relating to proceedings by infants and persons of unsound mind, it is provided:

"An infant . . . may . . . make any application to which these rules apply by his next friend . . ."

Plainly this is an application to which these rules apply, and it is suggested that the wife, as mother of the children, is the right person to be the next friend. By r. 64 (2) it is provided:

"Before the name of any person is used in any proceedings as next friend the solicitor for the infant . . . shall obtain a written authority signed by that person. The authority shall be attested by a solicitor, who shall certify that the proposed next friend has no interest in the proceedings adverse to that of the infant . . ."

The position at this moment is that the wife has signed an agreement to act and has stated that she has no adverse interest to the children. *Prima facie*, it is plain that not only has she no adverse interest, but that she has a favourable interest because the enforcement of this order manifestly is very much in her interest as well as in that of the children. Subject, therefore, to this authority being attested by the solicitor, I make the order that the wife be allowed to issue the summons as next friend on behalf of the two infants.

Order for leave to issue summons.

Solicitors: *May, May & Deacon* (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

BAYLIS v. BLACKWELL AND OTHERS.

[KING'S BENCH DIVISION (McNair, J.), November 5, December 6, 1951.]

Husband and Wife—Legal proceedings—Right of husband to sue wife for tort committed before marriage—Married Women's Property Act, 1882 (c. 75), s. 12—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 1.

A passenger in a motor car, who was injured in a collision with a lorry, subsequently married the woman who had been driving the car at the time of the accident. He having added her as third defendant to an action for damages for negligence which he had brought against the person in charge of the lorry and its owner.

HELD: any right of action against the woman driver in respect of her negligence which the passenger might have possessed had abated as a result of their marriage.

FOR THE MARRIED WOMEN'S PROPERTY ACT, 1882, s. 12, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 802; and FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 1, see *ibid.*, p. 811.

Cases referred to:

- (1) *Gottliffe v. Edelston*, [1930] 2 K.B. 378; 99 L.J.K.B. 547; 143 L.T. 595; Digest Supp.
- (2) *Wennhak v. Morgan*, (1888), 20 Q.B.D. 635; 57 L.J.Q.B. 241; 59 L.T. 28; 52 J.P. 470; 17 Digest 158, 591.
- (3) *Barber v. Pigden*, [1937] 1 All E.R. 115; [1937] 1 K.B. 664; 106 L.J.K.B. 858; 156 L.T. 245; Digest Supp.
- (4) *Mallett v. Dunn*, [1949] 1 All E.R. 973; [1949] 2 K.B. 180; [1949] L.J.R. 1650; 2nd Digest Supp.
- (5) *Edwards v. Porter*, [1925] A.C. 1; 94 L.J.K.B. 65; 132 L.T. 496; *affg.* S.C. *sub nom.* *Edwards v. Porter*, *McNeill v. Hawes*, [1923] 2 K.B. 538; 27 Digest 214, 1851.
- (6) *Chant v. Read*, [1939] 2 All E.R. 286; [1939] 2 K.B. 346; 108 L.J.K.B. 547; 160 L.T. 462; Digest Supp.
- (7) *Curtis v. Wilcox*, [1948] 2 All E.R. 573; [1948] 2 K.B. 474; [1949] L.J.R. 266; 2nd Digest Supp.
- (8) *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; *affg.* S.C. *sub nom.* *Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt*, [1893] 1 Ch. 630; 36 Digest 671, 1546.

PRELIMINARY POINT OF LAW under R.S.C., Ord. 25, r. 2.

The plaintiff, while travelling as a passenger in a motor car driven by the third defendant, was injured in a collision with a stationary motor lorry in the charge of the first defendant and owned by the second defendants. After the accident he married the third defendant. In an action for damages for personal injuries he alleged that the collision was due to the negligence of the first defendant in the course of his employment as servant or agent of the second defendants, and, alternatively, that it was due to the negligence of the third defendant. The third defendant contended that any cause of action against her, if it existed, had abated in consequence of her marriage to the plaintiff.

Van Oss for the plaintiff.

H. J. Baxter (*Ryder Richardson* with him) for the first and second defendants, *W. F. Blackwell* and *Victoria Motor Haulage Co., Ltd.*

Berryman, K.C., and *Marven Everett* for the third defendant, *Jean Baylis*.

Cur. adv. vult.

Dec. 6. **McNAIR, J.**, read the following judgment. This case, which comes before me for the determination of a preliminary point of law under R.S.C., Ord. 25, r. 2, raises in a neat form the question whether a husband can during

overture sue his wife in respect of an ante-nuptial tort. The facts as alleged in the pleadings, which for present purposes I must take as proved, may be shortly stated. On Dec. 14, 1948, the plaintiff was travelling as a passenger in a motor car driven by a lady when the motor car came into collision with a stationary trolley in charge of the first defendant, but owned by the second defendants, by reason whereof the plaintiff suffered personal injuries and loss and damage. The plaintiff, by his statement of claim, delivered on Nov. 2, 1949, pursuant to a writ issued against the first and second defendants on Oct. 22, 1949, alleged that the collision was caused by the negligence of the first defendant while acting in the course of his employment as the servant or agent of the second defendants. By their defence, delivered on Dec. 7, 1949, these defendants, while denying negligence, averred in the alternative that the collision was caused by the negligence of the lady driver of the motor car. Accordingly, on June 4, 1951, the plaintiff, having since the date of the accident married the driver of the motor car, amended his writ by adding her as third defendant as "Jean Baylis (married woman)", and, by his amended statement of claim, delivered on June 4, 1951, he alleged against her the negligence which had been alleged against her in the defence of the first and second defendants. The third defendant by her defence, delivered on July 18, 1951, pleads as follows:

"This defendant says that the amended statement of claim discloses no cause of action against her. Since the date of the said accident the plaintiff and this defendant have become man and wife. If the plaintiff ever had any cause of action against this defendant, which is denied, such cause of action has abated."

On Sept. 18, 1951, the master ordered that the point of law raised by the defendant, Jean Baylis, in her defence be set down for hearing and disposed of forthwith and before the trial of any other issue in the action. This, accordingly, is the issue which I have now to determine.

It is clear that, at least up to the date of the Married Women's Property Act, 1882, neither husband nor wife could sue the other in respect of ante-nuptial torts, though, as has been pointed out by McCARDIE, J., in *Gottliffe v. Edelston* (1) ([1930] 2 K.B. 387), striking encroachments had already by that date been made in the common law doctrine of the legal unity of husband and wife by the invention by the courts of equity of the doctrine of separate estate in order to mitigate the severity of the common law with respect to the husband's rights over the property of the wife. The authorities on which the common law doctrine was founded are fully analysed in the judgment of McCARDIE, J., above referred to, and it is sufficient to say that they disclose quite clearly that the basis of the rule is to be found in the legal unity of husband and wife which MANISTY, J., in *Wennhak v. Morgan* (2) (20 Q.B.D. 639) states to be founded on public or social policy.

The broad submission made on behalf of the plaintiff is that the process of encroachment or erosion has now, and, in particular, by the Law Reform (Married Women and Tortfeasors) Act, 1935, been carried so far as to sweep away the last remnant of the wife's dependency on the husband and to destroy finally the legal unity of the spouses, and reliance is placed on the maxim *cessante ratione legis, cessat ipsa lex*. It is, accordingly, necessary to trace briefly the steps by which this result is said to have been reached. By the Married Women's Property Act, 1882, s. 1, it was provided as follows:

"(1) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee. (2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or

otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

By s. 12 of the same Act it was provided that

"Every woman . . . shall have in her own name against all persons whomsoever, including her husband, the same civil remedies . . . for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

Though it may be said that the purposes of the Act did not necessitate any reference to the husband's rights of suit against the wife, it is significant that the legislature in 1882 appears expressly to have re-affirmed the common law rule in its entirety so far as the husband's rights of suit are concerned.

The next statutory step is to be found in the Law Reform (Married Women and Tortfeasors) Act, 1935, which, while repealing ss. 1 to 5 of the Married Women's Property Act, 1882, and the provisions relating to separate property in other sections, including s. 12, and thus, in effect, abolishing the married woman's separate estate, provided by s. 1:

"Subject to the provisions of this Part of this Act, and subject, as respects actions in tort between husband and wife, to the provisions of s. 12 of the Married Women's Property Act, 1882, a married woman shall—(a) be capable of acquiring, holding, and disposing of, any property; and (b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract, debt, or obligation; and (c) be capable of suing and being sued, either in tort or in contract or otherwise; and (d) be subject to the law relating to bankruptcy and to the enforcement of judgments and orders, in all respects as if she were a feme sole."

Of this Act SCOTT, L.J., in *Barber v. Pigden* (3) uses the following language ([1937] 1 All E.R. 125):

"The purpose of Part I of the Act is to give back to woman, though married, the full human status allowed by the common law to a man, a maiden, or a widow, of which the common law had robbed her; in short, it restores to her her natural status and capacity. It does it by sweeping away a host of legal fictions—fictions which in origin were inextricably mixed up with old procedural law."

See, too, the observation by HILBERY, J., in *Mallett v. Dunn* (4) ([1949] 1 All E.R. 976) to the effect that since the Act of 1935 "a wife is a fully independent legal person." These passages were strongly relied on by counsel for the plaintiff as showing that the process of encroachment on or erosion of the old doctrine of legal unity of man and wife had gone the whole length for which he contended. But the observation of LORD SUMNER in *Edwards v. Porter* (5) ([1925] A.C. 38) to the effect that

"Generally speaking, the Act of 1882 was a Married Women's Property Act, not a Married Man's Relief Act,"

is, in my judgment, equally applicable to Part I of the Act of 1935.

It remains for me to consider the authorities more particularly relevant. In *Gottliffe v. Edelston* (1) McCARDIE, J., had dismissed the wife's claim to recover against her husband for an ante-nuptial tort resulting in personal injury, on the ground that such a cause of action was not such a thing in action within the definition of "property" contained in s. 24 of the Act of 1882 as to become part

of the wife's separate property. This decision was followed by HALLETT, J., in *Thant v. Read* (6) when he held that the wife's right of action for personal injuries resulting from her husband's negligence during coverture was not a civil remedy for the protection and security of her property within the meaning of s. 12 of the Married Women's Property Act, 1882, as amended by the Act of 1935. Finally, in *Curtis v. Wilcox* (7) it fell to the Court of Appeal to consider the correctness of the decision in *Gottliffe v. Edelston* (1). In *Curtis*' case (7), as in *Gottliffe*'s case (1), the wife was suing her husband in respect of an ante-nuptial tort by the husband resulting in personal injury to the wife. WYNN-PARRY, J., in delivering the judgment of the court overruling *Gottliffe v. Edelston* (1), uses the following language ([1948] 2 All E.R. 574):

"It is clear, as McCARDIE, J., held, that at common law a wife cannot sue her husband for a tort committed before the marriage. If, therefore, the wife had a cause of action which she could pursue after the marriage it must have been because her right of action in tort, which arose before the marriage, was a thing in action forming part of her estate, which she could reduce into possession by action before marriage, which, by virtue of the Married Women's Property Act, 1882, became part of her separate estate on her marriage, and which, therefore, she could reduce into possession by action after marriage, such action being pursued for the purpose of securing that part of her separate estate."

The learned judge, however, came to the conclusion that McCARDIE, J., was in error in attributing to the expression "thing in action" in s. 24 of the Act of 1882 the limited meaning which he attributed to it, and held, accordingly, (*ibid.*, 576) that the case of *Gottliffe v. Edelston* (1) was wrongly decided and is not good law.

It is, in my judgment, clear that the *ratio decidendi* of the judgment in *Curtis v. Wilcox* (7) was that the particular cause of action there under consideration was "property" within the meaning of s. 12 of the Married Women's Property Act, 1882, and it is true that, as counsel for the plaintiff submitted, no decision was given on the broader principle here averred before me, but not, apparently, argued before the Court of Appeal, that the process of erosion or encroachment had gone so far as to destroy the basis of the common law rule. Further, I accept counsel's submission that the final paragraph in this judgment was not necessary for the decision, and I share, with respect, his difficulty in distinguishing a

"purely personal claim against her husband, *e.g.*, for damages . . . for assault,"

which would be barred, from a claim against the husband for personal injuries resulting from negligence which, according to the decision, would not be barred. Nevertheless, it seems to me that, when the legislature in 1935 expressly re-affirmed s. 12 of the Act of 1882 by providing that the new law laid down as respects the wife by s. 1 should be

" . . . subject, as respects actions in tort between husband and wife, to the provisions of s. 12 of the Married Women's Property Act, 1882 . . . "

it is impossible to say that the legislature did not at the same time re-affirm as respects the husband the provisions of that section that

"except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

It may be anomalous that in these days of equality the wife should be able to sue the husband for ante-nuptial torts and possibly for torts during coverture while the husband should not enjoy corresponding rights. This anomaly, if anomaly it be, is, in my judgment, so firmly engrafted in our law that it can only rightly be removed by legislation.

It is true, as was pointed out in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* (8) ([1894] A.C. 553), that public policy may change, and, in so far as the old rule against actions between husband and wife was based on public policy, the basis of the rule may be said to be no longer firmly founded, though, if civil litigation between spouses was unseemly in 1888, it is difficult to see why it should be considered seemly today. Nevertheless, there is, in my judgment, a countervailing principle, *viz.*, that the courts should not by over-refined subtlety of reasoning be persuaded, merely for the sake of logicity, to weaken well-established doctrines of the law which have long been acted on by the public and their legal advisers. In my judgment, the plea raised in the defence of the third defendant succeeds, and there must be judgment in the action for the third defendant, with costs.

Judgment for third defendant.

Solicitors: *Payne, Hicks Beach & Co.* (for the plaintiff); *Stanley & Co.* (for the first and second defendants); *Berryman's* (for the third defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

NOTE.

Re PLANT (*deceased*). JOHNSON *v.* HARDWICKE AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), December 4, 1951.]

Will—Two wills admitted to probate—*Principles of construction.*

ADJOURNED SUMMONS.

The testatrix, who died on June 13, 1950, left two wills both of which were admitted to probate. The first will, dated Aug. 24, 1939 (hereinafter called "the will of 1939"), purported expressly to revoke all former wills and codicils and was declared to be the last will of the testatrix. The second will (hereinafter called "the will of 1940"), which was undated, but, when admitted to probate, was deemed to have been executed on May 28, 1940, did not expressly revoke the first will, but was declared to be the last will of the testatrix. By the will of 1940 (which was home-drawn), the testatrix made similar bequests to those contained in the will of 1939 with some variations as to time of payment and the amount of legacies and purported to benefit the same persons except that five pecuniary legacies and one specific legacy bequeathed in the will of 1939 were not expressly mentioned in the will of 1940. This originating summons was issued to determine, *inter alia*, whether, on the true construction of the will of 1939 and the will of 1940, (a) all the pecuniary legacies bequeathed by the will of 1939 were revoked by the will of 1940; or (b) some, and, if so, which, of the said legacies were revoked by the will of 1940; or (c) none of the said legacies was revoked by the will of 1940. The question also arose whether the specific legacy given by the will of 1939, but not mentioned in the will of 1940, was preserved or revoked.

AS TO CONSTRUCTION OF GIFTS IN DIFFERENT TESTAMENTARY INSTRUMENTS, see HALSBURY, Hailsham Edn., Vol. 34, p. 360, para. 408; and FOR CASES, see DIGEST, Vol. 44, pp. 1006-1013, Nos. 8631-8716.

Cases referred to:

- (1) *Tuckey v. Henderson*, (1863), 33 Beav. 174; 55 E.R. 333; 44 Digest 1011, 8694.
- (2) *Hemming v. Gurrey*, (1827), 1 Dow. & Cl. 35; 6 E.R. 438; 44 Digest 1010, 8684.
- (3) *Jackson v. Jackson*, (1788), 2 Cox, Eq. Cas. 35; 30 E.R. 17; 44 Digest 1010, 8678.

(4) *Kidd v. North*, (1846), 2 Ph. 91; 16 L.J.Ch. 116; 41 E.R. 876; *sub nom. Tidd v. North*, 8 L.T.O.S. 289; 44 Digest 1010, 8689.

(5) *Re Gare*, [1951] 2 All E.R. 863.

R. Gwyn Rees for the plaintiff, the surviving executor.

Richmount for the first defendant, a residuary legatee.

G. C. D. S. Dunbar for the second to the seventh defendants, pecuniary legatees.

Denys B. Buckley for the Attorney-General.

ROXBURGH, J., held that on the true construction of the two documents the trusts of the will of 1940 were intended to be in substitution for the similar trusts in the will of 1939, but that, as the will of 1939 had been admitted to probate, the legacies bequeathed therein but not mentioned in the will of 1940 must be treated as subsisting. HIS LORDSHIP said that it seemed to him from the documents themselves that it was the plain intention of the testatrix to substitute the second document for the first. He could not, however, give full effect to that conclusion because both had been admitted to probate, and, therefore, it was not open to him to say that the second will revoked the first *in toto*. At the same time, he was entitled to look at the two documents side by side, and to draw such conclusions as he might from internal evidence, and, if the two wills as a whole showed that that was the intention of the testatrix, he considered that he had jurisdiction to give effect to that conclusion. *Tuckey v. Henderson* (1) appeared to give full warrant for that course. In that case, SIR JOHN ROMILLY, M.R., said (33 Beav. 175):

"I am of opinion that the cases of *Hemming v. Gurrey* (2), *Jackson v. Jackson* (3), and *Kidd v. North* (4), govern this case, and that, upon the construction of these two wills of the testatrix, the second instrument was meant to be in substitution for the first. It is true that both are wills of the testatrix, and that both are admitted to probate, and that it is, therefore, simply a question of construction. But as a question of construction, I am of opinion that the second is substitutionary for the first, as regards the legacies in the first will to legatees who are also named as legatees in the second. This differs from the case of a codicil, a codicil is professedly an addition to the will, but this is professedly a substitution for it. Though it is called 'the last will,' that does not prevent the proof of the prior will, which is not revoked: therefore both are proved, and if there be legacies given in the first will to objects of bounty not mentioned in the second will, they are not revoked, but, in all other respects, I think the legacies are substitutionary and not cumulative . . . There is a gift to the rector of Winterbourne, in trust for the aged poor women of the parish in the first will, and the same sum is given by the second will for the poor generally of the parish, as the minister and churchwardens shall think fit; I consider that a mere substitution of the one for the other . . . I am of opinion, regarding it as a question of construction, as the Lord Chancellor did in the case referred to, and considering that, although the testatrix calls the second instrument 'my last will,' yet both have been admitted to probate, you must look at the general scope of both and see if substitution is intended."

That was to be his (HIS LORDSHIP'S) approach. HIS LORDSHIP then compared the two documents in detail, and reached the conclusion above stated.

Solicitors: *Rhys Roberts & Co.*, agents for *C. James Hardwicke & Co.*, Cardiff for the plaintiff and first defendant); *William A. Crump & Son*, agents for *Gilbert Robertson & Co.*, Cardiff (for the second to the seventh defendants); *Treasury Solicitor*.

R.D.H.O.

COTTAGES, LTD. v. MINISTER OF FUEL AND POWER AND OTHERS.

[KING'S BENCH DIVISION (Croom-Johnson, Devlin and Parker, JJ.), December 10, 1951.]

Coal—Nationalisation of industry—Valuation of transferred interests—Compensation unit of nine houses—Notional sale in open market—Notional sale of unit as a whole, not in separate lots—Coal Industry Nationalisation Act, 1946 (c. 59), s. 13 (4).

Nine houses owned by the claimants became vested in the National Coal Board pursuant to the Coal Industry Nationalisation Act, 1946, and for the purpose of compensation were constituted one compensation unit. The houses differed in size and type, were situated in various parts of the coal mining district, and ranged in value from £150 to £2,500. In determining the value of the unit under s. 13 (4) of the Act the district valuation board proceeded on the basis that the value must be taken to be the amount which the houses might have been expected to realise if they had been sold in the open market as a whole to a single purchaser, and not sold in separate lots.

HELD: this was the correct basis of valuation.

FOR THE COAL INDUSTRY NATIONALISATION ACT, 1946, s. 10 (5) and s. 13 (4), see *HALSBURY'S STATUTES*, Second Edn., Vol. 16, pp. 291 and 296, respectively.

Case referred to:

- (1) *Ellesmere (Earl) v. Inland Revenue Comrs.*, [1918] 2 K.B. 735; 88 L.J.K.B. 337; 119 L.T. 568; 21 Digest 24, 136.

SPECIAL CASE stated by a referee under the Coal Industry Nationalisation (Valuation of Compensation Units) Regulations, 1947, reg. 40 (1).

The claimants, a Class B subsidiary of a colliery concern within the meaning of the Coal Industry Nationalisation Act, 1946, were the owners of nine houses which vested in the National Coal Board pursuant to para. 13 of sched. I to the Act and the exercise by the board of the option given by s. 5 (2) of the Act. The houses were not situate together. They were of varying types, and their values were between £150 and £2,500. A compensation unit was constituted which consisted of the transferred interests of the claimants in those houses. Pursuant to the Coal Industry Nationalisation (Valuation of Compensation Units) Regulations, 1947, the district valuation board prepared and served a draft valuation of the compensation unit, and, the claimants having objected thereto, the district valuation board determined the value of the said unit. As appeared from the statement of the basis of valuation contained in the determination of value, the district valuation board held themselves bound in law to assume that the compensation unit was sold as a whole to a single buyer. They made a deduction on the ground that a willing buyer of the unit as a whole would only buy to make a profit, and, therefore, the value of the unit would not be the sum of the full values of the individual properties with vacant possession, but would be less by approximately twenty per cent., which, in the view of the board, represented the speculator's risk. The claimants contending that the district valuation board was wrong in law in making that assumption, appealed to a referee. When the matter came before the referee the claimants asked him to state a Case, and in that Case he asked the court to determine the following questions: Whether, in the application of s. 13 (4) of the Act (a) it was as matter of law to be assumed that the said compensation unit was sold as a whole to a single purchaser, or (b) it was permissible, if the amount expected to be realised would thereby be greater, to assume that the compensation unit was sold in separate lots to several purchasers.

MacKenna, K.C., and *Brunyate* for the claimants.
Paull, K.C., and *Squibb* for the National Coal Board.
J. P. Ashworth for the Minister of Fuel and Power.
Littman for the Northern District Valuation Board.

CROOM-JOHNSON, J.: This Special Case raises a short point under s. 13 (4) of the Coal Industry Nationalisation Act, 1946. To understand it a brief examination of the structure of the Act is necessary. Under the statute, on the appointed day the assets described in sched. I, Part I, to the Act, which theretofore belonged to the colliery owners, vested in the National Coal Board without further assurance. Assets described in Part II of the schedule were subject to an option, to be exercised either by the board or by the owner, to transfer such assets to the board. When assets became vested in the board, it was provided under s. 10 that compensation should be paid by the board under the provisions of the statute. Under s. 10 (2) compensation had to be ascertained separately, as provided in para. (a) and para. (b) of that sub-section.

With regard to assets within the provisions of sched. I, compensation had to come out of what has been called the global sum. The statute dealt with the allocation of the global sum among various coal mining districts and the determination of their status as respects coal industry value. Transferred interests had to be dealt with under s. 10 (5) on the basis of what are called "compensation units." It was left to the Minister of Fuel and Power to prepare a draft scheme relating to these "compensation units." That appears in the Coal Industry Nationalisation (Options and Constitution of Compensation Units) Regulations, 1946 (S.R. & O., 1946, No. 1574), reg. 14 (1) of which provides:

"After the Minister has made such inquiries, considered such matters (including any representations which the claimant may have made as to the constitution of the relevant compensation unit or units) and taken such steps as he thinks requisite, he will, as soon as practicable, cause to be prepared a draft of the compensation unit, or of each of the compensation units, which he proposes to constitute in relation to the transferred interests mentioned in each statement and supplementary statement of interests duly delivered to him."

There is a provision that the draft compensation unit is to be served on the claimant. Therefore, Parliament has conferred on the Minister the right of determining, after carrying out the duties and investigations which are laid on him by reg. 14 (1), what the compensation units are to be. In the present case we are concerned only with certain houses which are part of the property of a colliery concern. The Minister decided that nine houses, situated in different places and of varying types and theoretical values, accommodation, and amenities, were to form a compensation unit. In pursuance of the statute that unit had to be valued.

I look next at s. 13 of the Coal Industry Nationalisation Act, 1946, which indicates how a compensation unit is to be dealt with. First, it has to be allocated to what is called a valuation district. Then the district valuation board have to determine the value. If there is objection made to their determination, there may be a reference to a referee. That is what happened in this case. No question arises here about the preliminary matters to be decided. The district valuation board made their determination. There was objection to their determination on much the same ground as that now raised before us. Finally, the matter came before the referee, who dealt with it under s.13 (4) which provides:

"For the purposes aforesaid the value of a compensation unit shall be taken to be the amount which it might have been expected to realise if this Act had not been passed and it had been sold on the primary vesting date in the open market by a willing seller to a willing buyer, no allowance being made on account of the vesting of the transferred interests comprised in the unit being compulsory."

It was contended by the claimants, before the referee, as it has been contended before us, that the effect of applying the words "by a willing seller to a willing buyer" necessarily involved the consideration of whether the nine items which constitute the unit were to be regarded as one unit or whether the referee was obliged to say with regard to each of the constituent items that a particular value might have been obtained, and, as a result of that, the nine of them would fetch from a willing buyer to a willing seller in the open market more than the referee was being invited to determine for them on the basis that they were all being sold together. It is contended on behalf of the claimants that the referee would err if he applied the omnibus valuation without taking into consideration the separate valuations. The basis of that argument is that the Act intended that the best possible price should be obtained and that it is not possible to obtain such a price if a whole collection of cottages or houses, spread here, there and everywhere within the particular valuation district, is offered together. The Minister has to decide what the compensation unit is to be under the safeguards provided in reg. 14 (1). Then the question arises as to the meaning of the best possible value. Is it to be the best possible value to the colliery which has gone out of existence as owning the compensation unit? Or is it to be the best possible value to the National Coal Board who are going to take over? Or is it to be the value to some other person or body who might be interested? I could not follow for whom, it was said, the best possible price was to be.

I go back to the plain, simple words of the sub-section. It is framed, as counsel for the National Coal Board emphasised, entirely in the singular. It says that it is the value of the compensation unit, reading s. 13 (1) and s. 13 (4) together, which has to be regarded. It is true that that has to be done as if the Act had not been passed, but it goes on to say "and it had been sold on the primary vesting date in the open market." "It" is again in the singular; "it" is again the compensation unit. It is that, and that alone, which the district valuation board and the referee have to value. When they have looked to see what it is that they have to value, they are then to apply the test of a sale in the open market by a willing seller to a willing buyer. It does not seem to me to follow that because they are going to apply the test of a sale by a willing seller to a willing buyer, therefore, they must determine that they can only approach the matter on the basis of first of all splitting up the compensation unit, fixed by the Minister, into its constituent parts. It seems to me that that branch of the argument is a *non sequitur*. Counsel for the claimants supported it by a reference to *Earl of Ellesmere v. Inland Revenue Comrs.* (1), which was an appeal to a referee against an assessment to estate duty. That arose out of the language used in the Finance Act, 1894, s. 7 (5), and s. 60 (2), of the Finance (1909-10) Act, 1910. For the purposes of those enactments, which were taxing enactments, the question for decision was what was the effect of the words "the price which . . . such property would fetch if sold in the open market"? SANKEY, J., for the purpose of that legislation, came to the conclusion that where there was what he called varied property the words gave to the assessing person the right to take into account the value of the constituent parts of the property. I have derived no assistance from that decision. I do not think that a decision on a taxing statute is of much assistance on a question as to the interpretation of a statute which deals with the nationalisation of an industry or in determining the value of property which has been transferred by another Act to a board set up by that other Act.

I, therefore, go back to the actual language of s. 13 (4), and before coming to a conclusion I look at the proviso to the sub-section which says:

"Provided that provision may be made by regulations requiring the said amount to be estimated on the basis that the purchaser on the assumed sale of the unit would be in a position to use the property in which the transferred interests subsisted with other assets used in association therewith before the transfer, or to be estimated in accordance with other rules

prescribed for securing that the said amount shall not be diminished by disregard of any factor appearing to the Minister to be relevant."

I am not disposed to attach too much importance to words used in a proviso, but a proviso relates to the section which it immediately follows and it is not to be expected that the draftsman will have changed his mind so quickly regarding what he intended by the enactment to which the proviso is appended. It seems to me that the proviso to s. 13 (4) is consistent with the whole framework of the sub-section, and it is obvious that in passing this proviso the legislature were thinking in terms of the unit set up by the Minister's action being submitted to the district valuation board, and ultimately, in a proper case, to the referee. I can see nothing which suggests any other possible view. I have come to the conclusion that, while the words used in the sub-section are to be a guide in arriving at the amount of the valuation, the referee was not obliged to direct himself that the compensation unit must be taken to have been sold in separate lots to separate purchasers. I can find no justification for that in any of the language which has been used. In my judgment, it was to be assumed by the referee that the compensation unit had been transferred as a whole to a single individual.

DEVLIN, J.: Section 13 (4) requires the board or the referee to ascertain the value of a compensation unit on the hypothesis that it had been "sold on the primary vesting date in the open market by a willing seller to a willing buyer." Counsel for the claimants says that the Act requires the compensation unit to be sold, but does not say whether it is to be sold as a whole or in parts, and, that question being open, the Act must be presumed to intend that the seller may dispose of it in such a way as is to his best advantage. Let me assume that, if the sub-section stopped there, that would be its right construction. There is, however, another step to be taken before arriving at its meaning. It has to be ascertained what is meant by "open market." It is a commonplace that there will be different markets for the same object or the same commodity and in those different markets different prices for the same object or the same commodity may be obtained. As between producer and wholesaler, as between wholesaler and distributor, as between distributor and retailer, and as between retailer and the ultimate buyer who is a member of the public, the same object fetches a different price. Before, therefore, beginning to apply the Act intelligently, it is necessary to ask oneself what is the level of the market contemplated by the section. The ordinary way of doing that is to ascertain in what lots or parcels the object or commodity is to be sold. Are we dealing in bulk, or are we dealing in small, individual objects? If it is in bulk, the sale will obviously be between wholesalers; if the subject of the sale is a small individual object, it will plainly fetch a higher price. In the present case we are dealing in something which is called a compensation unit. That is what s. 13 (4), which we have to construe, refers to, and s. 10 (5) provides:

"The transferred interests shall be dealt with for the purposes of compensation in units constituted as hereinafter provided (in this Act referred to as 'compensation units') . . ."

That makes it plain that we are dealing with transferred interests, not individually as, if I may pursue the analogy, a retailer might, but in bulk, in parcels made up into compensation units, and that the price we have to look for is the price for a compensation unit as a whole.

Counsel for the claimants argued that that in some way involves the willing seller in getting less than the full value or the best possible price for that which he is notionally deemed to be selling. I do not think that that is so at all. Taking again the analogy of a commodity, such as a stock of coal, which might well fall under s. 13 (4), it is plain that the price obtained for the coal will depend on whether it is deemed to be a sale at the pit-head, a sale in a wagon on a railway siding, or a sale in a half-hundredweight sack. All those will command different

prices. It may very well be that, sold in half-hundredweight sacks, the price would be twice that paid at the pit-head. I take that merely as an illustration. Is it then open to the seller, who is selling at the pit-head, to say: "I am not getting the best possible price for my coal. The best possible price is for coal in half-hundredweight sacks"? That is a wholly fallacious argument, because as soon as the seller investigates how the so-called best possible price is obtained, he finds that to get it he will have to render a lot more services, all of which cost him money, and to take extra and additional risk. I do not think that the position is any different in the case of the houses with which we are dealing here. What the valuation board have done is to say that a willing buyer of the unit as a whole would only buy to make a profit, and, therefore, the value of the unit would not be the sum of the full vacant possession values of the individual properties, but would be less by approximately twenty per cent. which, in the view of the board, represents the speculator's risk. Whether twenty per cent., ten per cent., or five per cent. would be the right figure is not a matter with which we are concerned, but what the board has done, and, in my judgment, rightly done, is to say in effect that there must be deducted from the value of the individual elements a sum representing the speculator's risk, and, no doubt, there is to be included in that last figure the additional expenses that the seller would have incurred if he had wished to sell individually—the necessity of employing an agent, the risk that he might get less, and the fact that he might be out of his money for some considerably longer time. All those things are part of the speculator's risk. It is not, in my judgment, true or fair to say that in some way a loss or deduction of twenty per cent. is imposed on what would otherwise be the fair value of these houses. It is true that, in dealing in things such as counsel for the claimants described as a mixed bag, it may well be that, by compelling the seller to part with a lot of miscellaneous objects altogether which he would do much better to dispose of in different places, he would sustain loss, because he would only get the price for a job lot. I do not think it is so in this case, but, if it be so, it is not because of any unfairness in the interpretation which, in my judgment, should be put on s. 13 (4), but because the make-up of the compensation unit would have erred. As my Lord has pointed out, that is a matter for the Minister. It must be presumed that he makes up the compensation units in such a way as to hold the scale even, in so far as he can, between the willing buyer and the willing seller. That being so, when the willing seller in the present case comes to part with the houses in one lot he must be presumed to have equal knowledge with the buyer, to be equally alive to the potentialities of the property and to the fact that it can be sold to better advantage by anybody who is willing to wait for individual prices of its component parts, and, therefore, although willing to allow the buyer a proper margin for the additional services and risk which he must be prepared to render and take, not willing to allow him an unreasonable profit. The twenty per cent. must be assessed on that basis. The make-up of the compensation unit may work both ways. Though counsel for the claimants wants to have it in his favour, it is conceivable that transferred interests sold separately might not fetch so much as if they were sold together. He is anxious to have the option of separating them where it suits the seller, but he would not, I suppose, on the construction that he puts on the section, grant a similar option to the buyer of separating them where it suits him. For these reasons I agree with the conclusion which my Lord has expressed.

PARKER, J.: I agree with both judgments just delivered.

Order accordingly.

Solicitors: *Lawrence Jones & Co.*, agents for *Maughan & Hall*, Newcastle-upon-Tyne (for the claimants); *R. S. S. Allen* (for the National Coal Board); *Treasury Solicitor* (for the Minister of Fuel and Power and the Northern District Valuation Board).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

TIGER v. BARCLAYS BANK, LTD.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), November 27, 28, 29, December 14, 1951.]

Trust and Trustee—Natural trustee—Corporate trustee—Bank—Right to withhold documents relating to estate from successors in office.

Per curiam: A natural trustee can be required to produce to his successor in office entries relating to the administration of the trust recorded by him in a diary or other document, and, similarly, two or more trustees can be required to produce the minutes of their meetings.

In the case of a corporate trustee the internal correspondence and memoranda of such a trustee is not, as such, necessarily exempt from production. Each individual document must be considered on its merits. If such a document relates to the administration of the testator's estate and no more than that is known about it, it is potentially a document which would or might assist a new trustee in the administration of the estate. Whether it would in fact do so or not must depend on its actual contents, and of that question, *prima facie*, the new trustee, whose duty it is to carry on the administration, would be the best judge, and obviously he could only form an opinion by looking at the document itself. He would, moreover, have to see it for the purpose of conducting his side of any argument about its production which might ensue before the master.

Where a trust corporation fills the double capacity of trustee and banker, its successors in the trust should be in no worse position as regards the obtaining of information with respect to the trust bank account and with regard to the production of documents relating to the trust than they would have been in if a third party had been the banker.

Decision of FINNEMORE, J. ([1951] 2 All E.R. 262), affirmed.

Cases referred to:

- (1) *Talbot v. Marshfield*, (1865), 2 Drew. & Sm. 549; 12 L.T. 761; 62 E.R. 728; 18 Digest 147, 970.
- (2) *Re Cowin. Cowin v. Gravett*, (1886), 33 Ch.D. 179; 56 L.J.Ch. 78; 18 Digest 147, 973.

APPEAL by the defendants from a decision of FINNEMORE, J., on June 8, 1951 (reported [1951] 2 All E.R. 262), in an action for delivery up of all documents in the possession or power of the defendants relating to the administration of the estate of a testator.

In November, 1949, in an action in the Probate Division for the revocation of the grant of probate of the testator's will a compromise was reached whereby the defendants, administrators *pendente lite* and executors of the testator's estate, renounced probate and the plaintiffs, Eduard Max Tiger and Klara Haider, two of the residuary legatees, undertook to apply for letters of administration with the will annexed. In the present action the plaintiffs contended that the defendants were under an obligation to hand over to them all documents connected with the administration of the estate, either as an implied term of the compromise agreement or on the ground that, having renounced probate, they had no right to retain possession of them as against the administrators. The defendants claimed that they were entitled to a formal release and discharge from all liability in respect of the estate before handing over the documents. FINNEMORE, J., held that the defendants were not entitled to a release and made an order for delivery up of all documents belonging to the estate of the testator or relating to the administration thereof that were in the possession or power of the defendants, whether the same were brought into existence by the defendants or came into their possession or power in connection with the administration. On appeal the defendants did not contest the decision of the judge on the point in issue before him, but sought to vary the order so as to exclude "any books or documents kept or brought into being by the defendants

as bankers of the said estate and any books kept by the defendants as . . . administrators or executors which also contain entries as to other trusts or matters, but as to such last-mentioned books with liberty to the plaintiffs to inspect the entries therein relating to the said estate, and excluding also any inter-office correspondence, memoranda, or other documents brought into existence by the defendants in the ordinary course of the defendants' business as a trust corporation, the production of which would not assist the plaintiffs in the discharge of their duties as administrators of the said estate". The Court of Appeal, in dismissing the appeal, made certain observations, with which this report is concerned, on the right of a corporate trustee to withhold documents from their successors in office.

J. G. Strangman, K.C., and Lindner for the defendant bank.

Platts-Mills and D. B. Broad for the plaintiffs.

Cur. adv. vult.

Dec. 14. **JENKINS, L.J.**, read the judgment of the court in which he stated the facts and continued: The sole question in issue before the learned judge having been decided against the bank, it does not appeal from that decision, but seeks to raise in this court for the first time an entirely new contention that the documents comprised in the description "all documents relating to the administration of the estate" include documents or classes of documents which the bank should not as a matter of law have been held liable to deliver up. If the point had been taken at the trial on pleadings appropriately framed so as to raise it and with evidence enabling the learned judge to appreciate with a reasonable degree of particularity what documents he was being asked to exclude from the order, no doubt the learned judge would have considered and decided the question, and it may be he would have thought fit to make the order for delivery up of documents by reference to some more restricted definition than the comprehensive one of "all documents relating to the administration of the estate." But, the question never having been pleaded or argued and no evidence having been adduced to show its bearing on the documents actually existing in this case, we think it would be contrary to all principle for this court to entertain an appeal based on this new contention. Counsel for the bank invited us to act under the "Slip Rule" (R.S.C., Ord. 28, r. 11), or, rather, under the inherent jurisdiction of the court (acted on in the cases noted under that rule in the *ANNUAL PRACTICE*, 1951, p. 465), to vary its orders so as to carry out its meaning, which could be done on appeal by virtue of Ord. 58, r. 4. The short answer to this seems to us to be that the order here in question plainly did carry out the learned judge's meaning in so far as it ordered delivery up of all documents relating to the administration of the estate, inasmuch as it was not in dispute before him that, subject only to the question of the release, those were the documents which the bank must deliver up. For these reasons we are of opinion that this appeal cannot properly be entertained by this court and must fail. We should add that the reasons we have stated are no mere technical reasons. As the argument proceeded it became increasingly apparent to us that it was really impossible to evolve *in vacuo* and without evidence as to the particular documents in question in this particular case any general formula adequately defining the more restricted obligation as to the production of documents which the bank would have us substitute for the obligation imposed by the order under appeal. Counsel for the bank told us he made no distinction between documents proper to be delivered up by the bank and documents proper to be retained by the bank subject to the right of inspection and taking copies. He objected equally to both courses as regards all documents for which exemption was claimed. The practical difficulty with regard to documents common to this and other matters (*i.e.*, books containing information relating to other trusts besides the testator's estate) was met by counsel for the plaintiffs conceding (as was obviously right) that under the order as it stood he could not claim more than a right to the inspection and taking copies of the relevant parts of documents

of this description. Save in cases of this sort we understood it to be a matter of indifference to the bank whether the documents for which exemption was claimed were delivered up or produced for inspection, both courses being equally objectionable from the bank's point of view. In what follows, therefore, we need not trouble with this distinction, and will use the word "production" as a neutral term equally applicable to delivery up or to inspection.

Counsel for the bank did not maintain before us the contention originally advanced in the notice of appeal that production should be limited to documents actually belonging to the estate of the testator, and, indeed, it became apparent that this restriction clearly could not be justified as it would make production by a retiring trustee to his successor of information essential to the execution of the trust depend on whether the physical property in the book or other document in which it was recorded belonged to the trust estate or to the retiring trustee. For this restriction counsel invited us to substitute a qualification to the effect that the documents to be produced should have been brought into existence by or come into the possession of the bank in its capacity as administrator *pendente lite* or executor of the testator's estate. This limitation at first sight has little significance, for, if an administrator or executor receives or himself creates a document relating to the administration of the estate, it is difficult to see how he can be said to have done either of those things in any capacity other than that of administrator or executor. Significance is, however, claimed for it in the present case by reason of the peculiar position of a trust corporation as distinct from an ordinary trustee, and, in particular, of a trust corporation which, like the bank in this case, combines the character of personal representative or trustee and that of banker to the estate or trust.

In substance two points were made by counsel for the bank, the first on the special position of a trust corporation and the second on the dual capacity of a trust corporation acting also as banker to an estate or trust of which it is personal representative or trustee. His first point was that whereas a natural trustee reflects in his own mind on matters arising in the execution of his trust and reaches from time to time decisions leading to action, a corporate trustee perforce performs the equivalent of a natural trustee's mental deliberations by means of internal memoranda and correspondence passing between its various officials and departments, leading in due course to the appropriate action or decision. From this he adduced the general proposition that the internal memoranda and correspondence of a corporate trustee should be exempt from production because they are equivalent to the private thoughts and deliberations of a natural trustee which are incapable of production because never reduced to writing. We are unable to accept this as a general proposition. If a natural executor or trustee does, in fact, reduce his deliberations to writing, as, for instance, by recording them in a diary relating to the administration of the estate or trust, we see no reason in principle why he should not be required to produce it to his successor in office. Another example may be found in the case of two or more natural trustees who record their deliberations in minutes of trustees' meetings. Here, again, we see no reason in principle why the advantage of production and perusal of such minutes should be withheld from their successors in office. Unless it can be shown that records such as these, if kept by natural trustees, would necessarily be exempt from production—and as at present advised we see no sufficient ground for this view—we find it impossible to accept the general proposition that the internal correspondence and memoranda of a corporate trustee must as such necessarily be so exempt. Indeed, counsel found himself in the end unable to maintain this general proposition. Examples were put such as that of a corporate trustee with its own legal department and of inter-departmental correspondence resulting in advice on some point of law arising in the administration of the trust being received by the trustee department from the legal department. Counsel, in effect, agreed that correspondence such as this ought to be produced, just as

production was ordered of the case submitted to counsel and his opinion thereon in *Talbot v. Marshfield* (1).

In its final form counsel's submission came in substance to this, that while he could not claim that all internal or inter-departmental correspondence and memoranda were as such necessarily exempt from production, there must be many such documents which ought to be exempted as obsolete or of insufficient materiality. This submission he sought to embody in his revised form of order in the words:

"And excluding also any inter-office correspondence, memoranda, or other documents brought into existence by the defendants in the ordinary course of the defendants' business as a trust corporation, the production of which would not assist the plaintiffs in the discharge of their duties as administrators of the estate."

This brings the matter down to a consideration of each individual document of the general description mentioned on its own merits. If such a document relates to the administration of the testator's estate and no more than that is known about it, then, at all events, it is potentially a document which would or might assist the plaintiffs in the administration of the estate. Whether it would in fact do so or not must depend on its actual contents, and of that question, *prima facie*, the plaintiffs, whose duty it is to carry on the administration, would be the best judges, and obviously they could only form an opinion by looking at the document itself. They would, moreover, have to see it for the purpose of conducting their side of any argument about its production which might ensue before the master. Accordingly, there seems to us from a practical point of view to be little, if any, substance in the partial and imprecisely defined exemption of internal correspondence and memoranda finally propounded by counsel for the bank.

The second point raised by counsel for the bank concerned, as we have said, the dual capacity of the bank as personal representative and as banker to the estate. As appears from his proposed form or order, he invited us to exclude "any books or documents kept or brought into being by the defendants as bankers of the said estate." As to this point, it seems to us that, while an investigation of the system of book-keeping used by the bank in cases in which it acts both as banker and trustee might justify the drawing of a line at some point between mere banking books or documents, on the one hand, and trust books or documents, on the other, the complete absence of evidence on the subject would make it impossible for us to vary the order by inserting a general exception of the kind suggested, even if it was otherwise open to the bank, having regard to the previous course of the proceedings, to claim such a variation, as, in our view, it is not. We should, perhaps, add that where a trust corporation fills the double capacity of trustee and banker its successors in the trust should, at all events, be in no worse position as regards the obtaining of information with respect to the trust bank account than they would have been in if a third party had been the banker.

We have said enough to show that the bank's proposed exceptions from and modifications of the order for delivery up of documents as made by the learned judge are at least open to criticism, but nothing we have said is to be taken as prejudging any case in which comparable questions may be raised on adequate evidence as to the nature of the particular documents of which production is disputed or as implying any decision as to the possibly more restricted form of order which it might have been proper for the learned judge to make in the present case, if the points now taken before us had been raised by the pleadings, and argued before him on adequate evidence.

Appeal dismissed.

Solicitors: *Reed & Reed* (for the defendant bank); *Kennedy Genese & Co.* (for the plaintiffs).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

TRANS TRUST S.P.R.L. v. DANUBIAN TRADING CO., LTD.

[KING'S BENCH DIVISION (McNair, J.), December 10, 11, 12, 13, 1951.]

Damages—Measure of damages—Foreseeable consequences of breach of contract—Sale of goods—Loss of profit—Payment by confirmed letter of credit—Failure to procure confirmation—Knowledge of parties that subject-matter of sale unobtainable by sellers without confirmation.

Under a contract for the sale of goods payment was to be cash against shipping documents from a confirmed letter of credit to be opened by American customers of the buyers, who undertook to cause it to be opened and confirmed forthwith. It was known to both parties that the sellers had an option to buy the goods from a Belgian firm and that neither sellers nor buyers were in a financial position to provide the Belgian francs required to obtain delivery of the goods unless the letter of credit was made available by the American customers. In breach of the contract the buyers did not cause the letter of credit to be opened or confirmed and the contract was not executed.

HELD: (i) the rule that damages for failure to pay money were restricted to the interest thereon must be strictly limited to cases falling within it and did not apply to failure to procure the provision of a letter of credit.

(ii) the impecuniosity of the sellers and the loss of profit resulting from their consequential inability to obtain delivery of the goods in the event of a breach of the contract being within the reasonable contemplation of the parties, the sellers were entitled to damages on the basis of that loss of profit.

Dictum of LORD WRIGHT in Monarch S.S. Co., Ltd. v. Karlshamns Oljefabriker (A.B.) ([1949] 1 All E.R. 14), applied.

AS TO REMOTENESS OF DAMAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 103-109, paras. 130-136; and FOR CASES, see DIGEST, Vol. 17, pp. 95-99, Nos. 108-141.

Cases referred to:

- (1) *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 2nd Digest Supp.
- (2) *Prehn v. Royal Bank of Liverpool*, (1870), L.R. 5 Exch. 92; 39 L.J.Ex. 41; 21 L.T. 830; 17 Digest 78, 3.
- (3) *Wallis v. Smith*, (1882), 21 Ch.D. 243; 52 L.J.Ch. 145; 47 L.T. 389; 17 Digest 79, 12.
- (4) *Re English Bank of the River Plate. Ex p. Bank of Brazil*, [1893] 2 Ch. 438; 62 L.J.Ch. 578; 69 L.T. 14; 10 Digest 932, 6383.
- (5) *Liesbosch, Dredger v. Edison S.S.*, [1933] A.C. 449; 102 L.J.P. 73; *sub nom. The Edison*, 149 L.T. 49; Digest Supp.
- (6) *Monarch S.S. Co., Ltd. v. Karlshamns Oljefabriker (A.B.)*, [1949] 1 All E.R. 1; [1949] A.C. 196; [1949] L.J.R. 772; 2nd Digest Supp.
- (7) *Muhammad Issa el Sheikh Ahmad v. Ali*, [1947] A.C. 414; [1948] L.J.R. 455; 2nd Digest Supp.
- (8) *Household Machines, Ltd. v. Cosmos Exporters, Ltd.*, [1946] 2 All E.R. 622; [1947] K.B. 217; [1947] L.J.R. 578; 176 L.T. 49; 2nd Digest Supp.
- (9) *Panoutsos v. Raymond Hadley Corp. of New York*, [1917] 2 K.B. 473; 86 L.J.K.B. 1325; 117 L.T. 330; 12 Digest 434, 3516.
- (10) *Charles Rickards, Ltd. v. Oppenheim*, [1950] 1 All E.R. 420; [1950] 1 K.B. 616; 2nd Digest Supp.

ACTION by sellers for damages for breach of a contract, entered into in September, 1950, for the purchase by the buyers of one thousand tons of hot rolled steel sheets and for a declaration.

The sellers alleged that payment for the goods was to be cash against shipping documents from a confirmed letter of credit to be opened by an American company to whom the buyers had re-sold, or were proposing to re-sell, the goods, such credit to be provided at the Krediet Bank in Brussels in favour of Messrs. S. A. Azur, of Brussels, from whom the sellers had an option to buy the goods. They alleged further that it was a term and condition of the contract that the buyers would cause the letter of credit to be opened and confirmed forthwith, and that it was not opened or confirmed, and that, in breach of the contract, by a letter dated Oct. 16, 1950, the buyers finally refused to take any steps to have the letter of credit provided. The sellers claimed as damages the loss of profit represented by the difference between the price at which they had bought the goods and the price which they would have received if the contract had been performed. They asked also for a declaration that they were entitled to be indemnified against any damages for which they might be held liable to the firm from whom they had the option to buy the goods. The buyers, who carried on business in London as general merchants and commission agents, denied that the agreement was ever concluded and submitted that it was at all times conditional on a letter of credit being provided by their American customers, which had not been provided. They contended further that their breach, if any, was merely a failure to pay money, that the damages recoverable were limited to interest on this money, and that the sellers' loss of profit was due to their own impecuniosity and did not represent the damages recoverable.

Mocatta, K.C., and *T. G. Roche* for the sellers.

Winn for the buyers.

McNAIR, J., stated the facts, found that there had been a completed contract as alleged by the sellers and that, by their letter of Oct. 16, 1950, the buyers had committed a breach of their obligations under it, and continued: I have now to deal with the question of damages. The first head of claim is for £3,214 5s. 8d., which is alleged to be loss of profit which the sellers suffered, being the difference between the price of 7,555 Belgian francs a ton at which they bought from Messrs. S. A. Azur and the contract price of 8,025 francs per ton which they would have received had the contract been performed. In support of this claim counsel for the sellers relied on the statement of principle by *ASQUITH, L.J.*, in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (1) ([1949] 1 All E.R. 1002, 1003). I need not read the passage in full, but, on the basis of the statement of the principle there, counsel submitted that, in as much as it was common ground between the parties that neither the sellers nor the buyers were in a financial position to provide the necessary Belgian francs which would be required to obtain delivery of the steel unless the letter of credit was made available by the American company, it must have been within the reasonable contemplation of the parties that failure by the buyers to procure provision of this letter of credit would necessarily result in the sellers being unable to complete the purchase of the steel from Messrs. Azur, and, accordingly, would necessarily cause them a loss at least equivalent to their loss of profit on the transaction with the buyers. In my judgment, the evidence clearly established the facts necessary to support this submission, if it be legally sound. It was established that at all material times the market value of the steel, in the hands of anyone in a financial position to obtain it from the suppliers, was in excess of the contract price as between the sellers and the buyers, but it was also established that both the sellers and the buyers knew that neither of them was in a position to put up the necessary Belgian francs to satisfy their purchase obligations unless the American buyers made the money available through their letter of credit. Accordingly, it would be within the reasonable contemplation of both of them that failure to put up the letter of credit would mean that the contract could not be executed.

On behalf of the buyers it was submitted, first, that their breach, if any, was merely failure to pay the money, and that, in general, the damages recoverable on a failure to pay money are limited to interest on that money: see MAYNE ON DAMAGES, 11th ed., p. 18; *Prehn v. Royal Bank of Liverpool* (2); *Wallis v. Smith* (3); *Re English Bank of the River Plate. Ex p. Bank of Brazil* (4). They said, secondly, that the sellers' loss of profit was caused by their own impecuniosity, and reliance in this connection was placed on the speech of LORD WRIGHT in *Liesbosch, Dredger v. Edison S.S.* (5) ([1933] A.C. 456).

As to the first submission, in my judgment, the special rule which restricts the damages ordinarily recoverable for failure to pay money, which, as SIR GEORGE JESSEL, M.R., said in *Wallis v. Smith* (3) (21 Ch.D. 257), was not consistent with reason, should be strictly limited to cases falling within the rule and has no application to the facts of this case. The breach here was failure to procure the provision of a letter of credit. This seems to me to be essentially different from the mere failure to pay money on a due date, notwithstanding that, if provided, the money would ultimately result.

As to the second submission, it is, in my judgment, a question of fact whether or not in a particular case the impecuniosity of the party claiming to have suffered the loss, and the loss resulting from such impecuniosity, can be said to have been within the reasonable contemplation of the parties: see the speech of LORD WRIGHT in *Monarch S.S. Co., Ltd. v. Karlshamns Oljefabriker (A.B.)* (6) ([1949] 1 All E.R. 14):

"Again, in *Liesbosch, Dredger v. Edison S.S.* (5) this House made some observations on the measure of damages, which are of general import. The case was one of tort. The question there was what was the proper sum to award by way of compensation for the loss of a dredger. LORD WRIGHT said ([1933] A.C. 464): 'Many, varied and complex are the types of vessels and the modes of employment in which their owners may use them. Hence the difficulties constantly felt in defining rules as to the measure of damages. I think it impossible to lay down any universal formula.' Earlier in his speech LORD WRIGHT said (*ibid.*, 463): '... the dominant rule of law is the principle of *restitutio in integrum*, and subsidiary rules can only be justified if they give effect to that rule.' In the *Liesbosch* (5) case it was held that loss due to the party's impecuniosity was too remote, and, therefore, to be neglected in the calculation of damages. It was special loss due to his financial position. A different conclusion was arrived at in *Muhammad Issa el Sheikh Ahmad v. Ali* (7) where damages consequent on impecuniosity were held not too remote, because, as I understand, the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from breach of the obligation undertaken: see the judgment of the Judicial Committee delivered by LORD UTHWATT ([1947] A.C. 427). The difference in result did not depend on the differences (if any) between contract and tort in this connection."

Here I have reached the conclusion, on the facts of this case, that the loss of profit claimed by the sellers is not too remote although consequent on the sellers' impecuniosity because the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from the breach of the obligation undertaken by the buyers. To adopt the language of LORD DU PARCQ in the *Monarch* case (6) ([1949] 1 All E.R. 19):

"Any jury of business men would, I believe, have received such a direction with dismay, and acted on it with reluctance. It would, indeed, as it seems to me, result in manifest injustice."

The direction there referred to was such a direction as counsel for the buyers submits the jury should have received here. Counsel for the sellers also submitted that the sellers are entitled to a declaration that they are entitled to be

indemnified against any damages which might be recoverable against them by Messrs. Azur. I was referred in this connection to the case of *Household Machines, Ltd. v. Cosmos Exporters, Ltd.* (8) in which LEWIS, J., made a declaration to that effect. Except that I accept the criticism made by counsel for the buyers that the declaration in that case was unduly wide and should be modified by the omission of the words, "and/or which may reasonably be paid in respect of the discharge of their legal liability," I consider that the sellers are entitled to the declaration claimed, and, accordingly, there will be judgment for the sellers.

Judgment for the plaintiffs.

Solicitors: *Hardman, Phillips & Mann* (for the plaintiffs); *A. & G. Tooth* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WILKIE v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Donovan, J. (sitting as an additional judge of the Division)), December 11, 12, 1951.]

Income Tax—Residence in United Kingdom—Six months in year of assessment—Calendar, not lunar, months—Fractions of days to be counted in hours—Income Tax Act, 1918 (c. 40), sched. D, Miscellaneous Rules, r. 2.

The taxpayer came to the United Kingdom for a temporary purpose only, and not with any view or intent of establishing his residence therein. He arrived at about 2 p.m. on June 2, 1947, and left at about 10 a.m. on Dec. 2, 1947. On the question whether he was chargeable to tax on income from foreign possessions in respect of the year 1947-48 (in which there were 366 days) as being actually resident in the United Kingdom for a period equal in the whole to six months in that year of assessment within r. 2 of the Miscellaneous Rules applicable to sched. D to the Income Tax Act, 1918.

HELD: (i) "six months" in r. 2 meant six calendar months and not six lunar months.

(ii) to ascertain whether a taxpayer had been actually resident in the United Kingdom for a period equal in the whole to six months within r. 2, the number of days during which he had been actually resident, whether continuous or discontinuous, should be added up to see whether their total equalled the number of days in one half of the particular year of assessment.

(iii) where fractions of a day entered into the computation of the six-months period, they must be taken into account in hours of actual presence.

(iv) accordingly the taxpayer having been resident in the United Kingdom for 182 days, 20 hours, had not been so resident for a period equal in the whole to six months in the year of assessment.

AS TO LUNAR AND CALENDAR MONTHS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 120-122, paras. 171-176; and FOR CASES, see DIGEST, Vol. 42, pp. 930-933, Nos. 13-67.

Cases referred to:

- (1) *Re North. Ex p. Hasluck*, [1895] 2 Q.B. 264; 64 L.J.Q.B. 694; 59 J.P. 724; *sub nom. Re North. Ex p. Parkinson*, 72 L.T. 854; 42 Digest 946, 189.
- (2) *Lester v. Garland*, (1808), 15 Ves. 248; 33 E.R. 748; 42 Digest 947, 203.

CASE STATED by the Special Commissioners of Income Tax.

The question for determination by the Special Commissioners was whether the taxpayer had resided in the United Kingdom for six months in the year of

assessment 1947-48, so as to make him chargeable to income tax under sched. D on income from possessions out of the United Kingdom under the Miscellaneous Rules applicable to sched. D, r. 2. The taxpayer was of Scottish origin and domicil, and had various connections with Scotland. He arrived in England from India at about 2 p.m. on June 2, 1947. Of the next twenty-six weeks he spent eight or nine in Scotland and the remainder in England and Wales, and he left England to return to India at about 10 a.m. on Dec. 2, 1947, his departure having been delayed for two days through compulsory cancellation by the air line of his earlier departure reservation.

Before the Special Commissioners the taxpayer contended that, according to both English and Scottish law (and, if not according to English law, then according to Scottish law, which should be applied) the day of arrival should be excluded in computing the six-months period, which would, therefore, not expire until midnight on Dec. 2, 1947, by which time he had left England. Alternatively, he contended that, since the latter part of his stay was against his will and through circumstances over which he had no control, that period should be excluded. The Crown contended (i) that there was an established rule of law in both England and Scotland that fractions of a day counted as a whole day, and that by reason thereof both the day of arrival and the day of departure should be included in computing the period, and (ii) that the fact that the taxpayer's stay in the United Kingdom was prolonged through circumstances beyond his control was immaterial.

The Special Commissioners took the view that on the facts the taxpayer was in England for temporary purposes only, spent the greater part of his time in England, and departed from England, and that there was a presumption, which the evidence of domicil and Scottish connections was insufficient to displace, that English law was to be applied in computing the length of his stay. They found that the taxpayer's stay was to be deemed to have commenced from the first moment of the day of arrival, and that, therefore, the six-months period expired at the last moment of Dec. 1, when the taxpayer was still in the United Kingdom, and that, accordingly, he actually resided in the United Kingdom for a period of six months in the year of assessment 1947-48. Before the court the taxpayer abandoned both the contentions he advanced before the Special Commissioners, and contended instead that the length of stay should be computed in hours. The Crown repeated their contention that fractions of a day should count as a day, and in addition contended that "six months" in r. 2 of the Miscellaneous Rules applicable to sched. D meant six lunar months.

Pennycuik, K.C., and *Bowe* for the taxpayer.

The Solicitor-General (Sir Reginald Manningham-Buller, K.C.) and *R. P. Hills* for the Crown.

DONOVAN, J., stated the facts and the contentions of the parties before the Special Commissioners and continued: In this court the Crown also advanced a new and more radical contention. They said that the expression "six months" in r. 2 of the Miscellaneous Rules applicable to sched. D to the Income Tax Act, 1918, meant six lunar months. A lunar month is twenty-eight days, and six lunar months, therefore, comprise 168 days. The taxpayer was admittedly actually resident in the United Kingdom for more than this number of days in 1947-48, and, therefore, it is said, he is taxable. If this interpretation of "six months" be right, there is an end of this case, and I, therefore, proceed at once to consider it. The argument runs thus. Rule 2 is a reproduction of s. 39 of the Income Tax Act, 1842. In 1842 the word "month," when used in a statute, meant, in the absence of a special definition to the contrary, a lunar month: see the authorities cited in *STROUD'S JUDICIAL DICTIONARY*, 2nd ed., at p. 1224. The Interpretation Act, 1889, by s. 3, provides that in all Acts passed since 1850 "month" means calendar month unless the contrary intention appears. The contrary intention does appear in the present Income Tax Act

passed in 1918, for the legislature cannot have intended to alter r. 2 so as to change the meaning of "six months" in that rule from lunar into calendar months, for that would make the rule unworkable.

Before dealing with this argument, I had better explain why the Crown alleges that r. 2 would be unworkable if "six months" be construed as six calendar months. The rule prescribes as one condition for exemption from tax that the person involved

"has not actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment."

So that where a person was actually resident here intermittently in the year of assessment, you must necessarily find out how many days he was here and add up the number and see if "in the whole" they equal the number of days in six months. You can do that, says the Crown, by treating "month" as meaning simply twenty-eight days, *i.e.*, a lunar month. You cannot do it by treating the word as meaning calendar month. For example, suppose a person is here for fifteen days in May, fifteen days in June and fifteen days in July, how many calendar months is that, seeing that a calendar month may be twenty-eight, twenty-nine, thirty, or thirty-one days according to which month you choose and whether or not it is leap year? Therefore, starting with the proposition that before 1850 "month" in a statute meant lunar month, which makes the rule workable, it must be assumed that in 1918 the legislature did not intend to make it unworkable. Six months, therefore, it is urged, still means six lunar months. I am not prepared to accept the initial premise on which this argument is based, for, if six months in the Act of 1842 meant six lunar months, there was no need for the legislature to deal with the case of an intermittent actual residence in the way it did. It dealt with that case by enacting that a person should not be charged who had not "actually resided in the United Kingdom at one time or several times for a period equal in the whole to six months in any year of assessment." But if "month" meant "lunar month," then, since "lunar month" simply means twenty-eight days, all that the legislature needed to do, to cover both continuous and intermittent actual residence, was to say, "who has not actually resided in the United Kingdom for six months in the year of assessment." Then you could add up the days of residence simply to find out whether they totalled six times twenty-eight, namely, 168 days. Moreover, I see no rational purpose behind a provision that the months shall be lunar months. When one is determining how long a foreigner or a Briton from abroad should be allowed to stay in the United Kingdom before contributing, through income tax, to the expenses of the State, there is at least something intelligible, if arbitrary, about selecting one-half of the fiscal year. But to tax him because he has been here for 168 days out of 365 is unintelligible and merely whimsical. In any event, if the Crown's initial premise were correct, I think the Interpretation Act involves that "six months" in r. 2 now means six calendar months, for I reject the view that a contrary intention can be read into the Income Tax Act, 1918, for the reasons suggested by the Crown inasmuch as I hope to show that the rule does not become unworkable by construing "six months" as six calendar months.

If that be the right construction of the term, then this much at least is common ground—it is right to apply the rule by adding up the number of days a person has been actually resident in order to see whether those days, whether continuous or discontinuous, equal the number of days in six calendar months.

But what is one to do about fractions of a day, for a person's stay will almost always begin and end with a fraction of a day? There are these alternatives: (i) To disregard altogether the day of arrival and to treat the day of departure as a whole day. Such a proceeding is, in my view, more appropriate where the words prescribing the period are words such as "so many days from a particular

event." The expression I have to construe is simply "for a period equal to . . . six months." (ii) To include the day of arrival as a whole day and to ignore the day of departure. For such a test I see no justification here. (iii) To ignore both the day of arrival and the day of departure altogether. This, however, is appropriate, in my view, only when the expression to be construed is "so many clear days," or words to that effect. (iv) To treat both the day of arrival and the day of departure as whole days. It is for this latter method that the Crown contend, and this whether "six months" means six lunar or six calendar months. Applying it to the present case, the result is, they say, as follows. The taxpayer was here from June 2 to Dec. 2, 1947. On June 2 and on Dec. 2 he was here for part of the day. Treat each of those days as a full day of actual residence on the part of the taxpayer. On this basis he was here for 184 days, which is over one-half of 1947-48, which, as I have said, comprised 366 days, so he was here for six months in the year of assessment and is taxable.

To determine whether this is the right approach to the problem, I think it is desirable to bear in mind the precise circumstances in which r. 2 comes into operation. First, there is a charge to tax imposed under sched. D by the opening charging words of r. 1 on income arising to any person residing in the United Kingdom from property whether situate in the United Kingdom or elsewhere. Then Miscellaneous Rule, r. 2, provides that a person shall not be charged to tax under sched. D if he proves three things: (i) he is here for a temporary purpose: (ii) he has no intention of establishing his residence here: (iii) he has not actually resided here on and off for six months in the year of assessment. In the present case the first two conditions are admittedly satisfied, and so, when face to face with the Revenue, the taxpayer has to prove, and to prove only, his satisfaction of condition no. (iii). He can do that if he, also, can pray in aid the method of treating fractions of a day as a whole day. For he was actually resident outside the United Kingdom for part of June 2, 1947, and for part of Dec. 2, 1947. Treating each of those days as a full day of actual residence outside the United Kingdom, then he was so resident for more than 183 days, *i.e.*, for more than six months. Therefore, he was not actually resident in the United Kingdom for six months. Why should not the taxpayer, as well as the Crown, invoke the rule about treating fractions of a day as a whole day? Because, says the Crown, what you are really determining under the rule is how long a person is actually resident here and nothing else. I do not accept this. You are also determining how long he has *not* actually resided in the United Kingdom. In the order of events it is the taxpayer who has to prove that first. No doubt, one method of doing this is to prove how long he actually resided in the United Kingdom, but that does not make it right to say that that is the only issue to be decided under the rule. Indeed, if the taxpayer fails to prove that he actually resided outside the United Kingdom for the requisite period, then he does not displace the existing charge to tax, so that the concluding words of the rule beginning, "but if any such person," give the Crown no greater rights to tax than they would have if the words were not there, as the Solicitor-General agreed.

One view of how r. 2 should be construed is, therefore, this. The taxpayer can treat any day for a part of which he was not actually resident in the United Kingdom as being a day for the whole of which he was not so actually resident, *i.e.*, by invoking the rule that fractions of a day count as a whole day. If the result is to show that he was actually resident outside the United Kingdom for a number of days greater than the number of days in six calendar months of the year of assessment in question, then he qualifies for the exemption, and the inquiry need go no further. One need not go on to consider the effect of the concluding words of the rule. This view, I confess, makes a very strong appeal to me. But it does side-step any difficulty that may arise if one takes into account the concluding words of the rule and applies in any given case the same method of treating fractions of a day as a whole day. On the whole, I feel it is better to

face any such difficulty, and to see whether there is any reasonable construction of the rule which will resolve it.

The concluding words of the rule are, "but if any such person resides in the United Kingdom for the aforesaid period he shall be so chargeable for that year." Applying the same rule about fractions of a day, one arrives at the result in this case, as already narrated, that in 1947-48 the taxpayer was actually resident in the United Kingdom for 184 days, *i.e.*, over six months. So that, by applying the rule about fractions of a day one gets the absurdity that the taxpayer is actually resident outside the United Kingdom for more than six months and actually resident inside the United Kingdom for more than six months. In other words, he is both exempt and chargeable under the rule. This absurdity, remarkable even in an Income Tax Act, the Crown seeks to resolve by asserting that really the thing one is seeking to discover under the rule is whether the taxpayer was actually resident in the United Kingdom for six months and seeking to discover nothing else. I have already given my reasons for disagreeing with that view.

The taxpayer says the absurdity can easily be avoided by rejecting the method of treating fractions of a day as a whole day, and he says it would be right to do so on any question arising under r. 2 at any rate. The reasons are these. First, because there is no general rule established in English law that fractions of a day should count as a whole day. The method to be employed in computing time must be determined by the terms of the instrument, be it statute or something else, which requires the computation; see in *Re North. Ex p. Hasluck* (1) ([1895] 2 Q.B. 269) where LORD ESHER, M.R., says:

"I think that this appeal should be dismissed. No general rule exists for the computation of time either under the Bankruptcy Act or any other statute, or, indeed, where time is mentioned in a contract, and the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made. Notwithstanding the elaborate array of authorities which have been cited to us, they seem on being sifted to contain no binding rule to the effect that time must be computed according to a hard and fast rule: that seems clear from the judgment in *Lester v. Garland* (2), in which SIR WILLIAM GRANT, after a learned examination of the whole subject, laid down what I conceive to be the wholesome view that no general rule exists."

Secondly, it is argued that the terms of r. 2 require the period of "actual" residence to be computed, and "actually" means truly and in fact, and is the reverse of notional. If, therefore, the so-called general rule is out of the way, why, in order to determine the actual period that a person is resident outside the United Kingdom or inside it, should you not use in the computation a lower unit of time if it be necessary to do so to arrive at the truth and avoid a fiction? To do that here you should regard complete days of actual residence and actual non-residence and at the hours in the case of days when the taxpayer was here for a part of the day and elsewhere for the rest, and then see whether or not it all adds up to the amount of time that there is in six months. If you do that and express the taxpayer's period of actual residence in this country in hours, you find—as is the truth—that he was here for a less number of hours than there were in six calendar months of 1947-48.

In answer the Crown says that this construction would impose such an undue administrative burden on the Revenue that the legislature could never have intended it. The Revenue officers, they say, would have to discover the exact hours of arrival and departure of the taxpayer, making allowances for summer time here and abroad, and even, perhaps, deciding when the three mile limit of the territorial waters of the United Kingdom was crossed. The argument of undue administrative inconvenience is a legitimate one when considering which of two rival constructions of a statute should be adopted, but it has very little

weight in the present case. For the burden of proving the facts justifying exemption under r. 2 lies on the taxpayer, who has to establish his case for exemption. And the cases where it is necessary to get down to hours in this connexion must be very rare. Rule 2 has been in operation for 109 years at least, and this is the first time that the courts have been asked to construe the words "six months" appearing in it. The reason, no doubt, is that those desiring to obtain the benefit of the rule take care to give themselves a margin of safety, and will continue to do so wherever possible. I do not think, therefore, that the construction contended for by the taxpayer involves any administrative nightmare. On the other hand, that construction has these merits. First, it gives effect to the word "actually." Secondly, it makes the rule entirely workable. Thirdly, it makes the operation of the rule the same in Scotland as in England, and there is some reason, as the Case Stated discloses, at least to suspect that the rule whereby fractions of a day sometimes count as a whole day in England does not prevail in Scotland.

I come to the conclusion that the taxpayer's construction should be upheld, and I declare that when computing the period of six months for the purposes of r. 2 there is nothing in the language of the rule to prevent hours being taken into the computation, but that, on the other hand, since what has to be determined is the period of actual residence, it is legitimate to do so. Several judicial decisions were cited to me on how time has been computed under other statutes for other purposes—for example, what a sentence of six months' imprisonment involves. The result was an interesting hour or two, but, since the present point is free from judicial authority and I can find a solution within the four corners of the rule itself and the argument I have heard on its language, I do not further burden this judgment with a recitation and examination of those cases. The Special Commissioners obviously devoted much time and care to the consideration of the arguments addressed to them, and, since I am reversing their decision, it is only fair that I should record that I do so as a result of contentions which they never had an opportunity of considering.

Appeal allowed.

Solicitors: *May, May & Deacon* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

GULLIVER v. CATT AND OTHERS.

[KING'S BENCH DIVISION (Barry, J.), November 2, 7, 8, December 12, 1951.]

Agriculture—Agricultural holding—Claim by landlord for compensation for breach of covenant—Jurisdiction of court to entertain—Notice to quit given before Mar. 1, 1948—Agricultural Holdings Act, 1923 (c. 9), s. 10—Agriculture Act, 1947 (c. 48), s. 29 (1), s. 44 (1)—Agricultural Holdings Act, 1948 (c. 63), s. 57 (1), s. 70 (1).

On Dec. 16, 1947, the landlord of a farm served on the tenants notice to quit expiring on Sept. 29, 1949. After the expiry of the notice he brought an action against the tenants and obtained judgment for possession. The tenants contended that the court had no jurisdiction to deal with a further claim in the action for damages for breach of a covenant for the repair and maintenance of the holding which, they said, must be determined by arbitration under the Agricultural Holdings Acts.

HELD: (i) the notice to quit had been given before the commencement of the Agriculture Act, 1947 (*i.e.*, Mar. 1, 1948), and when the tenants quitted the holding they would do so in consequence of that notice: *Preston v. Norfolk County Council* ([1947] 2 All E.R. 124), applied; in view of the date of the notice to quit and of the date when the tenants would quit the

holding, under s. 99 of, and sched. VIII to, the Agricultural Holdings Act, 1948, and s. 34 (1) of the Act of 1947 the application of s. 29 (1) of the Act of 1947 was excluded and the landlord's right to compensation was regulated by s. 10 of the Agricultural Holdings Act, 1923, which did not contain any provision postponing the landlord's claim to the tenants' quitting the holding on the termination of the tenancy; therefore, the claim for damages was not a claim arising "on or out of the termination of the tenancy," and the provisions of s. 44 (1) of the Act of 1947 and s. 70 (1) of the Act of 1948, which required such a claim to be determined by arbitration in accordance with those Acts, did not apply.

(ii) s. 70 (1) of the Act of 1948 was a provision "relating to the rights of landlords . . . to compensation" and the "recovery of compensation" within s. 99, and, therefore, the provisions of s. 70 (1) did not apply.

(iii) the provisions of s. 44 (1) of the Act of 1947 were "provisions relating to compensation" within s. 34 (1) of the Act, and, as the tenants would quit the holding in consequence of a notice to quit given before the commencement of the Act, the provisions of s. 44 (1) had no effect.

(iv) therefore, the landlord's rights were regulated by s. 16 (1) of the Act of 1923 and the court had jurisdiction to entertain the claim.

Lowther v. Clifford ([1927] 1 K.B. 130), applied.

FOR THE AGRICULTURE ACT, 1947, s. 34 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 1, p. 589.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 99, see *ibid.*, Vol. 28, p. 97.

Cases referred to:

- (1) *Preston v. Norfolk County Council*, [1947] 2 All E.R. 124; [1947] K.B. 775; [1947] L.J.R. 1301; 177 L.T. 390; 2nd Digest Supp.
- (2) *Lowther v. Clifford*, [1927] 1 K.B. 130; 95 L.J.K.B. 576; 135 L.T. 200; 90 J.P. 113; Digest Supp.
- (3) *Olive v. Paynter*, [1932] 2 K.B. 666; 101 L.J.K.B. 786; 148 L.T. 65; Digest Supp.

ACTION for possession of a house and farm, and (*inter alia*) damages for breach of covenant relating to the repair and maintenance of the premises.

The landlord, the plaintiff in the action, had let the house and farm, Great Worsham, Bexhill-on-Sea, to a Mrs. Ethel Mary Catt on a yearly tenancy commencing on Sept. 29, 1937. After the death of Mrs. Catt the administrators of her estate remained as tenants and continued to farm the holding. On Dec. 16, 1947, the landlord served a valid notice to quit on the tenants, requiring them to deliver up possession of the farm on Sept. 29, 1949. The tenants contended *inter alia* that the court had no jurisdiction to deal with the claim for damages for breach of covenant on the ground that by virtue of the Agriculture Act, 1947, s. 29 (1) and s. 44 (1), and the Agricultural Holdings Act, 1948, s. 57 (1) and s. 70 (1), such a claim could only be adjudicated on by an arbitrator appointed under the Agricultural Holdings Acts. The landlord contended that these sections did not apply because the notice to quit had been given before the commencement of the Act of 1947 (Mar. 1, 1948).

Laskey for the landlord.

Percy Lamb, K.C., and *Widgery* for the tenants.

Cur. adv. vult.

Dec. 12. **BARRY, J.**, read a judgment in which he stated the facts, held that the landlord was entitled to an order for possession, and continued: I must now turn to the second important issue which has been raised in this case. The tenants contend that the court has no jurisdiction to deal with the landlord's claim for damages for breach of covenant either by direct decision or by reference to an official referee or arbitrator under the Rules

of the Supreme Court. A claim of this nature made by the landlord of an agricultural holding against his tenant can, it is said, only be adjudicated on by an arbitrator appointed under the Agricultural Holdings Acts, and is subject to the provisions as to notice and other matters which are contained in those statutes. Counsel for the tenants conceded that, prior to the coming into operation of the Agriculture Act, 1947, there was a number of decisions of the Court of Appeal, binding on me, which established that claims such as the present, which arose out of breaches of the contract of tenancy and were independent of any right to compensation conferred on a landlord or tenant by the Acts themselves, could be heard and determined by the King's courts despite the arbitration provisions of the earlier Acts, and, in particular, those of the Agricultural Holdings Act, 1923. His argument is based on the provisions of the Agricultural Holdings Act, 1948, or, alternatively, the Agriculture Act, 1947, which, in his submission, have altered the law and effectively withdrawn all such cases from the jurisdiction of the courts.

The tenants' arguments can be quite shortly stated. Section 57 (1) of the Act of 1948, which, in matters material to this case, is similar in terms to s. 29 (1) of the Act of 1947, provides that a claim by a landlord for compensation under and in accordance with a written contract of tenancy in respect of the dilapidation or deterioration of, or damage to, the holding may only be made on the tenant quitting the holding on the termination of the tenancy. The tenants say that the present claim is a claim for compensation or damages in respect of the dilapidation or deterioration of, or damage to, the holding, and thus falls within the provisions of one or other of those sections. The claim cannot, therefore, be made until the tenant quits the holding—i.e., until the termination of the tenancy—and, for this reason, says counsel, it becomes a claim which arises on or out of the termination of the tenancy. Section 70 (1) of the Act of 1948 and s. 44 (1) of the Act of 1947 both provide that any claim of whatever nature by the landlord of a holding against his tenant which arises under any agreement and on or out of the termination of the tenancy shall be determined by arbitration either under the Act of 1948, or, in the case of s. 44 (1) of the Act of 1947, under the Agricultural Holdings Act, 1923. Counsel for the tenants contends that the present claim is one which arises under an agreement. The tenancy here expired after Mar. 1, 1948, when the Act of 1947 came into operation, and, therefore, it falls within s. 57 (1) of the Act of 1948 or s. 29 (1) of the Act of 1947. Thus, says counsel, it is brought in the clearest possible terms within the ambit of s. 70 (1) or s. 44 (1) and it must be referred to arbitration under one or other of these sections. The argument proceeds on the basis that nothing in the savings clauses in either the Act of 1947 or that of 1948 can alter this position. Section 44 (5) of the Act of 1947 expressly provides that nothing in s. 54 of the Act of 1923, which contains a general saving for the remedies of a landlord or a tenant, shall be construed as limiting the generality of the provisions of sub-s. (1) of this section. The same object is achieved in the later Act by an amendment to the savings clause itself, namely, s. 101, which is now made subject to the provisions of s. 70 (1) of that Act. The provisions of s. 29 (1) of the Act of 1947 or s. 57 (1) of the Act of 1948, to which I have referred, had no counterpart in s. 10 of the Act of 1923 nor in any of the earlier agricultural legislation. Neither the Act of 1923 nor the earlier Acts postponed claims by the landlord for dilapidation or deterioration of, or damage to, the holding made under a contract of tenancy at the time when the tenant quitted the holding on the termination of the tenancy. Moreover, the savings clauses in the earlier Acts were not qualified as they now are in the Acts of 1947 and 1948. In these circumstances, says counsel for the tenants, the decisions of the Court of Appeal on the interpretation of the Act of 1923 and the earlier Acts can no longer be regarded as correctly stating the law which now applies to tenancies which terminate after Mar. 1, 1948, i.e., the date of commencement of the Act of 1947.

This argument is a formidable one. There may be answers to it, but I think it is unnecessary for me to reach any decision on the merits of the point raised, as I am quite satisfied that the sections of the Acts of 1947 and 1948 on which the whole argument is based do not apply to the present case. Here the notice to quit was given on Dec. 16, 1947, before the commencement of the Agriculture Act, 1947. Having regard to the decision of the Court of Appeal in *Preston v. Norfolk County Council* (1) I think it is clear that the tenants will quit this holding, when they do so, in consequence of that notice, although their departure may be precipitated by the present litigation. If and so far as this is a question of fact, I find without hesitation that their quitting is, or will be, in consequence of that notice.

It thus becomes necessary to consider the application of the Acts of 1947 and 1948 to cases in which the tenant quits the holding after the commencement of those Acts, but in consequence of a notice given before the commencement of the Act of 1947, *i.e.*, before Mar. 1, 1948. I am not unmindful of the argument of counsel for the tenants as to the retrospective effect of procedural enactments, but here, as I see it, I need not—and, indeed, cannot—resort to any general rules of construction, because the answer is to be found in the express provisions of the Acts themselves. Section 99 of the Agricultural Holdings Act, 1948, provides:

“ . . . where the tenant . . . quits . . . after the commencement of this Act in consequence of a notice to quit given . . . before Mar. 1, 1948 . . . the provisions of this Act, so far as relating to the rights of landlords, tenants and occupiers to compensation . . . the payment and recovery of compensation . . . shall not apply, and in lieu thereof the enactments specified in sched. VIII to this Act, so far as relating to the matters aforesaid, shall continue to apply and shall . . . be excepted . . . ”

(from repeal under s. 98). Schedule VIII to the Act of 1948 incorporates a reference to the Agricultural Holdings Act, 1923, and Part III (with one irrelevant exception) of the Agriculture Act, 1947. It is, therefore, necessary to look at the Acts of 1923 and 1947 to ascertain the law applicable to the present claim. When one looks at Part III of the Act of 1947, it will be found to contain a number of sections dealing with compensation—in particular, ss. 22, 29 and 30. To s. 29 I have already referred. Section 34 (1) of the Act of 1947 provides that the provisions relating to compensation in Part III of the Act (and these provisions clearly include s. 29 (1)) shall not have effect if the tenant of a holding quits the holding in consequence of a notice to quit given before the commencement of this Part of the Act, *i.e.*, Mar. 1, 1948. Thus, as I see it, it is clear that s. 29 (1) of the Act of 1947 is not applicable to the landlord's present claim, and his statutory right to compensation is regulated by s. 10 of the Agricultural Holdings Act, 1923.

This section, as I have already indicated, does not postpone the landlord's claim for compensation under a written contract of tenancy to the tenants' quitting the holding on the termination of the tenancy as do s. 29 (1) of the Act of 1947 and s. 57 (1) of the Act of 1948, and thus, as I see it, the basic premise of the tenants' whole argument seems to me to be destroyed. In the absence of any provision postponing the landlord's claim, I can see no ground for holding that an ordinary claim such as this for damages for breach of the repairing and other covenants under a lease is one which arises “on or out of the termination of the tenancy.” Such a claim may be made on the termination of a tenancy or it may be made while the tenancy still continues. The present claim was brought after the notice to quit had expired, but the operative word in the Acts is not “bring,” but “arise,” and I am satisfied that this claim is not one which arises on or out of the termination of the tenancy. Indeed, as I understand it, counsel for the tenants did not seek to establish that it was, except by invoking the aid of the express words of s. 29 (1) of the Act of 1947, or s. 57 (1) of the Act of 1948, neither of which, to my mind, is applicable to the present claim.

Can the tenants obtain assistance from any of the other sections of the Acts of 1947 and 1948 on which counsel relied? I do not think they can. It is, first, necessary to consider whether the arbitration sections in these two Acts apply at all to the present claim. Section 70 (1) of the Act of 1948 is, I think, a provision

“relating to the rights of landlords, tenants and occupiers to compensation” [and] “the payment and recovery of compensation”

within the meaning of s. 99. That is a section relating to the settlement of claims and, I think, relates to the “recovery of compensation.” If I am right in this view, the Act of 1948 can be wholly disregarded and one must turn to the Act of 1947. Can s. 44 (1) of that Act, which is entitled “Provisions as to arbitration,” be properly classed as one of the “provisions relating to compensation” referred to in s. 34 (1) of that Act? On the whole I think it can. The wording of s. 34 (1) is not so clear as that of s. 70 (1) of the Act of 1948, as the phrase “recovery of compensation” is not to be found in s. 34 (1). None the less, even without the assistance of this phrase, I think that the words “provisions relating to compensation” are wide enough to cover the procedural enactments which regulate the recovery of compensation.

In my judgment, therefore, s. 34 (1) expressly excludes the application of s. 44 (1) to the present case, as the tenants will quit the holding in consequence of a notice to quit given before Mar. 1, 1948. If I am right in this view, the landlord's rights are regulated by s. 16 of the Act of 1923, which was the very section interpreted by the Court of Appeal in the cases of *Lowther v. Clifford* (2), *Olive v. Paynter* (3) and *Preston v. Norfolk County Council* (1), to which I have already referred. It is true that in these cases s. 16 was interpreted in the light of s. 54, which was the “savings” section of the Act of 1923. For the purposes of this case, however, there is no material difference between the wording of that section and the savings sections of the two later Acts. The qualification of s. 54 of the Act of 1923, which is to be found in s. 44 (6) of the Act of 1947, cannot be relied on because, as I have already indicated, s. 44 in its entirety is inapplicable to the present claim. Again, the opening words of s. 101 of the Act of 1948, on which counsel for the tenants relied, do not affect the present case, since s. 70 (1) of the same Act, which is therein referred to, is also, in my judgment, wholly inapplicable to this claim. On this construction of the two latter Acts, the landlord's present claim is regulated by enactments substantially identical with those considered by the Court of Appeal in the cases to which I have referred, and I am clearly bound by those authorities, which there is no necessity for me to review.

I do not think that the position is in any way altered if I am wrong in my view that the arbitration sections—viz., s. 70 (1) or s. 44 (1)—of the later Acts do not apply where the tenant quits the holding as a result of a notice to quit given before Mar. 1, 1948. Even if one or other of these sections is applicable, they both refer in terms to claims which arise “on or out of the termination of the tenancy.” I have already indicated that without the aid of s. 29 (1) of the Act of 1947 or s. 57 (1) of the Act of 1948 the landlord's present claim cannot be said to fall within this category. Thus, in my judgment, the landlord is entitled to pursue his claim for damages for breach of covenant in the ordinary courts.

Judgment for the landlord for possession and mesne profits. Claim for damages referred to an Official Referee.

Solicitors: *Edwin Coe & Calder Woods*, agents for *Tomkins & Bowes*, Bexhill-on-Sea (for the landlord); *Blyth, Dutton, Wright & Bennett*, agents for *Menneer, Idle & Brackett*, St. Leonards-on-Sea (for the tenants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re LUCAS (*deceased*). BENNETT AND ANOTHER *v.* LUCAS
AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), December 7, 1951.]

Affidavit—Evidence by affidavit—Cross-examination of deponent—Service of notice—Deponent out of jurisdiction—R.S.C., Ord. 38, r. 28.

Under R.S.C., Ord. 38, r. 28, when evidence is taken by affidavit any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve on the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination at the trial. That notice may be served notwithstanding that the deponent is out of the jurisdiction, and if the deponent is produced his affidavit shall not be used as evidence save by special leave of the court or a judge.

AS TO TRIAL ON AFFIDAVITS AND CROSS-EXAMINATION OF DEPONENTS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 782-785, paras. 859-862; and FOR CASES, see DIGEST, Vol. 22, pp. 523-526, Nos. 5583-5614.

ADJOURNED SUMMONS to determine, *inter alia*, whether the plaintiffs, as the personal representatives of Oliver Lucas deceased, ought to admit or reject or how otherwise deal with the claim of the defendant, Lily Adelaide Lucas, the widow of the deceased, to have been the absolute owner of a herd of Ayrshire cattle which, at the death of the deceased, was kept on his property.

At all material times this defendant was living in the Bahamas. The defendants in the opposing interest served a notice under R.S.C., Ord. 38, r. 28, requesting her production in order that she might be cross-examined on her affidavit evidence.

R. R. A. Walker for the plaintiffs, the personal representatives.

Bathurst for the first defendant, Lily Adelaide Lucas.

Lionel Edwards for the second and third defendants, other beneficiaries under the deceased's will.

ROXBURGH, J.: The defendant, Mrs. Lucas, is the widow of the testator, Oliver Lucas, and she claims ownership of a herd of Ayrshire cattle (or the proceeds of sale thereof) which was on property belonging to the testator at the time of his death. In those circumstances counsel for the executors and trustees took out a summons asking whether the plaintiffs ought

“to admit or reject or how otherwise deal with the claim of the defendant [Mrs. Lucas] to have been absolute owner of a herd of Ayrshire cattle known as the Morton Bagot herd which, at the death of the above named deceased, was kept on his property, Morton Bagot Manor and neighbouring lands.”

That is the only form of question which can properly be asked by originating summons in this type of case, but the adverse claimant often submits to have the actual claim dealt with on the originating summons. The defendant, Mrs. Lucas, has done so in this case.

Mrs. Lucas is resident in the Bahamas. On Aug. 2, 1950, she filed an affidavit and on Mar. 13, 1951, the other two defendants to the application served notice under R.S.C., Ord. 38, r. 28, requesting her production for cross-examination. Order 38, r. 28, provides:

“When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed, a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the

expiration of fourteen days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge."

I am told that Mrs. Lucas was in the Bahamas at the date of the service of the notice under that rule and is there today, and I am proceeding on that footing.

There has been a long-standing question whether this rule applies to a deponent who is outside the jurisdiction. I cannot see why it should not apply. It is not a rule providing for the service of a notice on the deponent; it provides for the service of a notice on the party by whom the affidavit has been filed. The rule is not absolute, because it says:

" . . . unless [the] deponent is produced . . . , his affidavit shall not be used as evidence unless by the special leave of the court or a judge."

In the case of a deponent who is outside the jurisdiction, it is plain to me that the judge would give special leave if he were satisfied that the attendance of the witness was wholly unnecessary. If, on the other hand, the judge thought that his cross-examination was desirable, he would consider whether in the circumstances it was reasonable or necessary to bring him to this country for cross-examination, and he would act accordingly. In some cases he might think it imperative that the witness should come if his evidence was to be used at all, but in many, perhaps in most, cases the judge would probably prefer to have the cross-examination conducted in the country where the witness was to be found and so save the witness the expense of coming to England. But all these matters are matters of discretion which, by the terms of the rule itself, are left to the judge.

I cannot see why the rule should not be applied to a deponent who happens to be outside the jurisdiction. There is certainly no qualification in the rule to that effect. Therefore, in my judgment, as the field is entirely open, I decide that Ord. 38, r. 28, does apply to a deponent who happens to be outside the jurisdiction.

Solicitors: *Powell, Skues & Graham Smith*, agents for *S. J. Grey & Willcox*, Birmingham (for the plaintiffs); *Ashurst, Morris Crisp & Co.* (for the first defendant); *Lewis & Lewis and Gisborne & Co.* (for the second and third defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

JACKSON v. JOHN DICKINSON & CO. (BOLTON), LTD.

[COURT OF APPEAL (Somervell and Jenkins, L.JJ.), December 14, 1951.]

Legal Aid—Costs—Security for costs—Plaintiff assisted person resident out of jurisdiction—Legal Aid and Advice Act, 1949 (c. 51), s. 1 (7) (b).

The plaintiff, who was ordinarily resident abroad, claimed as an assisted person damages for personal injuries. The defendants having applied for an order for security for costs,

HELD: the plaintiff being resident out of the jurisdiction, the fact that he was an assisted person did not disentitle the defendants to an order for security.

Conway v. George Wimpey & Co., Ltd. ([1951] 1 All E.R. 56), distinguished.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 1 (7) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 534.

Cases referred to:

(1) *Re Percy & Kelly Nickel, Cobalt, & Chrome Iron Mining Co.*, (1876), 2 Ch.D. 531; 45 L.J.Ch. 526; 10 Digest 862, 5813.

(2) *Conway v. George Wimpey & Co., Ltd.*, [1951] 1 All E.R. 56.

(3) *Willé v. St. John*, [1910] 1 Ch. 701; 79 L.J.Ch. 239; 102 L.T. 383; 42 Digest 258, 2919.

(4) *Crozat v. Brogden*, [1894] 2 Q.B. 30; 63 L.J.Q.B. 325; 70 L.T. 522; 40 Digest 433, 546.

(5) *Burton v. Holdsworth*, [1951] 2 All E.R. 381; [1951] 2 K.B. 703.

INTERLOCUTORY APPEAL of the defendants from an order of Mr. Commissioner GOODMAN ROBERTS, K.C., dated Nov. 29, 1951, reversing an order of the district registrar that the plaintiff should give security for costs.

The plaintiff, who was ordinarily resident in Dublin, claimed damages as an assisted person for personal injuries sustained by him while he was in the employment of the defendants. The defendants contended that, until the regulations referred to in s. 12 (1) (b) (ii) of the Legal Aid and Advice Act, 1949, had been made, in view of the provisions of s. 1 (7) (b) of that Act, they were entitled to security for costs. The plaintiff contended that the case was covered by *Conway v. George Wimpey & Co., Ltd.* (2), and that, as an assisted person, he could not be ordered to give security.

Marven Everett for the defendants.

P. C. M. Curtis-Bennett for the plaintiff.

SOMERVELL, L.J.: This is an appeal from a decision of Mr. Commissioner GOODMAN ROBERTS, K.C., allowing an appeal from an order of the district registrar that the plaintiff, who was claiming damages for personal injuries and was out of the jurisdiction, should lodge in court a sum of £25 by way of security for costs. The appeal raises the question whether security can properly be ordered, the plaintiff having become an assisted person under the Legal Aid and Advice Act, 1949.

The general rule as to security is contained in R.S.C., Ord. 65, r. 6, which provides:

"In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such times, and in such manner and form, as the court or a judge shall direct."

In the ANNUAL PRACTICE, 1950, there are notes which summarise the various principles which have been laid down by the courts as to the cases in which security may be ordered. The first note is headed "Residence Abroad," and states (p. 1445):

"The ordinary ground on which security is ordered is residence abroad . . . , and, subject to the exceptions hereinafter mentioned, the rule is inflexible"

in *Re Percy & Kelly Nickel, Cobalt, & Chrome Iron Mining Co.* (1), where it was held that a shareholder of a company who resides out of the jurisdiction and appears to oppose a petition for winding-up the company cannot be required to give security for costs, SIR GEORGE JESSEL, M.R., stated the principles applicable to persons residing abroad. He said (2 Ch.D. 531):

"The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the court compelled to give security for costs. That is a perfectly well-established and a perfectly reasonable principle . . ."

There is an exception to that rule when it can be shown that there is property in this country against which execution could be levied. Although the principle is to be found in the cases and not in the rules, it is clearly recognised by R.S.C., Ord. 65, r. 6A, which provides that

"A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction."

The plaintiff became an assisted person by virtue of the provisions of the Legal Aid and Advice Act, 1949, s. 1 (7) of which provides:

"Save as expressly provided by this Part of this Act or by regulations made thereunder . . . (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

Section 2 (2) provides:

"Where a person receives legal aid in connection with any proceedings . . . (e) his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute."

That provision plainly supersedes in respect of assisted persons the ordinary rule (with certain exceptions) that an unsuccessful party has to pay the taxed costs. Section 12 provides:

"(1) The Lord Chancellor may make such regulations as appear to him necessary or desirable for giving effect to this Part of this Act or for preventing abuses thereof. (2) Without prejudice to the foregoing sub-section or any other provision of this Act authorising the making of regulations, regulations may . . . (b) regulate the procedure of any court or tribunal in relation to legal aid, and in particular make provision . . . (ii) as to the cases in which and extent to which a person receiving legal aid may be required to give security for costs, and the manner in which it may be given . . ."

We are told that no regulations have so far been made under that power or under any other power affecting the issue which is now before us.

In *Conway v. George Wimpey & Co., Ltd.* (2), on Nov. 6, 1950, an order for security for costs was made against the plaintiff who was then not an assisted person. On Nov. 16, 1950, he became an assisted person, an emergency certificate being granted him, and it was held that until the regulations envisaged by s. 12 (2) (b) (ii) of the Act of 1949 were made, in the absence of special circumstances an order for security for costs should not be made against an assisted person, and, therefore, the order which had been made would be discharged. The security in that case was in respect of an appeal to this court and was applied for under Ord. 58, r. 15, the last three lines of which provide:

"Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal."

The question arises whether *Conway's* case (2) covers the present matter. COHEN, L.J., in his judgment, referred to the position under the Poor Persons procedure, now superseded by the Legal Aid and Advice Act, 1949. He referred to *Willé v. St. John* (3), which was parallel to the case before him in that an order for security had been made before the person became a poor person under the Poor Persons procedure as then in force. It was held there that, the litigant having become a poor person, the order for security should be suspended. The lord justice pointed out the difference between the position of a litigant under the Poor Persons procedure and one under the Act of 1949. Under the Poor Persons procedure, if the poor person failed, the opposite party could not recover any costs, whereas under s. 2 (2) (e) of the Act of 1949 the court may order the assisted person to pay the full or part of the costs. COHEN, L.J., said ([1951] 1 All E.R. 57):

"The matter is, therefore, not so plain under the Act of 1949 as it was under the Poor Persons procedure. None the less, until we get the guidance of the regulations which are indicated by the provisions in s. 12 . . . I think we must proceed on the basis that, generally speaking, and in the absence of special circumstances, it would be inappropriate to make an order for security for costs at a time when an emergency certificate is in force."

He goes on to say there were no special circumstances.

An application for security for costs against a plaintiff out of the jurisdiction is based, not on impecuniosity, but on inability to reach the plaintiff or his property and make effective an order for costs against him if he loses his action. In considering the present legislation under which some order might be made against the plaintiff in these proceedings, the inability to reach him or his property, which is the basis of the rule, remains. The fact that he is an assisted person may well be relied on as some indication that a full order for costs will probably not be made against him, but we have had the advantage of having read to us the certificate under which he became an assisted person, and, having regard to the figures therein, it is plain that it may well be that some order for costs may be made against him should he lose the action. In *Conway's* case (2) COHEN, L.J., was careful to make it clear that he was not seeking to lay down a general rule covering all classes of case and all circumstances. I think, for the reasons I have indicated, that this case falls into a different class for two reasons:—(i) that security is (subject to exceptions which are not relevant) ordered as a matter of course against a plaintiff out of the jurisdiction, and (ii) that the reason for ordering security when a plaintiff is out of the jurisdiction is that, unless he shows he has property within the jurisdiction, an order for costs may be ineffective. Therefore, I have come to the conclusion that the present case is not covered by any rule laid down in *Conway's* case (2), and that it is right to make an order. The question then arises as to quantum. We were told that the learned registrar, in fixing the sum of £25, had regard to the provisions of the Legal Aid and Advice Act, 1949, and I do not think we should interfere with the sum which he fixed. For these reasons, in my view, this appeal should be allowed.

JENKINS, L.J.: I agree.

Appeal allowed.

Solicitors: *Gardiner & Co.*, agents for *A. W. Mawer & Co.*, Manchester (for the defendants); *Gregory, Rowcliffe & Co.*, agents for *Lawson, Coppock & Hart*, Manchester (for the plaintiff).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

Re A DEBTOR (No. 41 OF 1951). *Ex parte THE DEBTOR v. HUNTER* (LIQUIDATOR OF MARVEL PAPER PRODUCTS, LTD.) AND ANOTHER.

[CHANCERY DIVISION (Danckwerts and Upjohn, JJ.), December 10, 1951.]

Bankruptcy—Bankruptcy notice—Validity—Debt due to company in liquidation—Notice served and petition presented in name of liquidator and not in name of company in liquidation—Bankruptcy Act, 1914 (c. 59), s. 147 (1).

By an order of the court, made on Feb. 16, 1951, the debtor was ordered to pay the sum of £1,008 3s. 9d. to H. as liquidator of a company in voluntary liquidation in respect of a call on shares and certain costs. A bankruptcy notice, dated June 5, 1951, was served on the debtor by H. in his own name followed by the words "liquidator of" the company. The notice required the debtor to compound or secure the sum of £1,008 3s. 9d. to the satisfaction of H., without describing H. as acting on behalf of the company, or to satisfy the court that he had a counterclaim, set-off, or cross-demand against H., without adding "as liquidator of the company." A petition in bankruptcy, based on the notice, was presented by H., again in his own name followed by the words "liquidator of" the company.

HELD: as the bankruptcy notice was served and the petition presented, not in the name of the company in liquidation, but in the name of H., followed merely by his description, they were wrong in form: *Re Winterbottom. Ex p. Winterbottom* (1886) (18 Q.B.D. 446); *Re Shirley. Ex p. MacKay* (1887) (58 L.T. 237); and *Re Bassett. Ex p. Lewis* (1895) (43 W.R. 427), followed; further, the bankruptcy notice was misleading in that it required the debtor to compound or secure to the satisfaction of H. without describing him as acting for the company, and referred to a counterclaim, set-off, or cross-demand against H. instead of against the company; these were defects which could have misled the debtor and were not formal defects or irregularities which could be remedied under the Bankruptcy Act, 1914, s. 147 (1); and, therefore, the bankruptcy notice and petition were bad and the bankruptcy proceedings were ineffective.

Re A Debtor (No. 21 of 1950). *Ex p. Debtor v. Bowmaker, Ltd.* ([1950] 2 All E.R. 1129), applied.

AS TO BANKRUPTCY NOTICE, see HALSBURY, Hailsham Edn., Vol. 2, p. 41, para. 52; and FOR CASES, see DIGEST, Vol. 4, pp. 94-98, Nos. 852-881.

Cases referred to:

- (1) *Re Winterbottom. Ex p. Winterbottom*, (1886), 18 Q.B.D. 446; 56 L.J.Q.B. 238; 56 L.T. 168; 4 Digest 95, 856.
- (2) *Re Shirley. Ex p. MacKay*, (1887), 58 L.T. 237; 4 Digest 134, 1228.
- (3) *Re Bassett. Ex p. Lewis*, (1895), 43 W.R. 427; 4 Digest 134, 1229.
- (4) *Re Howes. Ex p. Hughes*, [1892] 2 Q.B. 628; 62 L.J.Q.B. 88; 67 L.T. 213; 4 Digest 96, 871.
- (5) *Re A Judgment Debtor* (No. 530 of 1908), [1908] 2 K.B. 474; 77 L.J.K.B. 968; 99 L.T. 126; 4 Digest 97, 874.
- (6) *Re A Debtor* (No. 21 of 1950). *Ex p. Debtor v. Bowmaker, Ltd.*, [1950] 2 All E.R. 1129; [1951] Ch. 313; 2nd Digest Supp.

APPEAL by the debtor from a receiving order made against him by the registrar of Croydon County Court, on Nov. 2, 1951.

Judgment had been obtained against the debtor in respect of a debt due to a company in liquidation. The bankruptcy notice was served and the petition was presented in the name of the liquidator followed by his description of liquidator of the company. It was contended *inter alia* by the debtor that the notice and petition were bad in form and incapable of amendment as they were respectively served and presented, not by the company in liquidation, but by

the liquidator. This point was not taken before the registrar, but leave to take it on appeal was granted by the court.

Muir Hunter for the debtor.

M. Nesbitt for the liquidator and the official receiver.

DANCKWERTS, J.: This is an appeal from a receiving order made against a debtor on a bankruptcy petition in the Croydon County Court. The receiving order made by the registrar was based on a bankruptcy notice, dated June 5, 1951, which was stated to be based on an order dated Feb. 16, 1951, which had been obtained in the winding-up of a company, called Marvel Paper Products, Ltd., by the liquidator, one Archibald William Hunter. The petition and the bankruptcy notice were respectively presented and served by Mr. Hunter, who was at all material times the liquidator of the company. The order of Feb. 16, 1951, which was obtained on an originating summons in the voluntary winding-up of the company, orders that two persons, of whom the debtor is one,

“ . . . do within four days of the service of this order upon them respectively pay to the applicant the said Archibald William Hunter as . . . liquidator [of the company, Marvel Paper Products, Ltd.] at his office situate at 185/188 High Holborn in the county of London the several sums of money set opposite their respective names in the fifth column of the schedule, such sums being the amounts due from the said several persons respectively in respect of the call of £1 per share duly made by the said liquidator on May 2, 1950.”

In the schedule, against the name of the debtor, there is an amount due in respect of the call of £1,000 and a proportion of the costs of the proceedings, £8 3s. 9d., making a total sum of £1,008 3s. 9d. The bankruptcy notice, dated June 5, 1951, bears the heading “*Re* [the debtor]. *Ex parte* Archibald William Hunter, liquidator of Marvel Paper Products, Ltd.” In the body of the notice it is addressed to the debtor, giving his address, and continues:

“ Take notice that within seven days after service of this notice on you, excluding the day of service, you must pay to Archibald William Hunter, liquidator of Marvel Paper Products, Ltd., of 185/188 High Holborn W.C.1. in the county of London the sum of £1050 3s. 9d. [the £1008 3s. 9d. plus interest] claimed by Archibald William Hunter liquidator of Marvel Paper Products, Ltd., as being the amount due on a final order obtained by him against you in the High Court of Justice, Chancery Division, Companies Court, dated Feb. 16, 1951, whereon execution has not been stayed. Or you must secure or compound for the said sum to his satisfaction or to the satisfaction of this court; or you must satisfy this court that you have a counterclaim, set-off, or cross-demand against him which equals or exceeds the sum claimed by him and which you could not set up in the action or other proceedings in which the order was obtained.”

It is indorsed with the following note:

“ You are specially to note that the consequences of not complying with the requisitions of this notice are that you will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you. If, however, you have a counterclaim, set-off, or cross-demand, which equals or exceeds the amount claimed by Archibald William Hunter liquidator of Marvel Paper Products, Ltd., in respect of the order and which you could not set up in the action or other proceedings in which the said order was obtained, you must within three days apply to this court to set aside this notice, by filing with the registrar an affidavit to the above effect.”

The petition in bankruptcy bears the heading “*Ex parte* Archibald William Hunter, liquidator of Marvel Paper Products, Ltd.,” and states that the debtor

justly and truly indebted to him as liquidator of Marvel Paper Products, Ltd., in the sum of £1,050 3s. 9d.

The first point that is taken before us is that the bankruptcy notice and the petition were wrong in form because they were not served and presented in the name of the company, Marvel Paper Products, Ltd., in liquidation, but were served and presented in the name of Archibald William Hunter who is merely described as the liquidator of the company. There are authorities which are binding on us which establish that, in the case of a sum due to a company in liquidation, a bankruptcy notice and a petition are not correctly served and presented if they are served and presented in the name of the liquidator and not in the name of the company: see *Re Winterbottom. Ex p. Winterbottom* (1), *Re Shirley. Ex p. MacKay* (2), and *Re Bassett. Ex p. Lewis* (3). In the present case it is claimed that the moneys due in respect of calls, which were ordered to be paid by the order of Feb. 16, 1951, were due to the company in liquidation and were only payable to the liquidator, Archibald William Hunter, in his capacity as liquidator, i.e., as the agent of the company, or, as VAUGHAN WILLIAMS, J., put the matter (43 W.R. 427) in *Re Bassett* (3), "as collector of the assets of the company." Unlike the case of a trustee in bankruptcy in whom the assets of the debtor vest, in the case of a company in liquidation the assets, without a special and unusual order of the court, do not vest in the liquidator, but remain vested in the company in liquidation. Therefore, it is plain to me, on those authorities, that the bankruptcy notice and the petition ought to have been served and presented in the name of the company in liquidation and not in the name of the liquidator.

It is also said that there are authorities which show that the bankruptcy notice is bad unless it complies strictly with the form of the judgment on which it is based. In support of that proposition counsel for the liquidator cited *Re Lowes. Ex p. Hughes* (4), and *Re A Judgment Debtor* (No. 530 of 1908) (5). It seems to me that on that basis there is a further objection to the bankruptcy notice, viz., that it does not comply with the order of Feb. 16, 1951, which directed payment to "Archibald William Hunter as such liquidator," i.e., as liquidator of Marvel Paper Products, Ltd. The notice requires payment to "Archibald William Hunter liquidator," simply by that description, and does not make it clear, as in the terms of the order, that payment is due to him only as liquidator of the company in liquidation and collector of its assets. Therefore, even on that point it seems to me that the bankruptcy notice is in error. It is also plain that the bankruptcy notice is wrong in form because it is not in the name of the company in liquidation, but is in the name of Archibald William Hunter with the description added, and that it is dangerous and misleading in that it requires compounding or securing to the satisfaction of Mr. Hunter, without describing him as acting on behalf of the company, and refers to a counterclaim, set-off, or cross-demand against him, which is quite a different matter from a counterclaim, set-off, or cross-demand against a company on whose behalf he may be acting, because any private debt of his would be entirely irrelevant. It seems to me, therefore, that the bankruptcy notice is open to objection in all those respects, and the petition is likewise open to objection in that it is not presented in the name of the company in liquidation.

Counsel for the liquidator relied on the Bankruptcy Act, 1914, s. 147 (1), which provides that mere defects of form are not to invalidate proceedings, and he contends that this is a defect which does not cause any substantial injustice and, therefore, ought to be disregarded. That argument seems to me to be discredited by a number of cases, of which the latest is *Re A Debtor* (No. 21 of 1950). *Ex p. Debtor v. Bowmaker, Ltd.* (6), in which HARMAN, J., and I had to consider that very matter. The distinction is this. It is not necessary to prove that any debtor has actually been misled. It is sufficient if the possibility of his being misled exists. In the present case it is clear that the debtor could have been misled on the subject of set-off or counterclaim, whether or not he was

in fact misled. It has been laid down by the courts again and again that bankruptcy notices are matters of strict form in which defects will be fatal, because they are penal proceedings and, therefore, very closely guarded by the courts. It seems to me that both the bankruptcy notice and the petition in the present case were bad in form, that the proceedings, therefore, for bankruptcy are ineffective, and the appeal should be allowed.

UPJOHN, J.: I agree. For the reasons given by DANCKWERTS, J., I think that the bankruptcy notice was bad in that it was wrongly entitled. It should have been entitled "*Ex parte* Marvel Paper Products, Ltd." It was also bad in that the statement, "you must satisfy this court that you have a counterclaim, set-off, or cross-demand against him," referring to the liquidator, ought to have referred to a counterclaim, set-off or cross-demand against him as liquidator of the company. I should desire to reserve for further consideration the point taken by DANCKWERTS, J., that the notice did not follow exactly the terms of the order in that it did not indicate that the debtor must pay to Archibald William Hunter as liquidator of Marvel Paper Products, Ltd. As I think that the notice was plainly bad on the other two grounds, I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Warren & Co.* (for the debtor); *Hextall, Erskine & Mudford* (for the liquidator and the official receiver).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

NOTE.

In the Estate of BROMHAM. WASS AND OTHERS *v.* TREASURY SOLICITOR.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), November 20, 1951.]

Will—Dependent relative revocation—Expressed intention to alter will—Delay in carrying out intention.

PROBATE ACTION.

By his will, dated Oct. 3, 1945, the testator, Herbert Henry Bromham, made certain gifts to the three plaintiffs. In 1948 the testator became ill and was taken to hospital. Early in 1949, while he was in hospital, he expressed his intention to alter his will and asked his solicitor to attend on him for instructions. The solicitor died before he could call at the hospital. On hearing this the testator put off the making of a new will and later he became too ill to attend to his affairs. On his death on Jan. 10, 1950, the will was found among his private papers, mutilated. The plaintiffs contended that the revocation of the will by the testator was conditional on the preparation of a new will, and, therefore, the doctrine of dependent relative revocation applied. It was contended for the Treasury Solicitor that, as the precise date of destruction of the will was unknown and there was a long interval between the date when the testator expressed his intention to make a new will and the date of his death, it was impossible to say that the destruction, whenever it took place, was made conditional on the making of a new will.

AS TO DEPENDENT RELATIVE REVOCATION, see HALSBURY, *Hailsham Edn.*, Vol. 34, p. 89, para. 127; and FOR CASES, see DIGEST, Vol. 44, pp. 361-365, Nos. 1944-1978.

Cases referred to:

- (1) *In the Goods of Weston*, (1869), L.R. 1 P. & D. 633; 38 L.J.P. & M. 53; 20 L.T. 330; 33 J.P. 312; 44 Digest 362, 1951.
- (2) *Powell v. Powell*, (1866), L.R. 1 P. & D. 209; 35 L.J.P. & M. 100; 14 L.T. 800; 44 Digest 361, 1944.
- (3) *In the Goods of Appelbee*, (1828), 1 Hag. Ecc. 143; 162 E.R. 536; 44 Digest 363, 1960.
- (4) *In the Goods of Eeles*, (1862), 2 Sw. & Tr. 600; 32 L.J.P.M. & A. 4; 7 L.T. 338; 27 J.P. 9; 164 E.R. 1130; 44 Digest 363, 1962.
- (5) *In the Goods of Cockayne*, (1856), Dea. & Sw. 177; 164 E.R. 541; 44 Digest 363, 1961.
- (6) *In the Goods of Mitcheson*, (1863), 32 L.J.P.M. & A. 202; 44 Digest 355, 1866.
- (7) *In the Goods of De Bode*, (1847), 5 Notes of Cases, 189; 44 Digest 352, 1831.

William Latey, K.C., for the plaintiffs.

Victor Russell for the Treasury Solicitor.

LORD MERRIMAN, P., said that, in considering whether the doctrine of dependent relative revocation applied in any case, the question of the intention with which the will was destroyed was one of fact. The length of the interval between the formation of the intention and the destruction of the will was not necessarily decisive of the question one way or the other. In the present case there was a considerable lapse of time between the date when the testator discussed his intention to make a new will and his death, and it was urged on behalf of the Treasury Solicitor that he might very well have changed his mind. If, at the time when he intended to make a new will, the testator destroyed the existing will with reference to that intention, it did not seem to matter how long a time elapsed before the death, because it was his intention at the time of the destruction of the existing will which mattered. Whether the period which elapsed during which the intended will was not made was a day, a week, a month, or a year could not affect the question of the testator's intention at the time the existing will was destroyed. The lapse of time was important in considering whether the inference could be drawn that, whenever the testator did destroy the existing will, he did so with the intention of making a new will. The lapse of time in the present case left some uncertainty whether the act of destruction coincided with the expressed intention to destroy the existing will before making a new will, but in the circumstances he (HIS LORDSHIP) had no doubt that the destruction of the existing will took place with reference to the testator's intention to make a new will. That being so, the act of revocation was conditional and the subsequent lapse of time immaterial.

Grant of probate of complete draft of mutilated will.

Solicitors: *Gibson & Weldon*, agents for *Marchant & Co.*, Mansfield (for the plaintiffs); *Treasury Solicitor*.

A.T.H.

NOTE.**Re CAMBRIDGE COFFEE ROOM ASSOCIATION, LTD.**

[CHANCERY DIVISION (Wynn-Parry, J.), November 26, 1951.]

Company—Winding-up—Petition to wind-up dissolved company—Procedure—Effect of order to wind-up on title to company's property—Companies Act, 1948 (c. 38), s. 352 (1), s. 353 (5) (6).

PETITION by two directors of the Cambridge Coffee Room Association, Ltd., that (i) the name of the company might be restored to the register of companies, and (ii) the company be wound-up.

On Mar. 19, 1920, the company was incorporated as a company limited by guarantee to encourage temperance and thrift, to acquire and take over a business then being conducted on certain premises, and to carry on the business of caterers and canteen keepers. In 1934 the premises of the company were demolished, and, no alternative premises being found, the work of the company ceased, and its activities thereafter were limited to applying its funds to charitable purposes. In 1939 the secretary retired, and a new secretary was appointed who carried on the affairs of the company from her own address. She overlooked the necessity of notifying her appointment and the company's new address to the Registrar of Companies and was unaware that the company had to submit annual returns. On Aug. 23, 1949, the company was dissolved and its name was struck off the register under the Companies Act, 1948, s. 353 (5), notice being given in the "London Gazette" of that date. In consequence, the property of the company vested in the Crown as *bona vacantia* under s. 354. None of the letters for which s. 353 makes provision was received by the company from the Registrar of Companies. The memorandum of association provided, *inter alia*, that on a winding-up or dissolution any property remaining after payment of debts and liabilities should not be distributed among the members, but should be transferred to an institution or institutions which had objects similar to or cognate with the objects of the company. In October, 1950, the management committee of the company desired to wind-up the company and discovered that the company had already been struck off the register. Two of the directors of the company presented a petition to have the company wound-up, but, doubt having arisen whether a simple order for the company to be wound-up would divest the Crown of the property of the company and re-vest it in the company, the petition was amended to ask for the relief stated.

Case referred to:

- (1) *Re Dixon, Ltd.*, [1947] 1 All E.R. 279; [1947] Ch. 251; [1947] L.J.R. 783; 177 L.T. 127; 2nd Digest Supp.

K. W. Mackinnon for the petitioners.

Denys B. Buckley for the Attorney-General.

WYNN-PARRY, J.: The only question is whether or not it is more convenient to restore the name of the company to the register before making a compulsory winding-up order. In my judgment, it is more convenient to do so, but I do not intend to cast doubt on past cases where a compulsory winding-up order has been made without the name of the company having been restored to the register. In the present case the company has been struck off the register under the Companies Act, 1948, s. 353 (5), and no question is raised as to the correctness of that action.

By s. 353 (5):

"At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the

'Gazette,' and on the publication in the 'Gazette' of this notice the company shall be dissolved: Provided that (a) the liability, if any, of every director, managing officer and member of the company shall continue and may be enforced as if the company had not been dissolved; and (b) nothing in this sub-section shall affect the power of the court to wind-up a company the name of which has been struck off the register."

By s. 352 (1):

"Where a company has been dissolved, the court may at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

Doubt has been raised whether s. 354 could have any application in view of the terms of s. 352 and s. 353.

By s. 354:

"Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property but not including property held by the company on trust for any other person) shall subject and without prejudice to any order which may at any time be made by the court under the two last foregoing sections, be deemed to be *bona vacantia* and shall accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, and shall vest and may be dealt with in the same manner as other *bona vacantia* accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall."

In *Re Dixon, Ltd.* (1) the court made an order declaring that the dissolution of a company was void under the Companies Act, 1929, s. 294 (1) (which is replaced in the Act of 1948 by s. 352 (1)), and it was held that the result was that any property which purported to have been vested in the Crown never so vested, and, therefore, that no order for the re-vesting of such property in the company was necessary.

By s. 353 (6) of the Act of 1948:

"If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiration of twenty years from the publication in the 'Gazette' of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."

Where an order has been made under s. 352 (1) or under s. 353 (6), no question as to *bona vacantia* can arise under s. 354 because of the words in s. 354

"... subject and without prejudice to any order which may at any time be made by the court under the two last foregoing sections ..."

Section 353 (5) contains no saving provisions similar to those to be found in s. 352 (1) and in s. 353 (6). Section 353 (5) gives no power to wind-up a company, and, for that, jurisdiction must be sought under that Part of the Act dealing with winding-up.

There appears to me to be force in the submission that doubt exists whether a compulsory winding-up order alone amounts to an order "made by the court under the two last foregoing sections" so as to exclude s. 354. I do not propose to construe the sections as I have no desire to cast doubt on previous decisions. In all the circumstances it appears desirable that the petition in such cases should follow the form of this amended petition which asks that the name of the company be restored to the register and then that the company be wound-up.

Solicitors: *Waterhouse & Co.* (for the petitioners); *Treasury Solicitor.*

R.D.H.O.

R. v. BLANCHARD.

[LEEDS ASSIZES (Ormerod, J.), December 7, 10, 1951.]

Criminal Law—Evidence—Wife—Competence as witness—Husband charged with committing buggery with wife.

On a charge against a husband of buggery with his wife, the wife is competent to give evidence against her husband.

AS TO EVIDENCE OF THE WIFE OR HUSBAND OF THE DEFENDANT, see HALSBURY, Hailsham Edn., Vol. 9, pp. 217-220, paras. 304-306; and FOR CASES, see DIGEST, Vol. 14, pp. 450-452, Nos. 4757-4785, and Digest Supp.

Cases referred to:

- (1) *R. v. Leary* (unreported), Leeds Assizes, March, 1942.
- (2) *R. v. Lapworth*, [1931] 1 K.B. 117; 100 L.J.K.B. 52; 144 L.T. 126; 95 J.P. 2; Digest Supp.
- (3) *Reeve v. Wood*, (1864), 5 B. & S. 364; 34 L.J.M.C. 15; 34 L.J.Q.B. 24; 11 L.T. 449; 29 J.P. 214; 122 E.R. 867; 14 Digest 450, 4762.
- (4) *R. v. Jellyman*, (1838), 8 C. & P. 604; 14 Digest 451, 4770.
- (5) *R. v. Wakefield*, (1827), 2 Lew. C.C. 279; 2 Town St. Tr. 112; Mood. & M. 197n.; 14 Digest 451, 4774.

TRIAL on indictment.

At Leeds Assizes before ORMEROD, J., and a jury Ernest William Blanchard was charged on an indictment with committing buggery with Violet Blanchard, his wife, in September, 1951. When she was called to give evidence counsel for the defence submitted that she was not a competent witness against her husband, and the case is reported on this point only.*

Veale, K.C., and *J. S. Taylor* for the Crown.

A. W. Stephenson for the defendant.

ORMEROD, J.: In this case Ernest William Blanchard is indicted for committing an unnatural offence on his wife. Counsel for the accused submits that the wife is not a competent witness against her husband on this charge. He submits that it is a well-established general principle at common law that the husband or the wife of a prisoner is not a competent witness against his or her spouse. There have been certain statutory exceptions to that rule which are set out in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE (32nd ed.), at p. 477. None of these exceptions affects this case. There are, in addition, certain other exceptions to the rule, and one well-established exception is that the wife is a competent witness against her husband in cases of personal injury to her. The question I have to decide here is whether in this case, where the husband is accused of buggery against his wife, the offence comes within that exception. I am satisfied that it does.

It was decided by BIRKETT, J., in *R. v. Leary* (1), that in a case of this kind the wife is a competent witness against her husband, but I think the

* The defendant was found Not Guilty and was discharged.

principle was established long before that. The object of the exception is that in cases of this kind—cases where violence is offered, for instance, by a husband to a wife—it must frequently happen that the only person able to give evidence against the husband is the wife herself. If she were not a competent witness, clearly the ends of justice would be defeated. That in itself, I think, would be sufficient grounds for including an offence of this kind within the exception, but it really goes further than that, because cases of personal injury within the exception have been defined by authority as cases which affect the person or the liberty of the spouse who is being called on to give evidence. I find it impossible to hold that a charge of this kind, which is certainly an offence against the person of the spouse, can be regarded as anything other than a case affecting the person, although not necessarily the liberty, of the spouse. In those circumstances I am satisfied that the wife is competent to give evidence on this charge.

Solicitors: *E. H. Bullock*, town clerk, Hull (for the Crown); *Payne and Payne*, Hull (for the defendant).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

WHITEHILL AND OTHERS v. BRADFORD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett, L.J., and Upjohn, J.), December 10, 11, 12, 13, 1951.]

Trade—Covenant in restraint of trade—Medical practice—Retiring partner prohibited from “directly or indirectly carrying on or being interested or concerned in carrying on the business or profession of medicine . . . within a radius of ten miles”—Reasonableness.

National Health Service—Medical practitioner—Partnership—Goodwill—Clause in partnership agreement prohibiting retiring partner from carrying on practice within ten-mile radius—Validity—National Health Service Act, 1946 (c. 81), s. 35 (1)—National Health Service (Amendment) Act, 1949 (c. 93), s. 1 (1).

The plaintiffs and the defendant carried on the practice of general medical practitioners in Atherstone, in the county of Warwickshire, under a deed of partnership, dated Feb. 9, 1945, cl. 21 of which provided that a retiring and outgoing partner should for twenty-one years be prohibited “from directly or indirectly carrying on or being interested or concerned in carrying on the business or profession of medicine, surgery, midwifery, or pharmacy, or any branch thereof, anywhere within a radius of ten miles of the parish church of Atherstone . . . but the above prohibition shall only apply to a retiring or outgoing partner carrying on or being interested or concerned in the profession of a general medical practitioner.” In 1945 one third of the partnership income was derived from patients living within the ten-mile radius, but outside a five-mile radius. In 1951 ninety-nine per cent. of the patients resorting to the partnership lived within the five-mile radius. Each of the partners had entered his name on the list of medical practitioners undertaking to provide general medical services under the National Health Service Act, 1946. On Sept. 29, 1951, the defendant retired from the partnership, but he continued to carry on his practice in the district.

HELD: (i) on the true construction of cl. 21, the effect of the words at the end of the clause for the purposes of the present case was to limit the prohibition contained in the first part of the clause to the exercise of the profession of medicine, surgery, midwifery, or pharmacy as part of the profession of a general medical practitioner; the words “directly or indirectly” could not be eliminated from the clause, but, as the contract was a partnership agreement between professional men, the words did not

carry the effect of the clause beyond what was reasonably required to protect the continuing partners against competition, which was, in such a case, a proper subject-matter for protection; and, on the facts of the case, the prohibition imposed on a retiring partner was not unreasonable as to radius: *Empire Meat Co., Ltd. v. Patrick* ([1939] 2 All E.R. 85), distinguished; or as to period of time.

(ii) although under the National Health Service Act, 1946, s. 35 (1), a medical practitioner whose name was entered on a list of medical practitioners undertaking to provide general medical services could no longer sell the goodwill or part of the goodwill of his medical practice, that prohibition did not have the effect of destroying the goodwill or of vesting it in the State; as the National Health Service (Amendment) Act, 1949, s. 1 (5), provided that, in the case of an agreement like the present one, the share of the goodwill of a retiring partner should be transferred to the continuing partners on the terms provided in the agreement except that the purchase price should not be payable by the partners, and that, in lieu thereof, the retiring partner should receive compensation from the State, the goodwill remained one of the assets of the partnership subject only to the limitation that it could not be sold; from s. 1 (5) and s. 1 (12) of the Act of 1949, which provided that the provisions of a partnership agreement which were to take effect on the purchase of a share of the goodwill of the practice should take effect in like manner on a transfer of that share in accordance with s. 1, notwithstanding that the transfer did not constitute a purchase, it was clear that the ordinary principles which applied to covenants in restraint of trade were not affected by the National Health Service Acts, but were still effective, and, therefore, the plaintiffs were entitled to an injunction to restrain the defendant from practising in contravention of cl. 21.

AS TO REASONABLENESS OF CONTRACT IN RESTRAINT OF TRADE, see HALSBURY, Hailsham Edn., Vol. 32, pp. 403-418, paras. 675-698; and FOR CASES, see DIGEST, Vol. 43, pp. 21-24, Nos. 135-147.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 35, see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 367.

FOR THE NATIONAL HEALTH SERVICE (AMENDMENT) ACT, 1949, s. 1, see *ibid.*, Vol. 28, p. 945.

Cases referred to:

(1) *Fitch v. Dewes*, [1921] 2 A.C. 158; 90 L.J.Ch. 436; 125 L.T. 744; 43 Digest 34, 276.

(2) *Routh v. Jones*, [1947] 1 All E.R. 179; *affd.* C.A. [1947] 1 All E.R. 758; 2nd Digest Supp.

(3) *Empire Meat Co., Ltd. v. Patrick*, [1939] 2 All E.R. 85; Digest Supp.

APPEAL by the defendant, a medical practitioner, from an order of DANCKWERTS, J., dated Oct. 29, 1951, in an action by three medical practitioners, with whom the defendant was formerly in partnership, to enforce a clause in the partnership agreement which prohibited a retiring partner, for a period of twenty-one years from the date of retirement, from directly or indirectly carrying on a practice within a radius of ten miles from the town where the main premises of the partnership business were situated. The agreement was made in 1945 and the defendant retired from the partnership on Sept. 29, 1951, but continued to practise in the district. He contended (a) that the restrictive covenant in the partnership agreement was unreasonably wide in time and space, and (b) that the National Health Service Act, 1946, s. 35 (1), had destroyed the subject-matter of the protection (*viz.*, the goodwill of the business) or had vested it in the Minister of Health. His contentions were rejected by the learned judge, who granted an injunction restraining the defendant from practising in breach of the covenant.

Lindner for the defendant.

Salt, K.C., and *H. E. Francis* for the plaintiffs.

SIR RAYMOND EVERSHED, M.R.: The proceedings in the present case afford another illustration of the difficult topic which finds many expressions in the law reports, namely, that of covenants in restraint of trade. The topic is notoriously troublesome, and I confess that I have not found the present case an easy one. I do not propose to add to what LORD BIRKENHEAD, L.C., in *Fitch v. Dewes* (1) called ([1921] 2 A.C. 163) the generous elucidation of the law in relation to these matters, in that regard adhering to my own example in *Routh v. Jones* (2). Indeed, the principles may be taken now to be well established, the difficulty being that of their application to the facts of particular cases. The court is here dealing with a covenant entered into mutually between four doctors on the occasion of their executing a partnership agreement for the purpose of carrying on together as partners the business or profession of general medical practitioners.

In cases between master and servant it is, I think, clear that the court looks somewhat closely into the terms of any covenant entered into by the servant and is not disposed to enforce such a covenant if it goes further than is reasonably necessary to protect some subject-matter of contract or proprietary interest legitimately entitled to protection. This approach is adopted by the court, first, because it cannot be otherwise than that a servant on such occasions is at some disadvantage *vis-à-vis* his employer when the service agreement is made, and, secondly, because it is contrary to the general policy of the law that a man should be impeded in earning his livelihood, according to his own trade, business, or profession, more than is properly requisite for the due protection of his master. In cases arising between vendor and purchaser, or in cases, such as the present, of mutual covenants between professional men, or others, the test of reasonableness still, no doubt, remains, but in cases such as those last mentioned it is not open to question that there is always a proper subject-matter for protection and that protection comprehends that which it does not comprehend in master and servant cases, namely, protection against competition as such. Consequently, in the class of cases with which we are now concerned, it is apparent from the authorities that the court applies what may be called a reasonable construction to the language which is used. The court will not, I conceive, look for fanciful or extravagant possibilities and then reject the covenant because it may be said that some one or more of such possibilities might be comprehended by the strict language of the covenant. If there is still, in the cases now under discussion, a general policy of the law that a man should not be unduly hampered in his capacity to carry on his trade or profession, it is also the policy of the law that contracts freely entered into should, *prima facie*, be enforced.

In the present case the parties to the contract, each of them educated men with medical qualifications, must be taken to have known what was comprehended, and what they intended should be comprehended, within the ambit of the practice of general medical practitioners on which they were together embarking and in what manner such a practice or profession would be liable to be injured by competition. To that extent what I have said is relevant, but, at the end, the question to be determined has to be determined, not by the understanding between the parties, but on the view taken by the court. I turn, accordingly, to the partnership deed which was made on Feb. 9, 1945. The parties were Dr. Fisher [who retired shortly afterwards, Dr. Spark being taken to the partnership in his place], Dr. Whitehill, Dr. Egan and the defendant, Dr. Bradford. Clause 2 provided that the partnership should commence on Feb. 1, 1945, and should continue for the period of twenty-one years, determinable as therein provided. The business to be carried on was that of general medical practitioners, in continuation of a like business formerly carried on by other persons who are referred to. I suppose that most people have in their minds a

general idea of what exactly is comprehended by practice as a general medical practitioner, but, as LORD GREENE, M.R., pointed out ([1947] 1 All E.R. 761) in *Routh v. Jones* (2), it is not proper for members of the court to rely too much on individual knowledge of these matters. There is, however, some evidence of the nature of such a practice in the answer given by the first plaintiff, Dr. Whitehill, when he was asked in the court below what he meant by "general medical practitioner", his answer being:

"We undertook to advise and treat all cases of medicine, midwifery and surgery. Any cases requiring specialised treatment we would send to the consultants concerned."

Clause 19 of the agreement provided that a partner could serve notice determining the partnership, and the other partners thereupon acquired an option (which was exercised in the present case when the defendant proposed leaving the partnership) of acquiring the share in the business of the outgoing partner. Clause 21 provided:

"A retiring and outgoing partner shall for the period of twenty-one years from the date of such retirement be prohibited from directly or indirectly carrying on or being interested or concerned in carrying on the business or profession of medicine, surgery, midwifery, or pharmacy, or any branch thereof, anywhere within a radius of ten miles of the parish church of Atherstone . . . under a forfeiture of £1,000 to be payable as liquidated damages and not as a penalty and without prejudice to the right of the continuing partner or partners his or their successors or assigns to an injunction to restrain him therefrom but the above prohibition shall only apply to a retiring or outgoing partner carrying on or being interested or concerned in the profession of a general medical practitioner."

The first duty of the court is to construe that clause. Those responsible for its final formulation rendered the task somewhat more difficult by the unusual method of first stating a prohibition and then appending some words with the obvious intention of limiting in some regard the extent of the prohibition originally inserted. The difficulty is evidenced by the fact that, at the end of the appendage, not all the words to which recourse has been had in the earlier part of the clause were repeated. Therefore, the first question is whether, by the effect of what I have called the appendage, the words "directly or indirectly" are eliminated from the prohibition. It is also to be noticed that, whereas in the main part of the clause the formula is used "interested or concerned in carrying on the business or profession", in the appendage the phrase is "interested or concerned in the profession." The construction which I give to this clause does not have the effect of eliminating from the covenant the language "directly or indirectly." In other words, I think that the true effect of the appendage was to limit what otherwise might have been the scope of the phrase "the business or profession of medicine, surgery, midwifery or pharmacy." Without the appendage the result would, on the face of it, have been to have prevented an outgoing partner from carrying on any one of those professions as a specialist, *e.g.*, as a specialist surgeon. Such an activity would not *prima facie* have involved any competition with the general medical practice carried on by the firm, as in cases requiring a specialist the partners would send the patient to a specialist and not treat him themselves. I think, therefore, that the effect of the words at the end of the clause was to limit the prohibition only in this regard, that the ban on the exercise of the arts of medicine, surgery, midwifery or pharmacy was limited to their exercise as part of, or in connection with, the profession of a general medical practitioner. The result, therefore, for practical purposes, I think, is the same as though, instead of saying "the business or profession of medicine, surgery, midwifery or pharmacy," the clause had read "the business or profession of a general medical practitioner," I am

not saying that for all purposes that is the result of the construction, but, so far as this case is concerned, the effect is, I think, the same. There remains, accordingly, as part of the prohibition the somewhat wide and vague formula:

“ . . . directly or indirectly carrying on or being interested or concerned in carrying on the business . . . ”

The main burden of the attack on cl. 21 in the court below by counsel for the defendant was as regards the radius of ten miles. [HIS LORDSHIP reviewed the evidence on the point which showed (a) that, at the date of the trial, as many as ninety-nine per cent. of the number of patients resorting to the partnership were persons living within a five-mile radius, which only included a number of small townships while the ten-mile radius included a number of larger towns, such as Nuneaton, and (b) that, though the number of patients more or less on the periphery of the ten-mile radius was small, it included a number of more affluent persons who had not taken advantage of the National Health Service but paid for the attention which they received, and, at the date when the covenant was entered into, these persons contributed about one-third of the total partnership income. HIS LORDSHIP continued:] As I have said, this is not a case of master and servant. It is a case in which the remaining or continuing partners are entitled to have themselves protected against the competition of an outgoing partner. I quite agree that, as a general principle, if the court concludes that in any respect, *e.g.*, in respect of area, a covenant is wider than reasonable for the protection of that which is entitled to protection, it is not a good answer to say: “ Well, it is only just a little bit too wide and unreasonable.” *Empire Meat Co., Ltd. v. Patrick* (3), which was cited by counsel for the defendant, illustrates that principle in the case of master and servant. In that case the plaintiffs were butchers, the defendant had been their servant, and a restriction was put on him which barred him from various activities within an area of five miles from certain premises in the city of Cambridge. Delivering the judgment of this court, FINLAY, L.J., said ([1939] 2 All E.R. 93):

“ It is clear on the evidence, and it is found by the judge, that the great bulk of the plaintiffs’ business was within a radius of two miles. If it were necessary, we should be prepared to go further, and to say that the great bulk of it was within a one mile radius, but it is sufficient to say that beyond a two miles radius the customers appear to be quite negligible in number.”

That led the court in a master and servant case to say that it was unreasonable to restrict the ex-employee from earning his livelihood anywhere within a radius of as much as five miles, because there was no appreciable subject-matter which would entitle the plaintiffs to so much protection. It seems to me that the present case is different, and that, in considering whether the radius suggested is too wide properly to protect the continuing partners against the competition of a former partner, it is not sufficient merely to point to the fact that a very small percentage in numbers of the patients which the firm had in 1945 were beyond the five-mile and within the ten-mile radius. I think that the learned judge may, perhaps, have laid less emphasis than counsel for the defendant was entitled to require on the large numerical superiority of the first five miles, so to speak, as against the second, but there is, I think, nothing in his judgment which involves any misapprehension of the facts of the case, and on the whole, therefore, I have come to the conclusion that in a case of this kind there is no sufficient ground for saying that we should interfere with the judge when he held that ten miles was a reasonable area to impose on an outgoing partner.

The next point taken was with regard to the length of time of twenty-one years. Twenty-one years, of course, is a long time, and in practice might, no doubt, well be equivalent to a life banishment from the area concerned, but, again, I am not persuaded that in a case of this kind there is anything vicious in so long a

period of time. The partnership, as is evidenced by the second clause, was intended to continue for a long period. A man like the defendant, with his professional qualifications, is a relatively mobile person and the whole of the rest of the United Kingdom is open for the application by him of his professional skill. I am not, therefore, satisfied that twenty-one years is over long.

Now I come to consider the effect of the formula in cl. 21 of the agreement;

“ . . . directly or indirectly carrying on or being interested or concerned in carrying on the business or profession of medicine, surgery, midwifery or pharmacy.”

I agree with counsel for the defendant that there ought not to be any “ common form ” in covenants of this kind. I think it is somewhat unfortunate that the tendency appears to persist of using such formulae as this in covenants of this kind, perhaps without any close reflection on what the results may be. But in considering the language in this case it is important, to my mind, to note that we are here dealing with professional men. If we were dealing with the business of butchers, to revert to the illustration of *Empire Meat Co., Ltd. v. Patrick* (3), it is clear from the name of the plaintiffs in that case that the business or trade is one which may be carried on by or through the medium of a limited liability company. And if one imposes on a covenantor a prohibition against directly or indirectly being concerned or interested in the particular business which is, or is likely to be, carried on by a limited company, one may be saying that he cannot hold a few shares in a trust company which itself holds the majority of the shares in another company or concern which carries on the trade of butchers. That may very well be fatal to the covenant, but no one has ever suggested (and I cannot think that it will happen in the near future) that the business of a general medical practitioner can be carried on by a limited company. These professional businesses require that professional men having certain professional qualifications shall themselves carry on the business or profession, and, therefore, in such a case as the present this formula cannot, I think, have so wide an effect as it would have in the example I have taken of butchers. Indeed, it has not been easy for the learned counsel in this case to think of examples to which this formula might apply. It may even be that it was inserted in the belief that it really meant nothing or added nothing, and, if it did, my only comment is that it would have been much better left out. Still, there are, perhaps, illustrations which are not extravagant to which the words might have application. To take an example given by counsel for the plaintiffs, if the outgoing partner carried on the business by entering into a partnership with another doctor, that other doctor doing all the work while he, the outgoing partner, remained what is called a sleeping partner, he might then be said to be interested or concerned in carrying on the business though he did nothing himself actively within the area. There is, also, the illustration of financing another to enable that other to carry on the business in the area, or (without being a mere menial servant of a doctor), being an assistant to a doctor carrying on within the area, the nature of his assistance being such as would involve some participation in the conduct of the profession itself. All these cases seem to me to provide some scope for the formula. No one has suggested any obvious or clear meaning which would involve something to my mind altogether unreasonable. The illustrations which I have given do not seem to me to carry the effect of this clause beyond what is reasonably required to protect the continuing partners against competition.

Another point which was debated can be best stated by reference to an example. Suppose that the defendant set up a business with his name on a plate and established a surgery in the centre of the city of Coventry outside the ten-mile radius, would he then, without infringing his obligation, be entitled to go inside the ten-mile limit and attend to patients there or to attend to patients who came from inside the area to his surgery in Coventry? My own view is that the

formula which has been used would prevent the outgoing partner from coming in and acting as a doctor to patients within the area although his name-plate and place of business were outside the area. At any rate, I am prepared to assume for this purpose that that is the effect of the clause. Even so, however, I cannot conclude that it goes further than is required to protect the continuing partners against the competition of the former partner, and, this being a case of covenants between professional men, I do not think that there is anything unreasonable in the provision. Finally, I do not think that, if we add all these various points together—the extent of the radius, the length of time, the width and liberality of the language used—one gets a result that in its totality produces something unreasonably wide.

There only remains for discussion the question: What is the result of the impact on this matter of the National Health Service Act, 1946? By s. 35 (1) of the Act medical practitioners who participated in the scheme of the Act could no longer sell their goodwill. That formerly valuable asset of a doctor's practice became no longer saleable by a doctor whose name was entered on a list of medical practitioners undertaking to provide general medical services, and in the present case each of the four partners was a listed doctor. But that prohibition does not, in my judgment, have the effect of destroying the goodwill. Still less does it have the effect of vesting it in the State or in any emanation of the State. The goodwill remains one of the assets of the firm, but it is subject to the limitation that it cannot be sold to other people. So long as the firm carries on, the goodwill must necessarily remain one of its most valuable assets, for by goodwill one means in this case the tendency that patients whom the doctors have treated will continue to resort to that firm for further treatment. The partners' livelihood, therefore, as doctors depends very substantially on the goodwill which they have created and on the extent to which they are able to preserve it. So much, indeed, seems to me to be necessarily implicit in the National Health Service (Amendment) Act, 1949. Section 1 (5) provides:

"Where any agreement to which this section applies [*i.e.*, a partnership agreement such as the present] imposes an obligation or confers an option on a listed or new listed partner to purchase the share of another partner being a listed partner in the goodwill of the partnership practice . . . that share shall be transferred at the time and on the terms (except as to the payment of the purchase price) provided in the agreement . . ."

Section 1 (5) goes on to provide that the continuing partners do not have to pay the purchase price, but the outgoing partner becomes entitled, at some time (which may or may not have occurred in the present case), to receive compensation. Section 1 (12) provides:

"Where any agreement to which this section applies contains provisions which take effect on the purchase of any share or part of a share of the goodwill of the partnership practice, those provisions shall take effect in like manner on the transfer of that share or part in accordance with this section, notwithstanding that the transfer does not constitute a purchase."

As I understand the purpose and effect of the Acts, it seems to me, in face of these amending provisions, impossible to say that the element of goodwill is so taken away that the ordinary principles which would otherwise have applied in regard to restraint of trade covenants are no longer effective. I think we must consider this covenant apart from the new legislation, and, if we were satisfied that when it was made in 1945 it was a good covenant and one which the court would enforce, then nothing that has happened as the result of the National Health Service Act, 1946, has altered that result. I think, therefore (with the learned judge), that the matter is not affected in the circumstances by the Act of 1946. I do not think that this is a case in which the court ought in any

way to limit, or refrain from imposing, any injunction which would otherwise have been granted, and I, accordingly, think that the appeal should be dismissed.

BIRKETT, L.J.: I agree completely with the judgment of SIR RAYMOND EVERSHED, M.R.

UPJOHN, J.: I also agree.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Restall, Round & Gloster*, Birmingham (for the defendant); *Carleton-Holmes & Co.*, agents for *A. H. Sale & Hill*, Atherstone (for the plaintiffs).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL. *Ex parte* SHAW.

[COURT OF APPEAL (Singleton, Denning and Morris, L.J.J.), December 4, 5, 6, 7, 19, 1951.]

Certiorari—Statutory tribunal—Error of law on face of decision—Form of record—Affidavit evidence—Admissibility—National Health Service (Transfer of Officers and Compensation) Regulations, 1948 (S.I., 1948, No. 1475), reg. 12.

Under reg. 10 of the National Health Service (Transfer of Officers and Compensation) Regulations, 1948, the applicant claimed compensation for loss of employment attributable to the passing of the National Health Service Act, 1946. Being dissatisfied with the amount which the compensating authority awarded him, he appealed to the appeal tribunal under reg. 12. The tribunal upheld the decision of the compensating authority. On an application by the applicant for an order of *certiorari* to remove the order of the tribunal into the High Court to be quashed it was admitted that an error of law appeared on the face of the tribunal.

HELD: *certiorari* to quash the decision of a statutory tribunal lay, not only where the tribunal had exceeded its jurisdiction, but also where an error of law appeared on the face of the record, and, therefore, the application would be granted.

Walsall Overseers v. London & North Western Ry. Co. (1878) (4 App. Cas. 30), and *R. v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128), applied.

Racecourse Betting Control Board v. Secretary of State for Air ([1944] 1 All E.R. 60), not applied by SINGLETON, L.J., distinguished by DENNING, L.J., and doubted by MORRIS, L.J.

Per DENNING, L.J.: The record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, *certiorari* lies to quash the decision . . . Affidavit evidence is admissible on an application for *certiorari* to show that the record is incomplete. When *certiorari* is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, admissible, for the simple reason that the error must appear on the record itself . . . An error admitted openly in the face of the court can be corrected by *certiorari* as well as an error that appears on the face of the record.

Decision of DIVISIONAL COURT ([1951] 1 All E.R. 268), affirmed.

AS TO ERROR ON FACE OF PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 887-889, paras. 1491-1493; and FOR CASES, see DIGEST, Vol. 16, pp. 427-430, Nos. 2870-2908.

Cases referred to:

- (1) *R. v. London County Council. Ex p. Entertainments Protection Assocn., Ltd.*, [1931] 2 K.B. 215; 100 L.J.K.B. 760; 144 L.T. 464; 95 J.P. 89; Digest Supp.
- (2) *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; Digest Supp.
- (3) *R. v. Minister of Health. Ex p. Davis*, [1929] 1 K.B. 619; 98 L.J.K.B. 636; 141 L.T. 6; 93 J.P. 49; Digest Supp.
- (4) *Ricelip Parish v. Henden Parish*, (1698), 5 Mod. Rep. 416; 87 E.R. 739; 37 Digest 299, 995.
- (5) *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 16 Digest 419, 2795.
- (6) *Walsall Overseers v. London & North Western Ry. Co.*, (1878), 4 App. Cas. 30; 48 L.J.M.C. 65; 39 L.T. 453; 43 J.P. 108; 16 Digest 186, 920.
- (7) *R. v. Bolton*, (1841), 1 Q.B. 66; 10 L.J.M.C. 49; 5 J.P. 370; 113 E.R. 1054; 16 Digest 418, 2775.
- (8) *Racecourse Betting Control Board v. Secretary of State for Air*, [1944] 1 All E.R. 60; [1944] Ch. 114; 113 L.J.Ch. 129; 170 L.T. 29; 2nd Digest Supp.
- (9) *Williams v. Bagot (Lord)*, (1824), 4 Dow. & Ry. K.B. 315; 2 L.J.O.S.K.B. 152; 16 Digest 436, 2999.
- (10) *R. v. Chandler*, (1702), 1 Ld. Raym. 581; 1 Salk. 377; 91 E.R. 1288; 33 Digest 350, 595.
- (11) *R. v. Daman*, (1819), 1 Chit. 147.
- (12) *R. v. Burnaby*, (1703), 1 Com. 131 (92 E.R. 998); 3 Salk. 217 (91 E.R. 786); *sub nom. R. v. Barnaby*, (1704), 1 Salk. 181 (91 E.R. 166); 33 Digest 353, 632.
- (13) *R. v. March*, (1824), 4 Dow. & Ry. K.B. 260.
- (14) *R. v. Inhabitants of Audly*, (1700), 2 Salk. 526; 91 E.R. 448.
- (15) *R. v. Devon JJ.*, (1819), 1 Chit. 34; 33 Digest 440, 1495.
- (16) *R. v. Dobbyn*, (1696), 2 Salk. 474; 91 E.R. 408; 33 Digest 309, 285.
- (17) *R. v. London*, (1703), 3 Salk. 261; 91 E.R. 814.
- (18) *Ditton's Case*, (1701), 2 Salk. 490; 91 E.R. 421.
- (19) *Talbury (Inhabitants) v. Foston (Inhabitants)*, (1696), 2 Salk. 475; 91 E.R. 409.
- (20) *Commins v. Massam*, (1666), March. N.R. 196; 82 E.R. 473.
- (21) *Grenville v. College of Physicians*, (1700), 12 Mod. Rep. 386 (88 E.R. 1398); *sub nom. Groenvelt v. Burnell*, Carth. 491 (90 E.R. 883); Holt, K.B. 184 (90 E.R. 1000); Holt, K.B. 536 (90 E.R. 1195); 1 Com. 76 (92 E.R. 967); 1 Salk. 144 (91 E.R. 134); 16 Digest 400, 2440.
- (22) *Cardiffe Bridge Case*, (1700), 1 Salk. 146; 91 E.R. 135; *sub nom. R. v. Glamorganshire (Inhabitants)*, 12 Mod. Rep. 403; 88 E.R. 1409; 16 Digest 401, 2458.
- (23) *R. v. White*, (1883), 11 Q.B.D. 309; *revsd. C.A.* (1884), 14 Q.B.D. 358; 52 L.T. 116; 49 J.P. 294; *sub nom. R. v. Sibly*, 54 L.J.M.C. 23; 38 Digest 591, 1222.
- (24) *Kent v. Elstob*, (1802), 3 East. 18; 102 E.R. 502; 2 Digest 522, 1601.
- (25) *Hodgkinson v. Fernie*, (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 140 E.R. 712; 2 Digest 527, 1645.
- (26) *Apsley's Case*, (1671), Sty. 85; 82 E.R. 549.
- (27) *R. v. Levermore*, (1700), 1 Salk. 146; 91 E.R. 135; 16 Digest 471, 3511.
- (28) *Ashley's Case*, (1697), 2 Salk. 479; 91 E.R. 412; 16 Digest 470, 3494.
- (29) *R. v. Warnford*, (1825), 5 Dow. & Ry. K.B. 489.
- (30) *Anon.*, (1697), 2 Salk. 479; 91 E.R. 412; 33 Digest 390, 1011.
- (31) *South Cadbury (Inhabitants) v. Braddon, Somerset (Inhabitants)*, (1710), 2 Salk. 607; 91 E.R. 515; 33 Digest 403, 1131.

- (32) *R. v. Anon.*, (1816), 2 Chit. 137.
- (33) *R. v. Essex (Inhabitants)*, (1792), 4 Term Rep. 591; 100 E.R. 1193; 33 Digest 110, 736.
- (34) *R. v. Tower Hamlets Sewers Comrs.*, (1843), 5 Q.B. 357; 13 L.J.Q.B. 12; 2 L.T.O.S. 167; 8 J.P. 214; 114 E.R. 1284; 16 Digest 461, 3353.
- (35) *R. v. West Riding of Yorkshire JJ. Ex p. Broadbent*, [1910] 2 K.B. 192; 79 L.J.K.B. 731; *sub nom. R. v. Morris, etc., West Riding JJ. Ex p. Broadbent*, 102 L.T. 814; 74 J.P. 271; 19 Digest 567, 87. A
- (36) *General Medical Council v. Spackman*, [1943] 2 All E.R. 337; [1943] A.C. 627; 112 L.J.K.B. 529; 169 L.T. 226; 2nd Digest Supp.
- (37) *R. v. Dickenson*, (1857), 7 E. & B. 831; 26 L.J.M.C. 204; 29 L.T.O.S. 180; 22 J.P. 243; 119 E.R. 1455; 33 Digest 450, 1605.
- (38) *Kydd v. Liverpool Watch Committee*, [1907] 2 K.B. 591; *revsd. H.L.*, [1908] A.C. 327; 77 L.J.K.B. 947; 99 L.T. 212; 72 J.P. 395; 33 Digest 450, 1607. B

APPEAL by the Northumberland Compensation Appeal Tribunal, constituted under the National Health Service (Transfer of Officers and Compensation) Regulations, 1948, from an order of the Divisional Court dated Dec. 14, 1950, and reported [1951] 1 All E.R. 268. C

Under reg. 10 of the regulations the applicant had been awarded compensation for loss of employment as clerk to a joint hospital board by the Gosforth Urban District Council as compensating authority, and he had appealed against the award to the tribunal on the ground that the compensating authority had failed to take into account his service with the district council, as required by the regulations. The tribunal upheld the decision of the compensating authority. The applicant moved in the Divisional Court of the King's Bench Division for an order of *certiorari* to remove the decision of the tribunal into the High Court to be quashed on the ground that the decision was erroneous on the face thereof. In the Divisional Court both the tribunal and the compensating authority were respondents to the motion and both admitted that their decisions were wrong and that an error of law appeared on the face of the decision of the tribunal, but they contended that the court had no power to make an order of *certiorari*, since the tribunal had not acted without jurisdiction. The Divisional Court made an order of *certiorari*, and from that order the tribunal appealed. In the Court of Appeal the tribunal repeated its contention that *certiorari* did not lie on the ground of an error of law appearing on the face of the decision of the tribunal. In addition it contended that, although it was admitted that the tribunal had made an error of law, the error did not appear on the face of the record. D E F

The Attorney-General (Sir Lionel Heald, K.C.), J. P. Ashworth and H. A. P. Fisher for the tribunal.

Gardiner, K.C., and Maurice Lyell for the applicant.

Cur. adv. vult. G

Dec. 19. The following judgments were read.

SINGLETON, L.J. [having stated the facts]: Before this court the submission of the Attorney-General on behalf of the tribunal was twofold: (i) that an order of *certiorari* could not be granted in respect of a decision of a tribunal of this nature on the ground of error on the face of the record; and (ii) that, in any event, there was no error on the face of the record. It was said that the court could only look at the decision itself, and that that did not disclose any error on the face of it. Though the Attorney-General admitted that a mistake had been made, he submitted that the decision could not be inquired into by any court. H

On the first point the Lord Chief Justice in the Divisional Court gave a judgment which the Attorney-General described as "as clear and as forcible as any judgment could be." I find myself in complete agreement with the reasoning of

the Lord Chief Justice, and there is little that I would add to his judgment, but, having regard to the argument before us and to the authorities cited, it is right that I should express my views. I now come to *R. v. London County Council. Ex p. Entertainments Protection Assn., Ltd.* (1), in which SCRUTTON, L.J., said ([1931] 2 K.B. 233):

"The writ of *certiorari* is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of *certiorari* is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior court. There has been a great deal of discussion and a large number of cases extending the meaning of 'court.' It is not necessary that it should be a court in the sense in which this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of *certiorari*; and I do not discuss further the nature of the writ, because very elaborate discussions of it will be found in the recent cases of *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co.* (1920), *Ltd.* (2) and *R. v. Minister of Health. Ex p. Davis* (3)."

There is no doubt that the tribunal is an inferior court within the meaning of those words as explained by SCRUTTON, L.J. That was not in dispute.

Error on the face of the proceedings has always been recognised as one of the grounds for the issue of an order of *certiorari*. I can find no authority for saying that in this respect there is any distinction to be drawn between proceedings of a criminal nature and civil proceedings. *Ricelip Parish v. Henden Parish* (4) was a settlement case. In *R. v. Nat Bell Liquors, Ltd.* (5), an appeal before the Privy Council, LORD SUMNER said ([1922] 2 A.C. 154):

"There is no reason to suppose that, if there were any difference in the rules as to the examination of the evidence below on *certiorari* before a superior court, it would be a difference in favour of examining it in criminal matters, when it would not be examined in civil matters, but, truly speaking, the whole theory of *certiorari* shows that no such difference exists. The object is to examine the proceedings in the inferior court to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal convictions, except in so far as differences in the form of the record of the inferior court's determination or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior court, and therefore would not have been available as a reason for quashing the proceedings. In this connection, reliance was placed on a passage in the opinion of LORD CAIRNS in *Walsall Overseers v. London & North Western Ry. Co.* (6). The question for decision there was simply whether or not the Court of Appeal had jurisdiction to entertain an appeal from an order of the Court of Queen's Bench, discharging a rule *nisi* for a *certiorari* to quash an order of quarter sessions in a rating matter. LORD CAIRNS, speaking of *certiorari* generally, said (4 App. Cas. 39): 'if there was upon the face of the order of the court of quarter sessions anything which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the court found error upon the face of it, to put an end to its existence by quashing it.' He then turned to the kind of order under discussion, and after stating how much in that matter, both of fact and of law, the sessions were bound to set

out on the face of their order, he proceeded to point out that the statement of what had led to the decision of the court made the order 'not an unspeaking or unintelligible order', but a speaking one, and an order which on *certiorari* could be criticised as one which told its own story, and which for error could accordingly be quashed. It is to be observed on this passage, that the key of the question is the amount of material stated or to be stated on the record returned and brought into the superior court. If justices state more than they are bound to state, it may, so to speak, be used against them, and out of their own mouths they may be condemned, but there is no suggestion that, apart from questions of jurisdiction, a party may state further matters to the court, either by new affidavits or by producing anything that is not on or part of the record. So strictly has this been acted on, that documents returned by the inferior court along with its record, for example, the information, have been excluded by the superior court from its consideration. That the superior court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

Later, LORD SUMNER said (*ibid.*, 159):

"*R. v. Bolton* (7), undoubtedly, is a landmark in the history of *certiorari*, for it summarises in an impeccable form the principles of its application under the regime created by what are called Jervis's Acts, but it did not change, nor did those Acts change the general law. When the Summary Jurisdiction Act provided, as the sufficient record of all summary convictions, a common form, which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench, or alter the actual law of *certiorari*. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer: it was the inscrutable face of a sphinx."

LORD SUMNER shows how, and why, *certiorari* fell into disuse in the case of convictions before magistrates, yet there was no alteration in the law as to *certiorari*. Thus it appears to me that in a case such as the one before this court *certiorari* will lie if there be error on the face of the proceedings. The Attorney-General, in submitting the contrary, relied on the decision of the Court of Appeal in *Racecourse Betting Control Board v. Secretary of State for Air* (8). Unfortunately, neither the *Nat Bell* case (5) nor the *Walsall* case (6), was cited when the *Racecourse Betting Control Board* case (8) was before the court. The reasons given for the decision appear to me to be in conflict with the views of EARL CAIRNS, L.C., and LORD PENZANCE in the *Walsall* case (6) and of LORD SUMNER in the *Nat Bell* case (5), though it may be that the judgment could have been affirmed on other grounds. The decision of the tribunal was a "speaking order" in the sense in which that term has been used. The court is entitled to examine it, and if there be error on the face of it, to quash it—

"... not to substitute another order in its place, but to remove that order out of the way, as one which should not be used to the detriment of any of the subjects of Her Majesty,"

as LORD CAIRNS said in the *Walsall* case (6) (4 App. Cas. 39).

[HIS LORDSHIP then dealt with the second submission of the Attorney-General that in fact no error appeared on the record of the decision of the tribunal. He

came to the conclusion that error did appear, but in any event he considered that the point was not open to the tribunal, in view of the fact that the tribunal had admitted the error before the Divisional Court.]

The appeal fails. If it had succeeded, the applicant would have been deprived of some part of the compensation for loss of office to which he is entitled under the regulations, and to which everyone now agrees that he is entitled.

There was no way other than this by which the mistake could be rectified. The Attorney-General pointed out the undesirability of the court interfering with the decisions of tribunals set up by Parliament. I agree with him that the Divisional Court cannot extend its powers. It can only act according to the well-recognised rules. It is equally important that the court should not hesitate to act to prevent an injustice being done if the remedy sought is within the scope of its powers. Much time has been expended in recent years in considering whether in particular circumstances *certiorari*, or prohibition, will lie. A great deal of it could be saved. The regulations under the National Health Service Act, 1946, are of great complexity. The interpretation of them is left to the tribunal; there is no provision for an appeal to the courts. That position arises frequently nowadays. I most earnestly wish that in such cases, where difficult questions of law, and of interpretation, must arise, that there should be given some right of appeal. Perhaps the most convenient form is that adopted in s. 37 of the National Insurance (Industrial Injuries) Act, 1946, under which any question of law arising in connection with the determination of certain questions may, if the Minister thinks fit, be referred to the decision of the High Court, and any person aggrieved by the decision of the Minister on any question of law not so referred may appeal from that decision to the High Court. And there is provision in sub-s. (5) that the decision of the High Court shall be final, a provision which may be thought desirable in such cases. After all, it is the function of the courts to determine questions of law. Tribunals are sometimes given an unduly difficult task. There must be a feeling of dissatisfaction if it is recognised that a decision of a tribunal is wrong in law and yet there is no power to correct it—in other words, if there is no right to obtain the opinion of the court. I am satisfied that the course I have suggested would result in a saving of time, and of expense, and would be for the public good.

DENNING, L.J.: The question in this case is whether the Court of King's Bench can intervene to correct the decision of a statutory tribunal which is erroneous in point of law. No one has ever doubted that the Court of King's Bench can intervene to prevent a statutory tribunal from exceeding the jurisdiction which Parliament has conferred on it, but it is quite another thing to say that the King's Bench can intervene when a tribunal makes a mistake of law. A tribunal may often decide a point of law wrongly while keeping well within its jurisdiction. If it does so, can the King's Bench intervene? There is a formidable argument against any intervention on the part of the King's Bench at all. The statutory tribunals, like the one in question here, are often made the judges both of fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the King's Bench may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it. The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its

control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had.

The origin of this controlling power was the writ of *certiorari* by which the King commanded the judges of any inferior court of record to certify the record of any matter in their court with all things touching the same and to send it to the King's court to be examined. The wording of the writ was for many centuries as follows, being originally in Latin and afterwards in English:

"We being willing for certain reasons that all and singular orders made by you (as is said) be sent by you before us, do command that you do send forthwith before us all and singular the said orders with all things touching the same, as fully and perfectly as they have been made by you and now remain in your custody or power, together with this our writ, that we may cause further to be done thereon what of right and according to the law and custom of England we shall see fit to be done."

I would pause for a moment to notice the amplitude of this writ. The record of the inferior court is to be sent up so that the King's Bench may cause to be done thereon "what of right and according to the law and custom of England" ought to be done. The width of these words is only matched by the width of the words used by the great masters of the law in speaking of *certiorari*. Thus JOSEPH CHITTY, in his book on GENERAL PRACTICE, 3rd ed., vol. II, p. 353a, said:

"As an essential mode of exercising a control over all inferior courts, [the Court of Queen's Bench] has a most extensive power to bring before it their proceedings, and fully to inform itself upon every subject essential to decide upon the propriety of the proceedings below. This is effected by a writ called *certiorari* . . . The writ issues in civil as well as criminal cases. Thus, such a writ was ordered to be issued to the judge of an inferior jurisdiction, to return and certify the practice of his court [see *Williams v. Lord Bagot* (9)]."

Ninety years later LORD SUMNER used words of equal width in *R. v. Nat Bell Liquors, Ltd.* (5) ([1922] 2 A.C. 156). The supervision by *certiorari*

" . . . goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

Of recent years the scope of *certiorari* seems to have been somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law, and several learned judges have said as much. But the Lord Chief Justice has, in the present case, restored *certiorari* to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction. I have looked into the history of the matter, and find that the old cases fully support all that the Lord Chief Justice says. Until about one hundred years ago, *certiorari* was regularly used to correct errors of law on the face of the record. It is only within the last century that it has fallen into disuse, and that is only because there has, until recently, been little occasion for its exercise. Now, with the advent of many new tribunals and the plain need for supervision over them, recourse must once again be had to this well-tried means of control. I will endeavour to show how the writ of *certiorari* was used in former times, so that we can take advantage of the experience of the past to help us in the problems of the present.

Let me start with convictions by magistrates in summary proceedings under Acts of Parliament. Ever since the days of LORD HOLT, C.J., the Court of King's Bench has been extremely strict to see that all was in order. Everything necessary to support the conviction had to appear on the face of the record. The conviction had to recite the information in its precise terms. It had to set out the evidence of each witness as nearly as possible in his actual words. It had to state the adjudication with complete certainty. It had to show that the case

was brought within the terms of the Act of Parliament creating the offence. If there was any defect in point of form, or any error in point of law, appearing on the face of the record, the conviction would be moved into the King's Bench by *certiorari* and quashed. Nothing could be supplied by argument or intendment. The principles on which the court acted will be found well stated by LORD HOLT, C.J., in *R. v. Chandler* (10), and by BAYLEY, J., and HOLROYD, J., in *R. v. Daman* (11). An entertaining illustration will be found in *R. v. Barnaby* (12) and specimen convictions in CHITTY'S GENERAL PRACTICE OF THE LAW, vol. II, p. 198, and in *R. v. March* (13), where the conviction was drawn up by counsel on both sides so as to raise the point of law. The result of all this strictness, however, was that many convictions were quashed for defects of form and not of substance. The legislature, therefore, intervened in 1848 to make the record of a conviction much more simple. Instead of a detailed speaking record, there was provided an unspeaking common form which rarely disclosed any error. Thenceforward there was not so much room for *certiorari* in the case of convictions, but the fundamental principles remained untouched: see *R. v. Nat Bell Liquors, Ltd.* (5), per LORD SUMNER ([1922] 2 A.C. 159).

Next I will turn to the orders of justices in civil matters. The Court of King's Bench was never so strict about these as it was about convictions. It did not require a detailed speaking record to be sent up to them. The record had to contain everything necessary to show that the justices had jurisdiction to deal with the matter, and it had to set out their adjudication, but it was not necessary to set out either the evidence or the reasons. If a point of law arose, however, on which either party desired the ruling of the King's Bench, he could ask the justices to make a speaking order, that is, to make a special entry on the record of the reasons for their judgment. The justices were not bound to do this, but they usually did so if they entertained a doubt about the point. When their reasons thus appeared on the record, the Court of King's Bench would on *certiorari* inquire into their correctness, and if the reasons were wrong, would quash the decision. Sometimes the justices would find the facts and state them specially as part of the record so as to enable the Court of King's Bench to say whether their judgment on those facts was in law right or wrong. It was then known as a Case Stated, and the King's Bench would again on *certiorari* determine whether the decision was correct or not. The principles on which the court acted will be found well-stated by LORD HOLT, C.J., in *R. v. Inhabitants of Audly* (14) and *Ricelip Parish v. Henden Parish* (4), and in the argument before ABBOTT, C.J., and his colleagues in *R. v. Devon JJ.* (15), and by LORD CAIRNS in *Walsall Overseers v. London & North Western Ry. Co.* (6). Interesting illustrations will be found in *R. v. Dobbyn* (16), *R. v. London* (17), *Ditton's Case* (18), and *Talbury (Inhabitants) v. Foston (Inhabitants)* (19). The procedure in these cases was, however, simplified in 1857 when the legislature intervened to enable justices to state a Case for the opinion of the court without the record being removed by a writ of *certiorari*: see s. 10 of the Summary Jurisdiction Act, 1857. Thenceforward there was not so much room for *certiorari* in the case of orders of justices, but again the fundamental principles remained untouched.

So far, I have considered only the convictions or orders of justices, which were by far the most numerous cases in which *certiorari* was used. I now come to the orders of statutory tribunals. The Court of King's Bench has from very early times exercised control over the orders of statutory tribunals, just as it has done over the orders of justices. The earliest instances that I have found are the orders of the commissioners of sewers, who were set up by statute in 1531 to see to the repairs of sea walls and so forth. The Court of King's Bench used on *certiorari* to quash the orders of the commissioners for errors on the face of them, such as when they failed to set out the facts necessary to show that they had jurisdiction in the matter, or when they contained some error in point of law. It is recorded that on one celebrated occasion the commissioners refused to obey a *certiorari* issued out of the King's Bench, and for this the whole body of them were "laid

by the heels." The control thus exercised over the commissioners of sewers was used by LORD HOLT, C.J., as a precedent to control by *certiorari* the orders of any tribunal set up by Parliament, such as the College of Physicians and the commissioners for the repair of Cardiff bridge. Since that time it has never been doubted that *certiorari* will lie to any statutory tribunal. It was suggested before us on behalf of the tribunal that, in the case of these statutory tribunals, the Court of King's Bench only interfered by *certiorari* to keep them within their jurisdiction, and not to correct their errors of law. There are, however, many cases in the books where *certiorari* was used to correct errors of law on the face of the record. A striking instance was where the commissioners of sewers imposed an excessive fine, and it was quashed by the Court of King's Bench on the ground that in law their fines ought to be reasonable. Other instances are the numerous cases where *certiorari* was used to determine the validity of a sewer's rate imposed by the commissioners of sewers. There are several cases where an auditor's certificate has been quashed for error of law on the face of it. And I have no doubt that many more instances could be found throughout the books. The principles on which the court acted in the case of the commissioners of sewers will be found set out in *Commings v. Massam* (20), CALLIS ON SEWERS, 4th ed. (1824), pp. 203 and 204, and 342 to 344, and CHITTY'S GENERAL PRACTICE OF THE LAW, vol. II, at p. 379. The decisions of LORD HOLT are reported in *Grenville v. College of Physicians* (21), and the *Cardiffe Bridge Case* (22). A case of an auditor's certificate is *R. v. White* (23).

Leaving now the statutory tribunals, I turn to the awards of arbitrators. The Court of King's Bench never interfered by *certiorari* with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see the statute 9 and 10 Will. III, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in *Kent v. Elstob* (24) that an award could be set aside for error of law on the face of it. This was regretted by WILLIAMS, J., in *Hodgkinson v. Fernie* (25), but is now well established. This remedy by motion to set aside is, however, confined to arbitrators. It does not extend to statutory tribunals: see *Racecourse Betting Control Board v. Secretary of State for Air* (8). I look on that decision as merely a decision as to the scope of the remedy of setting aside on motion. It is not a decision on substantive law. It does not take away or diminish the inherent jurisdiction of the Court of King's Bench to interfere by *certiorari*.

It will have been seen that throughout all the cases there is one governing rule—*certiorari* is only available to quash a decision for error of law if the error appears on the face of the record. What, then, is the record? It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings: see BLACKSTONE'S COMMENTARIES, vol. III, p. 24. But it must be noted that, whenever there was any question as to what should, or should not, be included in the record of any tribunal, the Court of King's Bench used to determine it. It did it in this way. When the tribunal sent their record to the King's Bench in answer to the writ of *certiorari*, this return was examined, and, if it was defective or incomplete, it was quashed: see *Apsley's Case* (26), *R. v. Levermore* (27), and *Ashley's Case* (28). Alternatively, the tribunal might be ordered to complete it: *Williams v. Lord Bagot* (9) and *R. v. Warnford* (29). It appears that the Court of King's Bench always insisted that the record should contain, or recite, the document or information which initiated the proceedings and thus gave the tribunal its jurisdiction and also the document which contained their adjudication. Thus in the old days the

record sent up by the justices had, in the case of a conviction, to recite the information in its precise terms, and in the case of an order which had been decided by quarter sessions by way of appeal, the record had to set out the order appealed from: see *Anon.* (30). The record had also to set out the adjudication, but it was never necessary to set out the reasons: see *South Cadbury (Inhabitants) v. Braddon, Somerset (Inhabitants)* (31), nor the evidence, save in the case of convictions. Following these cases, I think the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, *certiorari* lies to quash the decision.

The next question which arises is whether affidavit evidence is admissible on an application for *certiorari*. When *certiorari* is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, admissible, for the simple reason that the error must appear on the record itself: see *R. v. Nat Bell Liquors, Ltd.* (5).^{*} Affidavits were, however, always admissible to show that the record was incomplete, as for instance, that a conviction omitted the evidence of one of the witnesses: see CHITTY'S GENERAL PRACTICE OF THE LAW, vol. II, p. 222, note (d), or did not set out the fact that the justices had refused to hear a competent witness for the defence: see *R. v. Anon.* (32), whereupon the court would either order the record to be completed, or it might quash the conviction at once.

Notwithstanding the strictness of the rule that the error of law must appear on the face of the record, the parties could always by agreement overcome this difficulty. If they both desired a ruling of the Court of King's Bench on a point of law which had been decided by the tribunal, but which had not been entered on the record, the parties could agree that the question should be argued and determined as if it were expressed in the order. The first case I have found in which this was done was in 1792, *R. v. Essex (Inhabitants)* (33), but thereafter it was quite common. It became a regular practice for parties to supplement the record by affidavits disclosing the points of law that had been decided by the tribunal. This course was only taken if no one objected. It seems to have been adopted by litigants as a convenient alternative to asking the tribunal to make a speaking order. Thus, in the numerous cases on the validity of a sewer's rate it was the regular course of proceeding for affidavits to be lodged stating the objections in law to the rate, and the case was decided on the objections stated in the affidavits: see, for instance, *R. v. Tower Hamlets Sewers Comrs.* (34). Recent cases such as *R. v. West Riding of Yorkshire JJ. Ex p. Broadbent* (35) and *General Medical Council v. Spackman* (36) show that the practice continues today. The explanation of all these cases is, I think, that the affidavits are treated by consent as if they were part of the record and make it a speaking order. Apart from these consent cases, it is often a very nice question whether an error which does not appear on the record is one which goes to jurisdiction or is only an error of law within the jurisdiction. If it goes to jurisdiction, affidavits are admissible, but otherwise not. I do not venture on a discussion of what does, or does not, go to jurisdiction, because it does not arise in this case. Nor do I venture on a discussion of the cases where Parliament has intervened to restrict the use of *certiorari* except to say that those restrictions can often be overcome by consent: see *R. v. Dickenson* (37). No such restriction appears in this case. We have here a simple case of error of law by a tribunal, an error which they frankly acknowledge. It is an error which deprives the applicant of the compensation to which he is by law entitled. So long as the erroneous decision stands, the compensating authority dare not pay him the money to which he is entitled lest the auditor should surcharge them. It would be quite intolerable if in such a case there were no means of correcting the error. The authorities to which I have referred amply show that the King's Bench can correct it by *certiorari*.

It is true that the record which has been sent up to the court does not distinctly disclose the error, but that is only because the record itself is incomplete. The tribunal has sent up its decision, but it has not sent up the claim lodged with the compensating authority or the order made by them on it or the notice of appeal to the tribunal. Those documents would, I think, properly be part of the record. They would, I understand, have disclosed the error. If it had been necessary, the court could have ordered the record to be completed. But that is unnecessary, having regard to the fact that it was admitted in open court by all concerned that the decision was erroneous. I am clearly of opinion that an error admitted openly in the face of the court can be corrected by *certiorari* as well as an error that appears on the face of the record. The decision must be quashed, and the tribunal will then be able to hear the case again and give the correct decision. In my opinion, the appeal should be dismissed.

MORRIS, L.J., stated the facts, held that the submission made on behalf of the tribunal that in fact no error appeared on the record of the decision of the tribunal was not open to the tribunal as it had conceded before the Divisional Court that error was apparent on the face of the tribunal's order, and continued: The appeal really resolves itself into the question whether *certiorari* lies in a case where the decision of an inferior court or tribunal manifestly reveals legal error. That an order of *certiorari* will go to the respondent tribunal does not admit of doubt. The tribunal is an inferior court in the sense discussed by SCRUTTON, L.J., in his judgment in *R. v. London County Council. Ex p. Entertainments Protection Assocn., Ltd.* (1) and by ATKIN, L.J., in his judgment in *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (2). In the former of the two cases just referred to SCRUTTON, L.J., spoke of the writ of *certiorari* as enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction. In the other case ATKIN, L.J., said that the controlling jurisdiction of the King's Bench Division was exercised when the inferior court acted in excess of their legal authority. But in neither passage was there more than a broad and general description of the nature of the writ. I do not read the judgments as embarking on or as intending to lay down an exhaustive or delimiting definition of the scope of, or the occasions for the issuing of, the writ.

Cases were cited in argument before us which showed that in times past *certiorari* lay where justices recorded decisions which were on the face of them bad in law. It was said, however, that this was not shown to have been the practice in the case of non-judicial tribunals. But there is no warrant for the view that the controlling power exercised by *certiorari* over inferior courts varies according to the description of, or the composition of, the inferior court. Once the body concerned is properly to be described as an inferior court in the sense in which this expression is now well understood, then, subject to any statutory provision, an order of *certiorari* will issue on any of the grounds recognised by law. It was further said that, though these grounds were formerly wide enough to include cases where decisions were, on the face of them, bad in law, there has in recent years been a contraction, with the result that *certiorari* no longer lies for such reason. It is said that this basis for the exercise of the controlling power has fallen into abeyance. I can find no justification for this contention. The speeches in the House of Lords in *Walsall Overseers v. London & North Western Ry. Co.* (6) demonstrated that, if that which was stated on the face of an order of an inferior court showed that the order was erroneous in law, then the order could be removed by *certiorari* and its existence could be ended by quashing. The *Walsall* case (6) was in 1878. No reason was suggested in argument why it should be held that in the subsequent period (a brief one in comparison to the antiquity of the writ) the efficacy of *certiorari* should be diminished or why it should lose part of its virtue and strength. In *Kydd v. Liverpool Watch Committee* (38) FLETCHER MOULTON, L.J., said ([1907] 2 K.B. 603) in reference to

cases when courts of quarter sessions had prior to 1879 given their decisions in the form of a Special Case for the opinion of the superior courts:

"The court of quarter sessions in such cases chose to embody the material and grounds of its decision in the decision itself. Any error in law in the decision became thereby an error on the face of the record, and therefore cognizable by the superior courts, should the record be brought up before them by the ordinary writ of *certiorari*. It was not as a court of appeal that the superior court sat when considering such Special Cases: it sat in the exercise of its ordinary jurisdiction to quash decisions of inferior courts, when those decisions were on the face of them bad in law."

The survey of the law by LORD SUMNER in 1922 in *R. v. Nat Bell Liquors, Ltd.* (5) lends no countenance to the view urged on behalf of the tribunal, but on the contrary negatives it. In my judgment, the law as laid down in the House of Lords in the *Walsall* case (6) must take precedence over any observations made in *Racecourse Betting Control Board v. Secretary of State for Air* (8) which may be in conflict.

It is plain that *certiorari* will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for re-hearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision or irregularity, or absence of, or excess of, jurisdiction where shown. The control is exercised by removing an order or decision, and then by quashing it. A consideration of the authorities leads me to the same result as that reached by the Divisional Court, and I find myself in full agreement both with the conclusion and the reasoning of the judgment there delivered.

Appeal dismissed with costs.

Solicitors: *Solicitor, Ministry of Health* (for the tribunal); *Gwylym T. John* (for the applicant).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Re A SOLICITOR (1951 M. No. 234).

[CHANCERY DIVISION (Roxburgh, J.), December 13, 1951].

Solicitor—Clients' account—Bankruptcy of solicitor—Account not to vest in trustee in bankruptcy—Removal of solicitor from trusteeship of account—Appointment of new trustees—Bankruptcy Act, 1914 (c. 59), s. 18 (1), s. 38 (1)—Trustee Act, 1925 (c. 19), s. 41 (1).

In accordance with the Solicitors' Accounts Rules, 1945, made by the Law Society under the Solicitors Act, 1933, s. 1, a solicitor had opened a clients' account with certain bankers. On Feb. 7, 1951, the solicitor was adjudicated a bankrupt, and on Mar. 6, 1951, the Council of the Law Society, in pursuance of para. 5 of sched. I to the Solicitors Act, 1941, applied for and obtained an order that no payment should be made out of any account (including the clients' account) of the bankrupt with the said bankers.

HELD: (i) the clients' account was property held by the bankrupt on trust for another person within the meaning of the Bankruptcy Act, 1914, s. 38 (1), and did not vest in the trustee in bankruptcy under s. 18 (1) of that Act, but remained vested in the bankrupt.

(ii) the court had jurisdiction under the Trustee Act, 1925, s. 41 (1), to remove the bankrupt from his trusteeship of the clients' account and appoint new trustees in his place.

Re Henderson ([1940] 3 All E.R. 295), applied.

AS TO ACCOUNTS OF CLIENTS' MONEYS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 307-310, paras. 334-340.

Cases referred to:

- (1) *Plunkett v. Barclays Bank, Ltd.*, [1936] 1 All E.R. 653; [1936] 2 K.B. 107; 105 L.J.K.B. 379; 154 L.T. 465; Digest Supp.
- (2) *Roberts v. Death*, (1881), 8 Q.B.D. 319; 51 L.J.Q.B. 15; 46 L.T. 246; 21 Digest 629, 2131.
- (3) *Hancock v. Smith*, (1889), 41 Ch.D. 456; 58 L.J.Ch. 725; 61 L.T. 341; 43 Digest 1022, 4615.
- (4) *Loescher v. Dean*, [1950] 2 All E.R. 124; [1950] Ch. 491; 2nd Digest Supp.
- (5) *Re Henderson*, [1940] 3 All E.R. 295; [1940] Ch. 764; 109 L.J.Ch. 363; 2nd Digest Supp.

ADJOURNED SUMMONS by which the trustee in the bankruptcy of a solicitor applied for an order that, notwithstanding an order dated Mar. 6, 1951, and made on the application of the Law Society under the Solicitors Act, 1941, sched. I, para. 5, the Midland Bank, Ltd., at their Birkenhead branch, might be at liberty to pay to the trustee in bankruptcy moneys out of any bank account standing with them in the name of the solicitor.

C. A. Settle for the applicant, the trustee in bankruptcy.

J. L. Arnold for a creditor and for the solicitor.

N. S. S. Warren for the Law Society.

ROXBURGH, J.: The solicitor concerned in this case was adjudicated bankrupt on Feb. 7, 1951, and the applicant on this summons is his trustee in bankruptcy.

The Solicitors Act, 1933, s. 1, provides:

“The Council of the Law Society shall make rules (a) as to the opening and keeping by solicitors of accounts at banks for clients’ moneys . . .”

The phrase “accounts at banks for clients’ moneys” is, in my judgment, of some significance. It is not accounts for solicitors’ moneys, nor mixed accounts for solicitors’ and clients’ moneys. Section 8 provides:

“(1) Subject to the provisions of this section no bank shall, in connection with any transaction on any account of any solicitor kept with it or with any other bank (other than an account kept by a solicitor as trustee for a specified beneficiary) incur any liability or be under any obligation to make any inquiry or be deemed to have any knowledge of any right of any person to any money paid or credited to any such account which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it: Provided that nothing in this sub-section shall relieve a bank from any liability or obligation under which it would be apart from this Act. (2) Notwithstanding anything in the preceding sub-section, a bank at which a solicitor keeps an account for clients’ money shall not, in respect of any liability of the solicitor to the bank, not being a liability in connection with that account, have or obtain any recourse or right, whether by way of set off, counterclaim, charge, or otherwise, against moneys standing to the credit of that account.”

That section seems to me to reinforce the inference which I draw from s. 1, that the moneys in the clients’ account are clients’ moneys.

Rules have been made, and the rules now in force are the Solicitors’ Accounts Rules, 1945 (S.R. & O., 1944, No. 781). Rule 2 (1) of those rules provides:

“In these rules, unless the context otherwise requires—‘Solicitor’ shall mean a solicitor of the Supreme Court and shall include a firm of solicitors; ‘Client’ shall mean any person on whose account a solicitor holds or receives client’s money; ‘Client’s money’ shall mean money held or received by a solicitor on account of a person for whom he is acting in relation to the holding or receipt of such money either as a solicitor or, in connection with his practice as a solicitor, as agent, bailee, stakeholder or in other capacity.”

Rule 3 provides:

"Subject to the provisions of r. 9 hereof, every solicitor who holds or receives client's money, or money which under r. 4 hereof he is permitted and elects to pay into a clients' account . . ."

By r. 4:

"There may be paid into a client account—(a) trust money; (b) such money belonging to the solicitor as may be necessary for the purpose of opening or maintaining the account; (c) money to replace any sum which may by mistake or accident have been drawn from the account in contravention of sub-r. (2) of r. 8 of these rules; and (d) a cheque or draft received by the solicitor, which under r. 5 of these rules he is entitled to split but which he does not split."

One other statutory provision is relevant, *viz.*, the Solicitors Act, 1941, sched. I, para. 5, which provides:

"If the council [of the Law Society] are satisfied that a solicitor or his clerk or servant has been guilty of any such dishonesty as is mentioned in s. 2 of this Act, they may apply to the High Court or a judge thereof for an order, and the court or a judge thereof may on such application make an order, that no payment shall be made without the leave of the court, or a judge thereof by any banker named in the order out of any banking account in the name of such solicitor or his firm."

I note in passing that there is no provision there for getting what I will call a "stop order" removed.

Under that power, on Mar. 6, 1951, the council applied for and obtained a stop order on all the banking accounts (of which there were three) of this bankrupt at a particular bank. Two of the accounts were overdrawn, and accordingly of not much importance, and the third was the clients' account established in accordance with the Act of 1933 and the rules of 1945. There was a large sum of money to the credit of the latter account on the date of adjudication, Feb. 7, 1951, and there is no doubt that the creditor who is before me will be entitled to a major proportion of that money. The stop order having been made, no one knew what to do next, and that is not surprising, because that matter seems to have escaped the attention of the draftsman of sched. I to the Act of 1941, but the trustee has taken out the summons now before me which asks that, notwithstanding the stop order, the Midland Bank, Ltd., at their branch at Birkenhead (the relevant branch) may be at liberty to pay moneys out of any bank account in the name of the solicitor to the applicant, the trustee in bankruptcy, while he shall be acting as such trustee.

The summons raises two separate questions. One is procedural, *viz.*: What is the proper way of getting a stop order removed?, but *in limine* arises the important question: What is the nature of the clients' account—in other words, what happens to a clients' account on the bankruptcy of a solicitor? That question, in my judgment, primarily depends on those portions of the Solicitors Act, 1933, to which I have referred when read in conjunction with the Bankruptcy Act, 1914.

The Bankruptcy Act, 1914, s. 38, provides:

"The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars:—(1) Property held by the bankrupt on trust for any other person."

Section 18 (1) of that Act provides that on adjudication

"... the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee."

It is to be noted that the only property which vests in the trustee is that which is divisible among the creditors. Section 38 indicates what is meant in the Act

by the property of the bankrupt. Accordingly, this clients' account is not vested, and will not vest, in the trustee if it is property held by the bankrupt on trust for any other person. The words "on trust for any other person," in my judgment, are of very wide import. It is not unusual to find in books and judgments the phrase "trustee in the full sense of the term," or some such words, but the truth of the matter is that, as the principles of equity permeate the complications of modern life, the nature and variety of trusts ever grow, and it is, perhaps, rash to think of some conception of a trust having certain characteristic attributes and then to say that a trust which lacks one or some of those attributes is not a trust in the full sense. In my judgment, the question what are the terms or conditions of a trust has to be solved by reference to the express, or, in many cases, the implied, terms which are to be derived either from some instrument or from the situation, and I think that, if you can say of any asset that, though the title is in the bankrupt, a beneficial interest therein resides in some person other than the bankrupt, even though the bankrupt himself may also have a beneficial interest therein, the asset does not vest in the trustee, though any beneficial interest which the bankrupt himself may have would vest in the trustee.

That this is the right approach seems to me to be indicated not only by the nature of the account as indicated by the Solicitors Act, 1933, but by some *dicta* since the Act came into force. In *Plunkett v. Barclays Bank, Ltd.* (1) DU PARCQ, J., said ([1936] 1 All E.R. 657) of a sum of money which was assumed to have been paid in under the Solicitors' Accounts Rules, 1935, r. 3, then in force, which corresponds with r. 4 of the rules of 1945:

"It was accordingly trust money as is the money recovered by a judgment creditor in an action which he brings as trustee for another person (see *Roberts v. Death* (2)), or the money paid by a stock-broker into an account into which he pays nothing but moneys received on behalf of clients (see *Hancock v. Smith* (3))."

In *Loescher v. Dean* (4) HARMAN, J., refers to the question. He cites the passage which I have cited from the judgment of DU PARCQ, J., and then says ([1950] 2 All E.R. 126):

"Therefore, although that was not the point he was deciding, the learned judge did assume that money in a client account is trust money, and so in a sense no doubt it is . . ."

I note, of course, the qualification "in a sense" which HARMAN, J., there places on the statement. I think that he was referring to the fact that the terms of the trust might not be identical with those which characterise what is commonly called a trust in the full sense, but, at any rate, I do not think that there is anything in that qualification which should lead me to suppose that HARMAN, J., would have thought that a clients' account would vest in a trustee in bankruptcy. Therefore, my conclusion on this part of the case is that a clients' account constituted in pursuance of s. 1 of the Solicitors Act, 1933, or, more accurately, the chose in action represented by such an account, is property held by the bankrupt on trust for another person within the meaning of s. 38 (1), of the Bankruptcy Act, 1914, and, accordingly, does not vest in the trustee in bankruptcy under s. 18 of that Act.

I am informed by counsel, and believe, that there is no express statutory provision for the removal of the stop order provided for by the Solicitors Act, 1941, sched. I, para. 5, and no express statutory indication as to what is to happen to the clients' account in the event of the bankruptcy of a solicitor, *i.e.*, no express statutory provision for winding-up a clients' account. In those circumstances, the legal position seems to me to be reasonably clear. The Trustee Act, 1925, s. 41, as construed by BENNETT, J., in *Re Henderson* (5), will provide a satisfactory solution for all the problems, except one. I will mention that one to

dispose of it. So far as a trustee nominated by the Law Society may be concerned, the society, apparently, do not wish to ask for any remuneration for their nominee. So far as a trustee in bankruptcy is concerned, if he is appointed trustee, his position is quite different. I think I am right in saying that he is remunerated on a percentage basis, and, accordingly, he would get no remuneration for any services which he might render as trustee of the client's fund. That seems to me not to be altogether fair, but I know of no power to give him any remuneration. There is, of course, the procedure in connection with the appointment of judicial trustees which might be relevant in this connection, but I do not think that that would provide a satisfactory solution. Therefore, I have to confess myself unable to deal with that particular problem, *viz.*, the remuneration of the trustee in bankruptcy and of the trustee nominated by the Law Society if the society wanted him to receive remuneration. I must leave those problems, I think, for future statutory consideration. Apart from that problem, I find no difficulty, and I think a simple procedure can be evolved.

The Trustee Act, 1925, s. 41 (1), provides:

"The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who . . . is a bankrupt . . ."

That is clear enough, and BENNETT, J., has held in *Re Henderson* (5) that that section enables the court to remove a bankrupt trustee against his will. The trustee was not a bankrupt in *Re Henderson* (5), but BENNETT, J., dealt with the case of a bankrupt. Secondly, *Re Henderson* (5) shows that an application for such removal may be made by originating summons when there is no dispute of fact. There might be a dispute of fact before the bankrupt was adjudicated, but there could hardly be a dispute of fact afterwards because, *ex hypothesi*, if he has been adjudicated, he is bankrupt. It seems to me that, other things being equal, the court would be inclined to appoint two trustees—it seldom appoints only one—and that it would be inclined to appoint the nominee of the Law Society because under the Solicitors Act, 1941, s. 2, they administer a compensation fund which is available for compensating what I might call the professional, as opposed to the domestic, creditors of the solicitors, and, accordingly, they have a very strong duty to their own members to do their best to see that funds which ought to be applied in paying professional creditors are not applied in paying domestic creditors. On the other hand, the trustee in bankruptcy also has an interest. It is his affair to try to get as much as he can for the general creditors, and, therefore, in that capacity he represents the other point of view. Moreover, he will have all the books of the bankrupt and obviously will be in a good position to investigate the situation. Therefore, it seems to me there is a great deal to be said, other things being equal, for the appointment of the nominee of the Law Society and of the trustee in bankruptcy as trustees.

That being so, I think a very simple form of procedure is available. The summons should be intitled "In the Matter of the Solicitors Act" and also "In the Matter of the Trustee Act." It will be in the form which is not *inter partes*, but which does require entry of appearance, and it will ask in separate paragraphs for a stop order—I am using that short phrase to describe the order for which para. 5 of sched. I to the Act of 1941 makes provision—and for the appointment of trustees. It is almost certain that, if it is a case in which a stop order is justified, it is likely to be one in which the removal of the solicitor from the trusteeship of the fund will be justified. Therefore, there will be no difficulty or objection in asking for both forms of relief, even though the bankruptcy may

not have actually occurred. Then the existing procedure will be followed. The summons will come in the first instance before the master *ex parte* and he will, if it is a proper case for making an order, make an order in the form of the order now before me which is dated Jan. 22, 1951. It says:

"Upon the application of the Law Society by originating summons . . . it is ordered that no payment be made until [a certain date] without the leave of this court or of a judge thereof by the bank out of any banking account in the name of [the solicitor]. It is ordered that the said originating summons be heard [on a date specified] before the master and that the order [the interim *ex parte* stop order] be served forthwith on the solicitor together with the originating summons."

When that comes again before the master, the solicitor may have been adjudicated bankrupt or he may not. If he has not, then, if it is a case for making the stop order, the stop order will be made, and the other matter will stand over. But if he has by then already been adjudicated bankrupt, there is no reason why the stop should not then be removed simultaneously with the appointment of the trustees in his place. I suppose a vesting order would be made on the appointment of the trustees, which would presumably vest the account in the trustees. As far as I can see, that procedure will work. So far as I am concerned, at any rate, there will be no need for the Law Society to produce an affidavit of the fitness of the person whom they have nominated, being an officer in their employment, and, so far as the trustee in bankruptcy is concerned, there will be no necessity, so far as I am concerned, for an affidavit of fitness because he already gives security as a trustee in bankruptcy. *Prima facie* the Law Society would not be a person who could make application under s. 41 of the Trustee Act, 1925. If, however, the Law Society make a token payment, say of £1, out of their compensation fund to a professional creditor of the solicitor, being a person interested in the clients' account, then, on such payment, they become, under s. 2 (8) of the Act of 1941 subrogated to the rights of that professional creditor against the client's account and thus would, in my judgment, be a person or persons beneficially interested in the clients' account, and, therefore, a person or persons able to make an application under s. 41.

In this particular case I am able to short-circuit this procedure because the bankrupt has most fortunately appeared by counsel and is willing to undertake to sign cheques which will exhaust the clients' account. I have before me all the necessary parties, the trustee in bankruptcy, who protects the general body of creditors, the Law Society, and the bankrupt and the main creditor. The only persons who are not before me are the four creditors who are admitted to take precedence. Therefore, it is quite simple.

The bankrupt, in pursuance of his undertaking, will draw a cheque for the appropriate amounts in favour of the creditors (subject to provision for costs), and I will remove the stop order so far as is necessary to enable the bank to honour those cheques so drawn, which will in fact exhaust the whole fund. The bank will have notice of this and, of course, will not honour any other cheques, if perchance any other cheques should be drawn.

Order accordingly.

Solicitors: *Kinch & Richardson*, agents for *Percy Hughes & Roberts*, Birkenhead (for the applicant, a creditor, and the solicitor); *Hempsons* (for the Law Society).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

ARMSTRONG AND ANOTHER v. STRAIN AND OTHERS.

COURT OF APPEAL (Singleton, Birkett and Romer, L.J.J.), November 21, 22, 23, 26, 27, 28, December 20, 1951.]

Misrepresentation—Principal and agent—Liability of principal for misrepresentation of agent—Innocent misrepresentation by agent—Knowledge of true facts by principal—No fraud on part of principal.

In the course of negotiations by the plaintiffs for the purchase of a bungalow belonging to the first defendant, the agents of the first defendant made certain statements as to the value of the property. Owing to the defective condition of the bungalow the statements were untrue, but the agents were not aware of the existence of any defects and so made the statements innocently, believing them to be true. The first defendant, who was aware of the defective structural condition, had not authorised his agents to make the statements, nor had he deliberately kept them in ignorance with the dishonest intention that they should mislead a prospective purchaser, and he did not know that the statements were being made. Relying on the agents' representation, the plaintiffs bought the property. On discovering its defective condition, they sued the first defendant and his agents for damages for fraudulent misrepresentation.

HELD: in the absence of actual fraud or dishonesty on the part of a principal, knowledge by him of facts which render false a statement made innocently by his agent does not render the principal guilty of fraudulent misrepresentation, and, therefore, the action failed.

London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co., Ltd. ([1936] 2 All E.R. 1039), criticised and explained.

Derry v. Peek (1889) (14 App. Cas. 337), applied.

Observations of ATKINSON, J., in *Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding Urban District Council* ([1937] 3 All E.R. 335), approved.

AS TO PRINCIPAL'S LIABILITY FOR AGENT'S MISREPRESENTATION, see HALSBURY, Hailsham Edn., Vol. 1, p. 289, para. 475; and FOR CASES, see DIGEST, Vol. 1, pp. 587-594, Nos. 2245-2281.

Cases referred to:

- (1) *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co., Ltd.*, [1936] 2 All E.R. 1039; 155 L.T. 190; Digest Supp.
- (2) *Gordon Hill Trust, Ltd. v. Segall*, [1941] 2 All E.R. 379; 2nd Digest Supp.
- (3) *Pearson & Son, Ltd. v. Dublin Corpn.*, [1907] A.C. 351; 77 L.J.P.C. 1; 97 L.T. 645; 1 Digest 588, 2250.
- (4) *Derry v. Peek*, (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 9 Digest 125, 642.
- (5) *Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding Urban District Council*, [1937] 3 All E.R. 335; [1937] 2 K.B. 607; 106 L.J.K.B. 885; 157 L.T. 450; Digest Supp.
- (6) *Nocton v. Ashburton (Lord)*, [1914] A.C. 932; 83 L.J.Ch. 784; 111 L.T. 641; 35 Digest 55, 493.
- (7) *Cornfoot v. Fowke*, (1840), 6 M. & W. 358; 9 L.J.Ex. 297; 151 E.R. 450; 1 Digest 589, 2255.
- (8) *Ludgater v. Love*, (1881), 44 L.T. 694; 45 J.P. 600; 1 Digest 589, 2254.
- (9) *Evans v. Edmonds*, (1853), 13 C.B. 777; 1 C.L.R. 653; 22 L.J.C.P. 211; 21 L.T.O.S. 155; 138 E.R. 1407; 35 Digest 32, 235.
- (10) *Pasley v. Freeman*, (1789), 3 Term Rep. 51; 2 Smith, L.C., 12th ed., 71; 100 E.R. 450; 1 Digest 24, 194.

APPEAL by the plaintiffs from an order of DEVLIN, J., dated Mar. 21, 1951, dismissing the plaintiffs' claim for damages for fraudulent misrepresentation.

The plaintiffs had purchased a bungalow belonging to the first defendant, and alleged, as the first and second charges of fraud, that they had been induced to do so by fraudulent misrepresentations made by the fifth defendant and the second defendant, who were respectively a partner in an independent firm of estate agents (the sixth defendants) employed by the first defendant to find a purchaser, and a partner in the first defendant's own firm of estate agents (the third defendants). Another partner in the independent firm was joined as fourth defendant. DEVLIN, J., found that the fifth defendant had made an untrue statement, but that he had made it innocently. As regards the second defendant, he found that the statement made by him was neither fraudulent nor did it deceive the plaintiffs.

In addition to the charges of fraud against the fifth and second defendants, the plaintiffs alleged, as third and fourth charges of fraud, that the first defendant was guilty of fraud because (a) he had deliberately kept the fifth and second defendants in ignorance of the true facts with the dishonest intention that they should mislead a prospective purchaser, and (b) alternatively, that the representations made by the fifth and second defendants were untrue to the knowledge of the first defendant, and that, principal and agent being one in law, fraud was thereby established. DEVLIN, J., did not find fraud proved under the third head. With all the above findings under the first, second and third heads of charge, the Court of Appeal refused to interfere. As regards the fourth head (on which alone this case is reported), DEVLIN, J., found, as stated above, that a false representation was made by the fifth defendant, but was made innocently, and that it was admitted that the facts which falsified it were known to the first defendant, but he held that there was no principle of law which compelled him to find, and he declined to find, that the first defendant was guilty of fraudulent misrepresentation by reason of the false statement made by his agent.

Marlowe, K.C., and *Eric Myers* for the plaintiffs.

N. Lawson and *Percy Bloomfield* for the first three defendants.

Pollock, K.C., and *N. C. Bridge* for the fourth, fifth and sixth defendants.

Cur. adv. vult.

Dec. 20. The following judgments were read.

SINGLETON, L.J., after stating the facts and giving his reasons for not interfering with DEVLIN, J.'s, finding as regards the first, second and third charges of fraud, continued: Under the fourth head the judge said that he had already reached the conclusion that the representation of the agent, the fifth defendant, was a false and a material statement of fact, and he added that it was admitted that the facts which falsified it were known to the principal, the first defendant. He then proceeded to consider the decision in *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co., Ltd.* (1), on which the claim under this head was based. He was of opinion that it was an authority supporting the proposition for which the plaintiffs contended, and, subject to any other authority, binding on him. After a careful examination of the authorities, DEVLIN, J., arrived at the conclusion that a later decision of the Court of Appeal, *Gordon Hill Trust, Ltd. v. Segall* (2), was in direct conflict with the decision in the *London County Properties* case (1). He preferred the decision in *Segall's* case (2), and, accepting it, he held that the plaintiffs' claim under this head failed. I should say that it does not appear that the earlier case was cited when *Segall's* case (2) was before the court.

In my view, there has been in some quarters a misunderstanding of the decision in the *London County Properties* case (1). It does not provide any support for the plaintiffs' case in the absence of proof of fraud or of dishonesty. In that case GODDARD, J., had found that there was a breach of warranty, and had awarded damages. The defendants appealed, and the plaintiffs cross-appealed, submitting that there ought to have been a finding of fraud on the

part of the defendants' agent, Addis, a finding which GODDARD, J., had declined to make. Both appeal and cross-appeal succeeded. As the report shows ([1936] All E.R. 1040):

" . . . the plaintiffs asked, in substance, that the finding of the learned judge as to fraud be reversed and that there be judgment for the plaintiffs on that issue . . ."

The whole of the argument of counsel on the cross-appeal was directed to the issue of fraud or no fraud on the part of Addis: *vide* the submissions of Mr. Norman Birkett, K.C., on the one side, and of Mr. H. J. Wallington, K.C., on the other side ([1936] 2 All E.R. 1041). And it is clear from the judgment of SLESSER, L.J. (*ibid.*, 1046), that Addis knew the purpose for which his answer or statement was to be used. In those circumstances, it was open to the Court of Appeal on the cross-appeal to find that Addis was fraudulent if they were clearly satisfied that the judge's finding on this point was wrong. It cannot have been open to them to find that there was some form of liability in the absence of fraud—a case which had not been argued or suggested so far as the report shows. Nor did they do so. The considered judgment of SLESSER, L.J., and his examination of the facts show that his mind was directed to the question of fraud on the part of Addis. The uncertainty as to the true meaning of the decision may well arise from the other judgments. It may be, though I hesitate to say it, that ROMER, L.J., overlooked the fact that the arguments in *Pearson & Son, Ltd. v. Dublin Corpn.* (3) were founded on an allegation of fraud on the part of the engineers who had prepared the plans. The citation of the learned Lord Justice from that case embraces the words "guilty knowledge." Those words are an essential part of the judgment from which they are taken. "Guilty knowledge" means knowledge of fraud or dishonesty on the part of someone, and without it there can be no finding of fraudulent misrepresentation. Again, as LORD HERSCHELL said in *Derry v. Peek* (4) (14 App. Cas. 374):

"First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice."

maintain that, at least since the year 1889, it has not been open to any court to find for the plaintiff in an action of fraudulent misrepresentation unless there is proof of fraud or dishonesty.

In *Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding Urban District Council* (5) ATKINSON, J., was called on to consider the *London County Properties* case (1), and in the course of a masterly analysis of it and of the authorities on the subject, he said ([1937] 3 All E.R. 346):

"I cannot myself see how a principal can be held liable for fraud when there has been no fraud, no element of fraud, either on the part of himself or on the part of anyone for whose acts he is responsible."

Later (*ibid.*, 347) he said it was decided in that case

" . . . that a principal is liable for fraud where the fraudulent information supplied by one agent is handed on to a third party through an innocent agent."

I agree with the reasoning of ATKINSON, J., and, with all respect, I think that DEVLIN, J., took a wrong view of the decision of the Court of Appeal in the *London County Properties* case (1). That may well have arisen from the somewhat nebulous way in which the judgments in the case are expressed.

Difficulties may arise in a claim against a company which can only speak or act through its agents or officers, but if an officer of a company writes and represents that which is untrue when many other officers of the company know the true facts, it may well be found that he made the representation without belief in its truth, or that he made it recklessly, careless whether it was true or false. That must depend on the evidence. In the case before us the principal

is an individual; it was the agent who made the representation which was false. The judge negatived fraud on the part of both. In those circumstances an action for fraudulent misrepresentation cannot succeed against either.

London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property Investment Co., Ltd. (1) has led to much misunderstanding. For myself, I feel that it should not be treated as an authority except and in so far as the decision was based on the fraud of Addis. DEVLIN, J., took a different view of it. That does not affect the result of this appeal, for he preferred to follow the decision in *Segall's case* (2). In my judgment, this appeal should be dismissed.

BIRKETT, L.J.: I agree with the judgment which has just been delivered. It covers so fully the matters of fact and the questions of law which have been the subject of this appeal that I can state my own conclusions quite briefly. The court was occupied for some days in considering the evidence given before DEVLIN, J., and it was impossible not to feel considerable sympathy for the plaintiffs. There was great force in the plea made by counsel for the plaintiffs that the law should be able in some way to give the plaintiffs redress, and he relies on two main matters to bring about that result. [HIS LORDSHIP dealt with the first three heads of charge of fraud, agreed with the conclusions of DEVLIN, J., and continued:] Counsel for the plaintiffs argued that, notwithstanding the findings of the learned judge, the decision of the Court of Appeal in *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co., Ltd.* (1) still allowed the plaintiffs to succeed, and that DEVLIN, J., should have applied it to the facts of this case.

The all-important question is: What does that case decide? The acutest controversy has raged about it and still rages, and, I suppose, will continue to rage. DEVLIN, J., and ATKINSON, J., are on opposite sides. Both these learned judges have discussed the case in its relation to other authorities with great learning and force, DEVLIN, J., in the present case, and ATKINSON, J., in *Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding Urban District Council* (5). The essential point of difference between them is that ATKINSON, J., took the view that the basis of the decision in the *London County Properties* case (1) was a finding of fraud against one Addis, an agent of the company, whereas DEVLIN, J., took the view that the Court of Appeal made no such finding of fraud against Addis and came to its decision against the company notwithstanding the absence of any such finding. He interpreted the decision as meaning that, if an agent makes a representation on behalf of his principal which is untrue in fact, but which he honestly believes to be true, the principal is guilty of fraud if the true facts are known to another agent, although that other agent knows nothing of the representation, supplies no inaccurate information, and in no way fails in his duty. ATKINSON, J., rejected that interpretation altogether, for the reasons he gave at some length. It is enough for me for the purposes of this judgment to say that I agree with the judgment of ATKINSON, J., but I will just add a word or two.

It is to be observed in the *London County Properties* case (1) that the only point argued for the plaintiffs in the Court of Appeal was that Addis, who was the manager of the department which collected the rents of the flats for the defendant company and answered the questions of the plaintiffs, was guilty of fraud, and that GODDARD, J., should have so found. No argument was submitted to the court that the plaintiffs would be entitled to succeed if none of the servants of the company was guilty of fraud. It is true that none of the lords justices said expressly: "We base our decision on the fraud of Addis and we reverse the finding of the trial judge." This was a point which influenced DEVLIN, J., a great deal, but it is equally true that none of the lords justices said: "Although the only point argued before us was that Addis was fraudulent, we need not decide that point, for we propose to decide the appeal on another point altogether, although it was never raised or argued by either side." These

two features by themselves are enough to make the case remarkable, but nowhere do the lords justices seem to be impressed by the novelty or the vast importance of their decision. When the decision in *Derry v. Peek* (4) is kept in mind and the language that has been used to define fraud in that case and in scores of others, it would have been a natural thing for some emphasis to be laid on the novelty of the decision and its far-reaching importance if the interpretation of the case be such as DEVLIN, J., has suggested.

In the present case counsel for the plaintiffs contended that the decision covered the facts even if the first, fifth and second defendants were found to be guiltless of fraud, for, although the fifth defendant made a representation quite innocently and although the first defendant had not authorised him to make it at all—and, indeed, was completely without knowledge that the fifth defendant was making it—nevertheless, as the first defendant knew the facts which would make the fifth defendant's innocent representation false, the first defendant is, therefore, to be held liable for fraudulent misrepresentation because the plaintiffs were in fact deceived. I cannot think that the decision in the *London County Properties* case (1) justifies any such view. In the *Anglo-Scottish Beet Sugar* case (5) ATKINSON, J., said ([1937] 3 All E.R. 345):

"There is nothing whatever in that judgment to suggest the principle contended for by Mr. Wallington. There is nothing there to suggest that SLESSER, L.J., would have held the defendant company liable if the fact had been that Mr. Addis had not been communicated with in any way at all, and if he had not communicated any untrue information to Mr. De Rees. On the contrary, it seems to me to indicate that the fraud of Mr. Addis was essential for a judgment against the defendant company. His knowledge could fairly and properly be described as guilty knowledge. He knew that the statement was going to be made, he knew that it was untrue, and he knew that it was untrue because of the wrong information which he had himself supplied. That is the basis of the judgment of SLESSER, L.J."

In his judgment in the present case DEVLIN, J., said:

"Now, it is precisely that conscious knowledge—whether it be termed 'a mens rea,' 'a wicked mind,' or 'a dishonest purpose'—which can never be present in the case of an innocent division of ingredients, as in such a case the knowledge which the principal has is impliedly the knowledge which a man is able to display under direct questioning . . . There is no way of combining an innocent principal and agent so as to produce dishonesty. You may add knowledge to knowledge, or, as SLESSER, L.J., put it, state of mind to state of mind. But you cannot add an innocent state of mind to an innocent state of mind and get as a result a dishonest state of mind."

The chief difficulty in the *London County Properties* case (1) is, as my Lord has already pointed out, the judgment of ROMER, L.J. ([1936] 2 All E.R. 1050), mentioned in *Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding Urban District Council* (5):

"There was at one time a difference of judicial opinion upon the question whether a representation made by an agent innocently on behalf of a principal can be treated as a fraudulent representation for which the principal is liable, when the principal, though having no knowledge that the representation is made, knows that it is untrue. But it has now been laid down by the House of Lords that in such a case the principal is as much liable as though he had himself made the representation knowing it to be untrue: *Pearson & Son, Ltd. v. Dublin Corpn.* (3). In that case it was said by LORD LOREBURN, L.C. ([1907] A.C. 354) that: 'the principal and agent are one, and it does not signify which of them made the incriminated statement or which of them possessed the guilty knowledge'."

The facts of *Pearson & Son, Ltd. v. Dublin Corpn.* (3) have been referred to by my Lord, and the principle extracted from the case by ROMER, L.J., does not appear to be justified. In *Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding Urban District Council* (5) ATKINSON, J., said that, in his opinion, all that was decided in the *London County Properties* case was that a principal was liable for fraud where the fraudulent information supplied by one agent was handed on to a third party by an innocent agent. I think the appeal ought to be dismissed.

ROMER, L.J.: I agree that this appeal should be dismissed. Notwithstanding the searching analysis to which the evidence was subjected before us by counsel for the plaintiffs, I can see no sufficient ground for disturbing any of the learned judge's findings of fact. Of these findings the most important, for present purposes, were that neither the first defendant, nor either of his agents, the second and fifth defendants, was fraudulent. Inasmuch as there are no intermediate stages recognised by the law between fraud, on the one hand, and innocence, on the other, the case has, accordingly, on these findings, to be approached on the footing that each of these men was entirely guiltless in relation to the sale transaction in general and, in particular, to the representations on which the plaintiffs bought the bungalow. The first, second, and fifth defendants are, however, being sued for deceit, and the essentials of such an action have been prescribed by the highest authority. LORD HERSCHELL in *Derry v. Peek* (4) (14 App. Cas. 375) said:

"... fraud is essential to found an action of deceit, and ... it cannot be maintained where the acts proved cannot properly be so termed."

LORD DUNEDIN in *Nocton v. Ashburton* (Lord) (6) said ([1914] A.C. 963):

"... the fraud proved must be actual fraud, a *mens rea*, an intention to deceive. It is an action of deceit."

LORD PARMOOR said (*ibid.*, 978):

"... in an action founded on deceit, and in which deceit is a necessary factor, actual dishonesty, involving *mens rea*, must be proved."

Having regard to the law as so formulated, the position may be syllogistically presented somewhat as follows. An action of deceit cannot succeed against defendants who are guiltless of fraud. This is an action of deceit against defendants who are guiltless of fraud. The action, therefore, cannot succeed.

I myself think it is true to say (as DEVLIN, J., thought) that the observations of ROMER, L.J., in *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co., Ltd.* (1)—in which EVE, J., apparently concurred—would lead to a different conclusion if applied to the present case. So applied, it appears to me that, as the first defendant knew facts which falsified the fifth defendant's representation, he must be treated as having vicariously made a fraudulent misrepresentation, notwithstanding that he never authorised the fifth defendant to give the assurance which he, in fact, gave nor knew that the fifth defendant was giving it. I feel sure that ROMER, L.J., in expressing the views which would seem to lead to this result, had no intention of enunciating any doctrine that was new. His impression seems to have been that the doctrine or principle which he was stating emerged from *Pearson & Son, Ltd. v. Dublin Corpn.* (3). After a most careful consideration, however, of the facts and speeches in that case, I cannot but think that that impression was mistaken. I respectfully agree with what ATKINSON, J., said ([1937] 3 All E.R. 343) in *Anglo-Scottish Beet Sugar Corpn., Ltd. v. Spalding Urban District Council* (5), as to *Pearson & Son, Ltd. v. Dublin Corpn.* (3). The case decided, he said, that

"... a principal was liable for the fraudulent representations of his agent, although those representations reached the third party through

and by the innocent channel of the principal, just as the principal would be liable if he, the principal, fraudulently caused an innocent agent to communicate a misrepresentation to the third party."

It does not appear to me that the decision of the House of Lords went further than this, and I cannot find that it affords any authority for the view that the innocent acts or intentions of a principal or his agents, whatever detrimental effect they may have on a third party, can amount to a fraudulent misrepresentation on which such third party can bring an action in deceit.

If that be so, the force of the judgments of ROMER, L.J., and EVE, J., on this point in the *London County Properties* case (1) must largely disappear. For, as I have said, I think that the lord justice was doing no more than applying to the facts before him a principle which he believed derived from *Pearson's* case (3), and if it did not so derive it has but little independent basis, for my impression is that the lord justice was not intending to found it on his own authority. In these circumstances, and inasmuch as the principle, if accepted, would lead to results in conflict with (a) the essentials in actions for deceit to which I have above referred, (b) the decision in *Cornfoot v. Fowke* (7) and (c) one of the two grounds on which the decision in *Gordon Hill Trust, Ltd.* v. *Segall* (2) was based, the principle should not, in my judgment, now receive the recognition of this court.

Appeal dismissed.

Solicitors: *Manley & Cooke* (for the plaintiffs); *Richardson Sowerby, Holden & Co.*, agents for *William Bygott & Co.*, Rayleigh, Essex (for the first three defendants); *Bentleys, Stokes & Lowless* (for the fourth, fifth and sixth defendants).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Re ELLIOTT (deceased). LLOYDS BANK, LTD. v. BURTON-ON-TRENT HOSPITAL MANAGEMENT COMMITTEE AND OTHERS.

CHANCERY DIVISION (Harman, J.), November 21, December 19, 1951.]

Will—Condition precedent—Illegal condition—Gift of personalty subject thereto—Malum prohibitum and not malum in se—Validity of gift.

By his will, dated May 26, 1943, the testator, who died in August, 1950, directed his trustee to convert his whole estate, both real and personal, into money, and, after payment of debts, funeral and testamentary expenses, and expenses incurred in connection with his gravestone, he gave: "... the sum of £100 to the [B. infirmary] to be invested as the [trustee] shall direct for the purpose of maintaining and renovating my grave and headstone and subject to the [B. infirmary] accepting the above £100 and the terms as above attaching thereto then I give to the said ... infirmary the ... residue ... of my estate to be applied to the general purposes of the ... infirmary."

HELD: on construction of the will, the legacy of £100 was intended to be set apart in perpetuity for maintaining the testator's grave, and, therefore, it was void as transgressing the rule against perpetuities and the condition precedent attached to the gift of residue was an illegal one which the residuary legatee could not lawfully carry into effect, but, as the gift of residue was a gift of personalty and the condition was not *malum in se*, but merely *malum prohibitum*, the condition was avoided and the gift of residue took effect free from the condition.

Dictum of LORD HARDWICKE, L.C., in *Reynish v. Martin* (1746) (3 Atk. 332), cited by BOWEN, L.J., in *Re Moore* (1888) (39 Ch.D. 131), applied.

AS TO EFFECT OF INVALIDITY OF CONDITION, see HALSBURY, Hailsham Edn., Vol. 34, p. 104, para. 140.

Cases referred to:

- (1) *Re Morgan's Will Trusts*, [1950] 1 All E.R. 1097; [1950] Ch. 637; 2nd Digest Supp.
- (2) *Re Meyers (decd.)*, [1951] 1 All E.R. 538; [1951] Ch. 534.
- (3) *Egerton v. Brownlow (Earl)*, (1853), 4 H.L. Cas. 1; 8 State Tr. N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 10 E.R. 359; 44 Digest 460, 2806.
- (4) *Re Turton*, [1926] Ch. 96; 95 L.J.Ch. 136; 134 L.T. 439; 44 Digest 480, 2971.
- (5) *Re Moore*, (1888), 39 Ch.D. 116; 57 L.J.Ch. 936; 59 L.T. 681; 52 J.P. 596; 44 Digest 438, 2646.
- (6) *Re Thomas's Will Trusts*, [1930] 2 Ch. 67; 99 L.J.Ch. 286; 144 L.T. 64; Digest Supp.
- (7) *Louther v. Cavendish*, (1758), 1 Eden, 99; Amb. 356; 28 E.R. 621; 44 Digest 440, 2663.
- (8) *Reynish v. Martin*, (1746), 3 Atk. 330; 26 E.R. 991; *sub nom. Rhenish v. Martin*, 1 Wils. 130; 95 E.R. 532; 44 Digest 486, 3057.

ADJOURNED SUMMONS to determine (a) whether, on the true construction of the will of Arthur Elliott, a gift of £100 for the purpose of maintaining the testator's grave, was a valid gift, and (b) if the gift of £100 was void as transgressing the law against perpetuities, whether a gift of personalty (*viz.*, the testator's residuary estate), subject to the acceptance by the residuary legatee of the gift of £100 and the terms attached to it, was a valid gift and took effect freed from the condition.

M. J. Albery for the plaintiff, the trustee under the will.

F. E. Skone James for the first defendant, the residuary legatee.

Sir Lynn Ungood-Thomas, K.C., and *A. A. B. Fuller* for the second and third defendants, next of kin.

Cur. adv. vult.

Dec. 19. **HARMAN, J.**, read the following judgment. This case raises a curious point as to the validity of a gift of personalty on a condition precedent. The testator, Arthur Elliott, by his will, dated May 26, 1943, appointed the plaintiff bank to be executor and trustee and directed the bank to convert the whole of his estate, both real and personal, into money, and, after payment of his debts and funeral and testamentary expenses, including any expenses incurred in removing the stone of his grave, re-lettering, renovating, and replacing the same, he gave

" . . . the sum of £100 to the Burton-on-Trent Infirmary to be invested as the bank shall direct for the purpose of maintaining and renovating my grave and headstone and subject to the Burton-on-Trent Infirmary accepting the above £100 and the terms as above attaching thereto then I give to the said Burton-on-Trent Infirmary the rest residue and remainder of my estate to be applied to the general purposes of the said infirmary."

At the date of the will there was an unincorporated charitable association in Burton-on-Trent known as the Burton-on-Trent Infirmary managed by a board of management. Its assets were vested in a trust corporation. Before the death of the testator in August, 1950, the National Health Service Act, 1946, had come into force and the infirmary, together with other local institutions, had come under the jurisdiction of the first defendant, the Burton-on-Trent Hospital Management Committee, under a scheme submitted by the Birmingham Regional Hospital Board and duly approved by the Minister of Health. The work of the infirmary has since been carried on by the first defendant, and the infirmary continues to be known by its old name and is carrying on its former work. In the circumstances, if there had been no condition attached to the gift, I should have had no hesitation in holding that it went to the first defendant in accordance with *Re Morgan's Will Trusts* (1), a decision of ROXBURGH, J., followed by myself in *Re Meyers (decd.)* (2), on the footing that the gift was a gift for the work still being carried on under the new regime. This, however,

not an absolute gift, but is, in my judgment, a gift subject to a condition precedent under which the infirmity is to take the residue only if it accepts the legacy of £100 and accepts the terms, which are to maintain and renovate the testator's grave and headstone. It appears from the evidence that the testator was the owner of a grave in the Burton-on-Trent Corporation cemetery, where his wife and daughter, who predeceased the date of his will, were already then buried. Having regard to the terms of the gift, I have come to the conclusion that it was the testator's intention that the £100 legacy should be set apart in perpetuity for the purpose of maintaining and renovating the grave out of its income and that the legatee was not intended to have the right to spend the corpus of the fund. I come to this conclusion because the initial renovation of the grave is to be done by the bank before setting aside the legacy and because the legacy is directed to be invested.

It was admitted before me, and, I think, rightly, that, if this were a perpetual gift of a legacy for the purpose of preserving a grave unconnected with the fabric of a church, it was void as creating a perpetuity. If, then, the legacy be void, the £100 falls into residue. Nevertheless, the condition remains, but it is an illegal condition which the residuary legatee cannot lawfully carry into effect. The question is, therefore, whether the illegality of the condition avoids the gift of residue or whether it can be disregarded. Now, if this were a gift of real property, it is clear that failure to perform the condition must avoid the gift. This is and always has been the English law and is illustrated by the well-known case of *Egerton v. Earl Brownlow* (3). Compare the decision of ASTBURY, J., in *Re Turton* (4). ROPER ON LEGACIES, 4th ed. (1847), vol. 1, p. 754, contains the following statement:

"It is a general rule of the common law, applicable to real estates, that where an interest is so devised as only to arise upon a preceding condition, it cannot vest until that condition be performed, or the event happen, upon which it is given. This rule has been acknowledged and acted upon ever since the time of LORD COKE. The principle is, that there is no devise until the happening of the event, or performance of the terms upon which the disposition is made; a principle which applies to every case, so that although the condition require the performance of an impossible act, as for the devisee to go to Paris in half an hour, or it require the devisee to do an illegal act, as to kill B. or to burn his house (conditions *mala in se*); or whether it require a woman to separate from her husband (a condition against the policy of law); or whether the devise be made on condition that the legatee have criminal connection with a particular person (a condition *contra bonos mores*); the before stated principle authorises the conclusion, that, as all such conditions are void, the dispositions to arise only upon their performance are also void. But the rule of the civil law is different . . ."

This, however, is a gift of personalty and different rules apply, drawn from the ecclesiastical law which contains a great number of refinements on the subject, as is apparent by a consideration of SWINBURNE ON WILLS, 7th ed. (1803), vol. 1, p. 387 *et seq.* This work, however, deals with the ecclesiastical law and not all its niceties were adopted by the equity courts when they took over the administration of estates from the ecclesiastical courts. A deal of learning on this subject is to be found in *Re Moore* (5) where COTTON, L.J., citing from JARMAN ON WILLS, 4th ed., vol. II, p. 12, said (39 Ch.D. 128):

"The rule is thus stated by MR. JARMAN: 'But with respect to legacies out of personal estate, the civil law, which in this respect has been adopted by courts of equity, differs in some respects from the common law in its treatment of conditions precedent; the rule of the civil law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where

the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the civil agrees with the common law in holding both gift and condition void.' According to English law if a condition subsequent which is to defeat an estate, is against the policy of the law, the gift is absolute, but if the illegal condition is precedent there is no gift. In the civil law a distinction is taken between what is *malum in se* and what is only *malum prohibitum* . . . "

It was argued before me that the present case was governed by the decision of BENNETT, J., in *Re Thomas's Will Trusts* (6). In that case the testator was desirous of pledging his legatee to pursue an action in which the testator had been engaged connected with an undivided share in real property. Before the date of the will, however, this undivided share was converted into personal property by the Law of Property Act, 1925, and, therefore, the pursuit of the action had become impossible. BENNETT, J., held the condition not binding and relied ([1930] 2 Ch. 70) on a passage in SWINBURNE ON WILLS (Part IV, s. 6), cited by SIR R. HENLEY, Lord Keeper (1 Eden, 116) in *Lowther v. Cavendish* (7), but, with all deference to him, it seems doubtful whether that passage sufficed because the judge did not notice an exception which, apparently, provides that, where the impossibility was unknown to the testator the gift is avoided. However that may be, I am of opinion that *Re Thomas's Will Trusts* (6) does not govern the present case. That was a case of impossibility, it being physically impossible to bring an action about something which did not exist. There is no such impossibility here. There is only illegality.

Precedent conditions which are illegal are dealt with in ROPER ON LEGACIES, 4th ed., vol. 1, p. 757:

"It is a rule of the civil law, that, if a precedent condition require the performance of an act *malum in se*, as to kill B., burn his house, etc.; not only the condition, but the disposition itself is void; a rule, which being in unison with the common law in devisees of real estate, it is presumed that similar dispositions of personal property will receive the like construction in courts of equity. When, however, the illegality of the condition does not concern any thing *malum in se*, but is merely against a rule or the policy of law, the condition only is void, and the bequest single and good; for the condition not being lawful, it is held in the phrase of the civil law *pro non adjecta*."

It appears from this passage that, if the illegality involves *malum in se* the disposition is void, but, if it be merely *malum prohibitum*, then the condition is void and the bequest good. The present illegality is of the second kind, and, therefore, if this doctrine of the civil law has been imported into the English law, the condition can be disregarded. Mr. Roper is of the opinion that this rule was imported into equity, and for this there appears to be the authority of LORD HARDWICKE, L.C. (3 Atk. 332) in *Reynish v. Martin* (8), quoted and accepted by BOWEN, L.J. (39 Ch.D. 131) in *Re Moore* (5). This view is also agreeable to the observations in JARMAN ON WILLS, 4th ed., vol. II, p. 12 (cited by COTTON, L.J., in *Re Moore* (5)), which only states that illegality avoids the gift where it involves *malum in se*. I conclude, therefore, that the condition is avoided. If this be so, the gift is what the older authorities call pure and may be accepted by the legatee. Treating it, therefore, as a gift unfettered by a condition, I conclude that the first defendant can take the residue and disregard the condition.

Declaration accordingly.

Solicitors: *Wright & Bull*, agents for *R. W. Skinner & Son*, Burton-on-Trent (for the trustee); *Sharpe, Pritchard & Co.* (for the residuary legatee); *George Thatcher & Son*, agents for *A. H. & H. W. Timms*, Burton-on-Trent (for next of kin).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

ERRINGTON v. ERRINGTON AND ANOTHER.

DURT OF APPEAL (Somervell, Denning and Hodson, L.J.J.), October 25, 26, December 10, 19, 1951.]

ence—Licence to occupy premises—Occupation conditional on payments being made to third party.

ndlord and Tenant—Tenancy—Tenancy at will—Permission to occupy premises conditional on payments being made to third party.

In 1936 a father bought a house for his son and daughter-in-law. He paid £250 in cash and borrowed £500 from a building society on the security of the house, the loan being repayable with interest by instalments of 15s. a week. The house was in the father's name, and he was responsible to the building society for the payment of the instalments. He told the daughter-in-law that the £250 was a present to her and her husband, handed the building society book to her, and said that if and when she and her husband had paid all the instalments the house would be their property. From that date onwards the daughter-in-law paid the instalments as they fell due out of money given her by her husband. In 1945 the father died and by his will left the house to his widow. Shortly afterwards the son left his wife. In an action by the widow against the daughter-in-law for possession,

HELD: (i) the occupation of the house by the son and the daughter-in-law was not determinable by the widow on demand, since they were entitled to remain in possession so long as they paid the instalments to the building society, and, therefore, they were not tenants at will of the premises.

(ii) the payments of instalments could not be regarded as payments of rent made for convenience to the building society and not to the father, since the daughter-in-law and her husband were not bound under any agreement with the father to make those payments, and, therefore, they were not weekly tenants or tenants for the period during which the instalments fell to be paid.

(iii) the daughter-in-law and her husband were licensees, having a permissive occupation short of a tenancy, but with a contractual or equitable right to remain in possession so long as they paid the instalments which would grow into a good equitable title to the house when all the instalments were paid, and, therefore, the widow was not entitled to an order for possession.

AS TO A LICENCE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 8-12, paras. 6; and FOR CASES, see DIGEST, Replacement Vol. 30, pp. 526-543, Nos. 35-1773.

es referred to:

- (1) *Foster v. Robinson*, [1950] 2 All E.R. 342; [1951] 1 K.B. 149; 2nd Digest Supp.
- (2) *Lynes v. Snaitth*, [1899] 1 Q.B. 486; 68 L.J.Q.B. 275; 80 L.T. 122; 31 Digest, Replacement, 34, 1909.
- (3) *Thomas v. Sorrell*, (1673), Vaugh. 330; 124 E.R. 1098; 19 Digest 196, 1496.
- (4) *Doe d. Tomes v. Chamberlaine*, (1839), 5 M. & W. 14; 9 L.J.Ex. 38; 151 E.R. 7; 31 Digest, Replacement, 36, 1927.
- (5) *Peakin v. Peakin*, (1895), 2 I.R. 359; Digest Supp.
- (6) *Howard v. Shaw*, (1841), 8 M. & W. 118; 10 L.J.Ex. 334; 151 E.R. 973; 40 Digest 194, 1628.
- (7) *Booker v. Palmer*, [1942] 2 All E.R. 674; 2nd Digest Supp.
- (8) *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238; [1944] K.B. 298; 113 L.J.K.B. 436; 170 L.T. 146; 2nd Digest Supp.

- (9) *Southgate Borough Council v. Watson*, [1944] 1 All E.R. 603; [1944] K.B. 541; 113 L.J.K.B. 337; 171 L.T. 26; 108 J.P. 207; 2nd Digest Supp.
- (10) *Minister of Agriculture and Fisheries v. Matthews*, [1949] 2 All E.R. 724; [1950] 1 K.B. 148; 2nd Digest Supp.
- (11) *Marcroft Wagons, Ltd. v. Smith*, [1951] 2 All E.R. 271; [1951] 2 K.B. 496.
- (12) *Webb, Ltd. v. Webb*, [1951] Oct. 24 (unreported).
- (13) *Bramwell v. Bramwell*, [1942] 1 All E.R. 137; [1942] K.B. 370; 111 L.J.K.B. 430; 2nd Digest Supp.
- (14) *Pargeter v. Pargeter*, [1946] 1 All E.R. 570; 2nd Digest Supp.
- (15) *Old Gate Estates, Ltd. v. Alexander*, [1949] 2 All E.R. 822; [1950] 1 K.B. 311; 2nd Digest Supp.
- (16) *Middleton v. Baldock*, [1950] 1 All E.R. 708; [1950] 1 K.B. 657; 2nd Digest Supp.
- (17) *Wood v. Leadbitter*, (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 30 Digest, Replacement, 542, 1771.
- (18) *Thompson v. Park*, [1944] 2 All E.R. 477; [1944] K.B. 408; 113 L.J.K.B. 561; 170 L.T. 207; 30 Digest, Replacement, 539, 1736.
- (19) *Winter Garden Theatre (London), Ltd. v. Millennium Productions, Ltd.*, [1946] 1 All E.R. 678; *revsd.* H.L. [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.
- (20) *Rogers v. Hyde*, [1951] 2 All E.R. 79; [1951] 2 K.B. 923.
- (21) *Thompson v. Earthy*, [1951] 2 All E.R. 235; [1951] 2 K.B. 596; 115 J.P. 407.

APPEAL of the plaintiff from an order of His Honour JUDGE RICHARDSON, at Newcastle-upon-Tyne County Court, made on July 25, 1951, in an action for possession.

In 1936 the plaintiff's husband bought a house through a building society for his son and daughter-in-law, the first defendant, and agreed that so long as they kept up the repayment of the instalments on the mortgage they could occupy the house, and that when the mortgage was finally paid off the property would be theirs. In 1945 the father died and left the house by will to the plaintiff. At about the same time the first defendant's husband left her and she continued in occupation with her sister, the second defendant. In the claim by the plaintiff for possession the defendants contended that the first defendant and her husband were tenants at will and that the claim was barred by the Limitation Act, 1939, or, alternatively, that they were occupying the premises as tenants at a rent represented by the instalments paid to the building society and were protected by the Rent Acts. The plaintiff contended that the first defendant and her husband were in occupation under a bare licence revocable at will. The learned county court judge held that they were tenants at will and that the claim was statute-barred.

Hanlon and J. D. B. Richardson for the plaintiff.

Marnan for the defendants.

Dec. 19. The following judgments were read.

Cur. adv. vult.

SOMERVELL, L.J.: In 1936 the plaintiff's husband, who was the father-in-law of the first defendant, bought a house, 27, Milvain Avenue. The purchase was financed through a building society part of the purchase price being paid down and the rest left on mortgage repayable with interest by instalments over a period. The details were not before us, but the instalments are still running. The plaintiff's son had recently married and the father bought the house as a home for the son and his wife. The total purchase price was £750. The father paid £250, and the couple went into the house and paid the instalments. The question is: What was the agreement between the father and the son and his wife, the first defendant?

In 1945 the plaintiff's husband died leaving all his property by will to the plaintiff. Up till almost that time the first defendant and her husband had lived in the house. Differences then arose between husband and wife. The husband wanted his wife to come and live with his mother. She did not want to do so. Since about that time he has lived with his mother and the first defendant has lived at 27, Milvain Avenue. The second defendant is the wife's sister who has lived with her since the husband left. In these proceedings the plaintiff claims possession. The defences were (i) that the plaintiff's claim is barred by the Limitation Act, 1939, on the basis that the first defendant and her husband were tenants at will; (ii) alternatively, they were paying a rent and are protected by the Rent Acts. The learned county court judge decided that the first defence succeeded. He decided that they were tenants at will and that on this basis the claim was barred by the Limitation Act, 1939. He went on to say that, if the instalments were regarded as rent, the claim for possession also failed under the Rent Acts.

There is no written agreement or record of what happened between the plaintiff's husband and his son and daughter-in-law in 1936. At the trial the son gave evidence for the plaintiff and the first defendant gave evidence in support of her case. I will read the learned judge's findings as to the facts.

"The marriage took place in 1932 and in 1936 the husband of the plaintiff bought 27, Milvain Avenue with a building society mortgage of £500. The first defendant and her husband were on good terms until after the death of his father, and the first defendant was on very affectionate terms with her father-in-law. He wanted them to have a house of their own and said he would foot the bill for 27, Milvain Avenue for her and her husband to occupy. The first defendant said that he told her he 'would put down £250, as a present for Stan and I, but the house would go into his name.' He left her with 15s. a week to pay to the building society. The first defendant later went to see him about the rates which were 10s. a week and he told her, first, that he would give her 10s. to pay all rates and later said he would pay them himself. He handed the building society book to her and told her not to part with this and that the property would be hers and her husband's when the mortgage was paid. She made the payments to the building society from that date out of the housekeeping moneys paid to her by her husband. Her father-in-law died in July, 1945, and by his will left the house with all his other property to his wife, who after his death was living at Woolsington Gardens alone. After her father-in-law's death the first defendant went away for a short holiday. She was exhausted with looking after him in his last illness. When she came back her husband met her at the Central Station and told her that they would both go to Woolsington Gardens. She said she would go home to 27, Milvain Avenue. He said he would see her tomorrow, but he never came. She went and saw him and pleaded with him to return. He said his mother was in need of him and he has never been back to his wife since. For a time he paid her £2 10s. per week which was subsequently reduced to £2, and at periods went down to £1. Since 1945 it was not disputed that the first defendant had continued to pay the instalments either out of the money provided by her husband or from other resources, if any."

After the conclusion of the argument we came provisionally to the opinion that under the agreement the son and his wife were neither tenants at will nor tenants paying rent, but that the plaintiff was nevertheless not entitled to possession. We, therefore, had the case re-argued and had the assistance of counsel on both sides as to the terms of the agreement as they appeared to us to be on the findings of the learned judge.

I will state what seem to me to be the intended terms of the agreement and then consider whether there are any legal obstacles to their enforcement. The

father was undertaking to convey the house to the son and his wife if and when they had paid all the instalments. If and when they had done that they would, of course, have paid with interest two-thirds of the purchase price. The gift of the £250 was not a future gift in the sense that the father was undertaking to convey the house for two-thirds of the price which the vendor was charging. The son and his wife were to occupy the house in consideration of their paying the instalments to the building society. Two further questions remain to be considered which are connected. First, were they undertaking to pay the instalments? If they failed, would they have committed a breach of the agreement? I have hesitated about this. It would have been on the face of it advantageous for them so to undertake. They would be getting a house on ordinary building society terms for two-thirds of its price. I do not think that the transaction as found by the learned judge justifies finding that they had so undertaken. Further, if this had been the intention it is difficult to see why the father did not convey the house then and there. If the instalments were not paid I think their rights were at an end. If this happened towards the end of the period the father or his successors in title would have a good bargain, but the parties were not considering future possibilities at arm's length and the contemplation was that the son and his wife would complete the payments. Secondly, were their rights assignable? I think not. The father desired to benefit his son and daughter-in-law by making a present of the £250. He wanted to assist them to get a house to live in on advantageous terms. If they did not want it to live in, then, I think, the proper inference from the fact that he remained the owner is that he intended it should come back into his control.

I find it impossible to regard the son and his wife as tenants at will. In *Foster v. Robinson* (1) ([1950] 2 All E.R. 347) SIR RAYMOND EVERSHED, M.R., considered the possibility of a tenancy at will with a promise that the tenancy should not be determined. Without deciding whether a tenancy could remain "at will" with such a promise annexed I find the conception a difficult one.

We were invited to find a tenancy, for the period of the instalments, the latter, though paid to a third party, being rent as between the parties to the agreement. In the absence of any express agreement to that effect, it seems to be impossible to treat as rent payments made to a third party which differed in kind from rent in that they were instalments of the purchase price with interest payable under a mortgage. The position here was, as it seems to me, analogous to that of a purchaser who is admitted into possession before completion. One can imagine an ordinary contract of sale in which the purchase price was payable by instalments over a long period. If one also imagines a term that, if instalments were not paid, the vendor would have a right to rescind, but no other right, one gets near to the present position. It might be suggested that the title of the son and his wife so long as the instalments were paid was the same as that of a purchaser who goes into possession before completion under an ordinary contract of purchase and sale. The transaction in the present case, although it seems a not unnatural one, is, so far as the researches of counsel and ourselves have gone, legally novel. The equitable title under which a purchaser in possession before completion can rely is based, as I understand it, on the contract of sale under which he has undertaken to purchase and he is regarded in equity as owner subject to his fulfilling his part of the bargain. The contract here was different.

I think, therefore, that the son and his wife were licensees, and for the reasons elaborated by DENNING, L.J., in his judgment, which I have had the advantage of reading, there is no legal obstacle to holding that as licensees possession cannot be claimed so long as the instalments are paid. The right to a conveyance if and when the instalments are paid might raise a question under s. 53 (1) and s. 55 of the Law of Property Act, 1925, as the contract was oral. The issue is not directly before us, but it would seem to me that the doctrine of part performance would clearly apply. Counsel for the defendants argued that, if it was a licence, there would be no relief if an instalment was in arrear for however short a time. Assuming

this is so, it would be explicable on the ground that the transaction is an unusual one and neither equity nor the legislature have intervened to modify the letter of the bond.

The position as between the husband and the wife does not arise in these proceedings. The wife only was defendant, but subject to any proceedings between husband and wife she was, of course, entitled to rely on the joint contract as showing she was not a trespasser. With regard to the second defendant, she, as I have said, is a sister of the first defendant, and if, as I have said, the first defendant is entitled to retain possession, no question arises as to her. The payment of rates by the father should, I think, on the evidence be regarded as a gift from week to week which could have been stopped at any time and does not affect the position. I think, therefore, that the appeal must be dismissed.

DENNING, L.J.: The facts are reasonably clear. In 1936 the father bought the house for his son and daughter-in-law to live in. The father put down £250 in cash and borrowed £500 from a building society on the security of the house, repayable with interest by instalments of 15s. a week. He took the house in his own name and made himself responsible for the instalments. The father told the daughter-in-law that the £250 was a present for them, but he left them to pay the building society instalments of 15s. a week themselves. He handed the building society book to the daughter-in-law and said to her: "Don't part with this book. The house will be your property when the mortgage is paid." He said that when he retired he would transfer it into their names. She has, in fact, paid the building society instalments regularly from that day to this with the result that much of the mortgage has been repaid, but there is a good deal yet to be paid. The rates on the house came to 10s. a week. The couple found that they could not pay those as well as the building society instalments so the father said he would pay them and he did so.

It is to be noted that the couple never bound themselves to pay the instalments to the building society, and I see no reason why any such obligation should be implied. It is clear law that the court is not to imply a term unless it is necessary, and I do not see that it is necessary here. Ample content is given to the whole arrangement by holding that the father promised that the house should belong to the couple as soon as they had paid off the mortgage. The parties did not discuss what was to happen if the couple failed to pay the instalments to the building society, but I should have thought it clear that, if they did fail to pay the instalments, the father would not be bound to transfer the house to them. The father's promise was a unilateral contract—a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed, which they have not done. If that was the position during the father's lifetime, so it must be after his death. If the daughter-in-law continues to pay all the building society instalments, the couple will be entitled to have the property transferred to them as soon as the mortgage is paid off, but if she does not do so, then the building society will claim the instalments from the father's estate and the estate will have to pay them. I cannot think that in those circumstances the estate would be bound to transfer the house to them, any more than the father himself would have been.

What is the result in law of those facts? The relationship of the parties is open to three possible legal constructions: (i) That the couple were tenants at will paying no rent. That is what the judge thought they were. He said that in the present case, just as in *Lynes v. Snaith* (2), the defendant "was in exclusive possession, and was, therefore, not a mere licensee, but in the position of a tenant at will." But, in my opinion, it is of the essence of a tenancy at will that it should be determinable by either party on demand, and it is quite clear that the relationship of these parties was not so determinable. The father could

not eject the couple as long as they paid the instalments regularly to the building society. It was, therefore, not a tenancy at will. I confess that I am glad to reach this result because it would appear that, if the couple were held to be tenants at will, the father's title would be defeated after the lapse of thirteen years, long before the couple paid off the instalments, which would be quite contrary to the justice of the case. (ii) That the couple were tenants at a rent of 15s. a week, such rent being for convenience paid direct to the building society instead of to the father and the tenancy being either a weekly tenancy or a tenancy for the duration of the mortgage repayments. [But I do not think that 15s. can possibly be regarded as rent, for the simple reason that the couple were not bound to pay it. If they did not pay it, the father could not sue for it or distrain for it. He could only refuse to transfer the house to them. If the 15s. was not rent, then it affords no ground for inferring a tenancy.] (iii) That the couple were licensees, having a permissive occupation short of a tenancy, but with a contractual right, or, at any rate, an equitable right to remain so long as they paid the instalments, which would grow into a good equitable title to the house itself as soon as the mortgage was paid. This is, I think, the right view of the relationship of the parties. I will explain how I arrive at it.

The classic definition of a licence was propounded by VAUGHAN, C.J., in the seventeenth century in *Thomas v. Sorrell* (3) (Vaugh. 351):

"A dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful."

The difference between a tenancy and a licence is, therefore, that in a tenancy an interest passes in the land, whereas in a licence it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will: see *Doe d. Tomes v. Chamberlaine* (4), *Lynes v. Snaith* (2); whereas if he had not exclusive possession he was only a licensee: *Peakin v. Peakin* (5). This test has, however, often given rise to misgivings because it may not correspond to realities. A good instance is *Howard v. Shaw* (6), where a person was let into exclusive possession under a contract for purchase. ALDERSON, B., said that he was a tenant at will, and PARKE, B., with some difficulty agreed with him, but LORD ABINGER, C.B., said (8 M. & W. 122):

"While the defendant occupied under a valid contract for the sale of the property to him, he could not be considered as a tenant."

Now, after the lapse of a hundred years, it has become clear that the view of LORD ABINGER was right. The test of exclusive possession is by no means decisive. The first case to show this was *Booker v. Palmer* (7) where an owner gave some evacuees permission to stay in a cottage for the duration of the war, rent free. This court held that the evacuees were not tenants, but only licensees. LORD GREENE, M.R., said ([1942] 2 All E.R. 677):

"To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

Those emphatic words have had their effect.

We have had many instances lately of occupiers in exclusive possession who have been held to be not tenants, but only licensees—when a requisitioning authority allowed people into possession at a weekly rent: *Minister of Health v. Bellotti* (8), *Southgate Borough Council v. Watson* (9), *Minister of Agriculture and Fisheries v. Matthews* (10); when a landlord told a tenant on his retirement that he could live in a cottage rent free for the rest of his days: *Foster v.*

Robinson (1); when a landlord, on the death of the widow of a statutory tenant, allowed her daughter to remain in possession paying rent for six months: *Marcroft Wagons, Ltd. v. Smith* (11); when the owner of a shop allowed the manager to live in a flat above the shop, but did not require him to do so, and the value of the flat was taken into account at £1 a week in fixing his wages: *Webb, Ltd. v. Webb* (12). In each of those cases the occupier was held to be a licensee and not a tenant. Likewise there are numerous cases where a wife who has been deserted by her husband and left by him in the matrimonial home has been held to be, not a tenant of the husband owner, *Bramwell v. Bramwell* (13), *Pargeter v. Pargeter* (14), nor a bare licensee, *Old Gate Estates, Ltd. v. Alexander* (15), but to be in a special position—a licensee with a special right—under which the husband cannot turn her out except by an order of the court, *Middleton v. Baldock* (16).

The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee. In view of these recent cases I doubt whether *Lynes v. Snaitth* (2), and the case of the gamekeeper referred to therein ([1899] 1 Q.B. 490) would be decided the same way today.

Applying the foregoing principles to the present case, it seems to me that, although the couple had exclusive possession of the house, there was clearly no relationship of landlord and tenant. They were not tenants at will, but licensees. They had a mere personal privilege to remain there, with no right to assign or sub-let. They were, however, not bare licensees. They were licensees with a contractual right to remain. As such they have no right at law to remain, but only in equity, and equitable rights now prevail. I confess, however, that it has taken the courts some time to reach this position. At common law a licence was always revocable at will, notwithstanding a contract to the contrary: *Wood v. Leadbitter* (17). The remedy for a breach of the contract was only in damages. That was the view generally held until a few years ago: see, for instance, what was said in *Booker v. Palmer* (7) ([1942] 2 All E.R. 677); *Thompson v. Park* (18) ([1944] 2 All E.R. 479). The rule has, however, been altered owing to the interposition of equity. Law and equity have been fused for nearly eighty years, and since 1948 it has become clear that, as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a contract to allow him to remain: see *Winter Garden Theatre (London), Ltd. v. Millennium Productions, Ltd.* (19) ([1946] 1 All E.R. 680), *per LORD GREENE, M.R.* ([1947] 2 All E.R. 336), *per VISCOUNT SIMON*; nor in breach of a promise on which the licensee has acted, even though he gave no value for it: see *Foster v. Robinson* (1) ([1950] 2 All E.R. 346), where *SIR RAYMOND EVERSHED, M.R.*, said that as a result of the oral arrangement to let the man stay, he "was entitled as licensee to occupy the cottage without charge for the rest of his days . . ." This infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice.

I ought, perhaps, to mention two cases which appear at first sight to revert to the former view. The first is *Rogers v. Hyde* (20), where a landlord promised that a sharing arrangement (which was really a licence) should be within the Rent Acts. It was held by this court that the licensee was not protected, because the Rent Acts operate only on tenancies, and that, just as parties could not contract out of the Acts, so they could not contract into them. No argument was put forward that the landlord's promise was equivalent to saying: "I promise to give you, my licensee, the same protection as the Rent Acts give to tenants."

If that argument had been put forward, the very point might have arisen which arises in the present case, but, as it happened, the point was not taken, so there was no decision on it. The other case is *Thompson v. Earthy* (21), where a husband, for good consideration, gave an undertaking that he would allow his wife and children to remain in his house rent free. It was held that the husband was entitled to defeat his promise by selling the house over the wife's head, even though the purchaser took with full knowledge of the promise. I notice, however, that, in coming to this decision, ROXBURGH, J., emphasised that the wife was not a licensee, basing himself on something I said in *Old Gate Estates, Ltd. v. Alexander* (15) ([1949] 2 All E.R. 825), but the later decision of this court in *Foster v. Robinson* (1) ([1950] 2 All E.R. 346) shows that she was a licensee and that the husband could not have ejected her in breach of his promise. I cannot help thinking that, if that case had been cited to the learned judge, the decision might have been different. I see nothing, therefore, in these recent cases to shake the view I have expressed about contractual licences.

In the present case it is clear that the father expressly promised the couple that the property should belong to them as soon as the mortgage was paid, and impliedly promised that, so long as they paid the instalments to the building society, they should be allowed to remain in possession. They were not purchasers because they never bound themselves to pay the instalments, but nevertheless they were in a position analogous to purchasers. They have acted on the promise and neither the father nor his widow, his successor in title, can eject them in disregard of it. The result is that, in my opinion, the appeal should be dismissed and no order for possession should be made. I come to this conclusion on a different ground from that reached by the learned judge, but it is always open to a respondent to support the judgment on any ground. If there is a dispute between the son and the daughter-in-law as to their respective rights in the house, that must be decided under s. 17 of the Married Women's Property Act, 1882. If the father's widow should cease to pay the rates, the actual occupier must pay them, because the father did not bind himself to pay them. He only did so out of paternal affection.

HODSON, L.J.: I agree that the appeal fails. The problem is to decide what, on these apparently simple set of facts, is the true legal relationship between the parties. The learned county court judge thought that a tenancy at will had been created. This disregards the promise that the tenancy should not be determined. The promise not to determine the tenancy seems to me to be inconsistent with a tenancy at will, and I, like SOMERVELL, L.J., find the conception which was referred to by SIR RAYMOND EVERSHERD, M.R., in *Foster v. Robinson* (1) ([1950] 2 All E.R. 347) a difficult one. The alternate finding that there was a weekly tenancy is not, I think, maintainable, since the payments of the instalments by the supposed tenants to the building society cannot be regarded as rent payable to the landlords.

Counsel for the defendants put forward as a possible solution a tenancy for the term of years during which the instalments were payable. One objection to this solution is that the length of the term of years would depend on the contract between the father and the building society which might be varied in length as, for example, by the instalments being spread over a longer period. Would such a tenancy be assignable and subject to forfeiture? These questions do not admit of an easy answer. If there was not a tenancy, there is some attraction in the view that here there was a contract of sale followed by part performance when the son and daughter-in-law went into possession to be completed on payment of the last instalment. If this had been the intention of the parties, there seems to be no reason why the father should have taken the conveyance in his own name, and, moreover, there is the further difficulty that it would be necessary to imply a promise by the son and daughter-in-law to pay the instalments.

The plaintiff contends that there was nothing more than a bare licence vocable at will. She argues that the evidence taken at its highest shows no more than an imperfect gift which failed on the death of the father so that the son and daughter-in-law remained in occupation as licensees so long as the mother was willing for them to do so. I think that the real position is that they did occupy the house as licensees, but did so under a personal contract providing that the son and daughter-in-law should, so long as they occupied the house, pay the instalments to the building society. In consideration of their promise to pay the instalments, the father, and the mother (as his successor), agreed to permit them to occupy the house as long as the instalments were running and being paid by them. If they left the house, the contract would be at an end, and when the instalments are fully paid the question will arise whether the mother is bound to convey the property to her son and daughter-in-law. Any question between the son and the daughter-in-law, who are now, it appears, at the mother's length, will fall to be decided under s. 17 of the Married Women's Property Act, 1882.

Appeal dismissed.

Solicitors: *Bentleys, Stokes & Lowless*, agents for *Criddle, Ord & Muckle*, Newcastle-upon-Tyne (for the plaintiff); *Hyde, Mahon & Pascall*, agents for *Frank J. Lambert & Co.*, Gateshead (for the defendants).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

DAVIS COHEN & SONS, LTD. v. HALL.

COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
December 18, 19, 1951.]

Issues—De-rating—Industrial hereditament—Adapting for sale—Wholesale distributive business—Sorting, identification and arrangement of goods—Factory and Workshop Act, 1901 (c. 22), s. 149 (1) (c) (iii)—Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 3 (1).

The ratepayers occupied premises in which they stored twenty-five thousand cases of government surplus stores, the cases being there opened and their contents being identified and arranged, but no other work was done on them.

HELD: in the circumstances the premises were primarily occupied and used for the purpose of a distributive wholesale business and not for that of adapting an article for sale, and, therefore, they were not an industrial hereditament within the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1).

Dictum of LORD GREENE, M.R., in James A. Jobling & Co., Ltd. v. Sunderland County Borough Assessment Committee ([1944] 1 All E.R. 501), applied.

Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury Assessment Committee ([1931] A.C. 454), and *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assn., Ltd.* ([1931] A.C. 456), distinguished.

AS TO RATING RELIEF FOR FACTORIES AND WORKSHOPS, see HALSBURY, *Willsham Edn.*, Vol. 27, pp. 439-459, paras. 876-887; and FOR CASES, see GUEST *Supps.*

FOR THE RATING AND VALUATION (APPORTIONMENT) ACT, 1928, s. 3 (1), see HALSBURY'S STATUTES, *Second Edn.*, Vol. 20, p. 176.

Cases referred to:

(1) *Cockram v. Tropical Preservation Co., Ltd.*, [1951] 2 All E.R. 520; [1951] 2 K.B. 827; 115 J.P. 459.

- (2) *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.*, [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; *revsd.* H.L. *sub nom.* *Potteries Electric Traction Co., Ltd. v. Bailey (Stoke-on-Trent Revenue Officer)*, [1931] A.C. 151; 101 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.
- (3) *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assocn., Ltd.*, [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; *affd.* H.L., [1931] A.C. 456; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.
- (4) *Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury Assessment Committee*, [1931] 1 K.B. 385; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; *affd.* H.L., [1931] A.C. 454; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.
- (5) *Richardson & Son v. Middlesbrough Borough Assessment Committee*, [1947] 1 All E.R. 884; [1947] K.B. 958; 177 L.T. 103; 111 J.P. 357; 2nd Digest Supp.
- (6) *Moon (Lambeth Revenue Officer) v. London County Council*, [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; Digest Supp.
- (7) *Jobling (James A.) & Co., Ltd. v. Sunderland County Borough Assessment Committee*, [1944] 1 All E.R. 500; 2nd Digest Supp.

CASE STATED by the Lands Tribunal under s. 3 (4) of the Lands Tribunal Act, 1949.

The ratepayers appealed to the Lands Tribunal against the decision of a local valuation court that a hereditament occupied by them was not an industrial hereditament within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1). On Feb. 28, 1951, the tribunal affirmed the decision of the local valuation court, and the ratepayers required the tribunal to state this Case for the opinion of the court.

The hereditament consisted of three floors of a disused cotton mill at Blackburn. The ratepayers, who were wholesale dealers in government surplus stores, bought twenty-five thousand cases of miscellaneous surplus ex-service stores comprising about two thousand five hundred different kinds of articles. The goods were stored in the mill, and were there sorted and arranged in sets where parts of one article had been packed in separate cases. Articles of clothing were brushed, but no cleansing agent was used. No repair work was done on the premises, the articles being sent out to outside firms where repairs were required. The articles brought into the mill were not in any sense altered and nothing was actually done on the premises to make them different from what they were when they came in. Eight unskilled men were employed on the work, and the goods were sent for sale to various places according to orders received from the ratepayers' sales department in London.

Sir Arthur Comyns Carr, K.C., and *C. N. Glidewell* for the ratepayers.

Lawrence, K.C., and *de Ferrars (Maurice Lyell with them)* for the valuation officer.

SIR RAYMOND EVERSLED, M.R.: In *Cockram v. Tropical Preservation Co., Ltd.* (1) I cited at the beginning of my judgment a sentence of SCRUTTON, L.J., which I venture to quote again. It was taken from *Bailey (Stoke-on-Trent Revenue Officer) v. Potteries Electric Traction Co., Ltd.* (2) ([1931] 1 K.B. 495) and was as follows:

"In many cases, it is a question of degree, which is in my view fact and not law, and not properly the subject of a Special Case,"

but I went on to say, and I say again, that these matters cannot always be properly or safely regarded as being questions of fact, involving, as they do, the construction of the relevant Acts of Parliament.

I have started my judgment with that reference because, in opening the appeal, counsel for the ratepayers, after observing for our encouragement that this was a sorting case, went on to observe, for our further encouragement, that it was a sorting case." During the course of argument it became clear that in matters of sorting there may be a great gulf between operations conducted by one person and operations conducted by another. I hope I am not taking up time unduly. I give an example of the purchase of twenty-five thousand pairs of boots, mingled together so that the operation had to be performed of sorting them and finding the relative rights and lefts of each pair, so that eventually instead of a heap of unsorted boots, there was a number of pairs of boots. I do not think that counsel for the ratepayers suggested that such an operation would amount—certainly I should be prepared to hold that it would not amount to an "adaptation for sale" within the meaning of the Factory Act, 1901, s. 149 (1) (c) (iii). At the other end of the scale there is *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assn., Ltd.* (3), the "seeds case", and *Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury Assessment Committee* (4), the "rag case," which were among those heard in 1931. In each of those cases—I take the "rag case" to illustrate my point—what took place was certainly something a great deal more than mere arrangement and identification. It appears from the report ([1931] A.C. 479) that there were some 296 varieties of rags which ultimately emerged from what had been an amorphous mass of discarded material. In the process of arriving at the final state of affairs fifty-six skilled operatives were employed who had, among other things, to separate the materials, or some of them, into their component parts, sorting the cotton parts from the wool, the darns from the socks, and so on.

In the present case what has been done has been fully considered and specified by the Lands Tribunal in the course of the Special Case. I do not propose to read the entire Case though I wish to be taken to have referred to all of it. I think, for my present purposes, I should summarise the operations in this way. The ratepayers, who have carried on for half a century the business of wholesale dealers in government surplus stores, acquired in Hamburg a quantity of such stores which were contained in twenty-five thousand cases. These cases had been divided into seventeen lots, which would mean there were about fifteen hundred cases in each lot. It appears that some description of what each lot contained was given, but the cases themselves bore no labels or other means of informing a buyer of their contents. These cases were placed in the premises which are the subject of the present appeal, premises which were specially required for the purpose. There, with the assistance of eight unskilled men, the secrets of these boxes were one by one unfolded. The ratepayers then proceeded so to arrange the contents that, as from time to time occasion made convenient, they were able to dispatch for sale to their London premises the articles which they had acquired. They divided the goods into six general heads, including, for example, clothing, textile goods, and wireless sets, and each of these headings was itself sub-divided according to the age and condition of the particular article—used, damaged, good as new, and so on.

What I have so far described seems to me to be, whatever may be the result under the Act, no more than identification and arrangement. It is, however, not to say that as regards certain of the goods some other and more specialised activities were performed. I use that phrase because in the Special Case those activities are called specialist jobs. For example, among the articles bought were haversacks. It appears that the haversacks and the straps which are normally attached to them were not in the same cases, so that they had to be assembled. I do not understand that there was actual attachment of the straps to the haversacks, but there were assembled haversack straps in addition to the haversacks—that when a parcel of haversacks was required in London there would be sent with them the appropriate number of haversack straps. That would appear to be a simple operation. Simple also would be that of assembling the component

parts of a webbing belt. Slightly more elaborate would be the assembly of wireless sets where they were not already assembled. In this connection it must, I think, clearly be the fact that no such assembly was called for as would require any degree of electrical knowledge, because we are informed (and the Case finds) that the men were unskilled. I, therefore, assume that nothing more was required than that, if the set required a battery, a battery should be placed with it, or if it required a loud speaker a loud speaker should be placed with it. Finally, there was a number of anti-gas boots which had rubber soles and oilskin tops. In that case the operation was destructive of the identity of the boots. The soles were stripped so as to be available for sale as mere rubber soles, and the tops were sent elsewhere for treatment and, when returned, were sold as fabric. That last operation in isolation would, I should have thought, have been likely to have been held to be an adaptation for sale, but I need not occupy time about it because those "specialist jobs" were plainly of an entirely subsidiary character, and counsel for the ratepayers made no point that they give a colour or character to the whole of the rest of the operations. I, therefore, proceed to consider my answer to the problem posed on the footing that at most the operations conducted on these premises were those of assembly to some extent and substantially of identification and arrangement. I have said enough to show that the operations so described were substantial. Therefore, the case, at the very least, may be said to come somewhere in the considerable region which lies between my illustration of boots and the decided cases of seeds and rags.

No one would be so arrogant as to say that these cases are simple. They depend often enough on rather elaborate sets of facts and require the application of a complex and composite statutory definition, and there is, as *BERKETT, L.J.*, observed in *Cockram v. Tropical Preservation Co., Ltd.* (1) ([1951] 2 All E.R. 527), at least a richness of judicial utterances about this subject-matter which are quoted on one side or the other. All that is some reason for suggesting that where it is not shown that the tribunal has in some regard misdirected itself, this court should be a little slow to reverse the conclusion at which it has been arrived on the particular facts of the case. In my judgment, in the present case we should not disturb the view taken by the tribunal.

I am not going to read the whole of the relevant sections. It is sufficient to say that by s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, an industrial hereditament for the purpose of that Act is stated not to include, among other premises, premises primarily occupied and used for "the purposes of distributive wholesale business"; but, subject to that exemption, they include premises described as a workshop in the Factory and Workshop Act, 1901, s. 149 (1) (c) (iii) and, therefore, and so far as is relevant for this case, premises in which

" . . . manual labour is exercised by way of trade or for purposes of gain in or incidental to . . . the adapting for sale of any article . . . "

The Lands Tribunal considered whether the operations which I have briefly summarised amounted to an adaptation for sale of the articles which eventually emerged from the Blackburn premises. Reference was made to the cases, including *Richardson & Son v. Middlesbrough Borough Assessment Committee* (5), commonly called the "egg case." The tribunal's decision, so far as relevant, was this:

" This case seems to me to be very near the line on the question whether or not the premises are a workshop and it may be that by a narrow application of the legal authorities they might be held to fall within the definition. I am, however, not under the necessity of deciding that point, because, as I see it, there can be no doubt but that the sorting and cleaning and possibly other minor jobs which may from time to time be done on the premises are ancillary and subsidiary to the primary purpose for which the premises are occupied."

counsel for the ratepayers criticised that method of considering the matter. He argued that there was—and we have eliminated the subsidiary matters such as the anti-gas boots—but one series of operations, and either those operations amounted to an adaptation of articles for sale or they did not. If they did, it is *nil ad rem* that the ratepayers were wholesale dealers in government surplus stores and that the operations were a stage in the process of the business which they conducted of distributing the goods. Thus, it was contended, this court should decide the question: Aye or no, was there here an adaptation for sale? At least should say that, in the absence of a finding on that matter, the decision cannot be regarded as satisfactory.

I am not prepared to accept that view. I think, as has been pointed out in the House of Lords, in *Moon (Lambeth Revenue Officer) v. London County Council* (1), that there is here in truth a composite definition. I think it is open to a tribunal to say: "Well, those activities in some contexts, conducted by some persons or businesses, might be held to be an adaptation of the articles in question for sale, but I find that those operations, as conducted by this particular company and having regard to the character of the company's particular business, are really no more than a mere stage in their distributive business transactions." Of course, the words "adaptation for sale" are capable of very wide scope and meaning. I think it would be impossible to say that any dealing in goods so that they might be more suitably sold, involving no alteration of the character of the goods at all, amounted to an adaptation for sale. I refer to my illustration of the boots.

I think the same point was in the mind of LORD GREENE, M.R., in *James A. Hobling & Co., Ltd. v. Sunderland County Borough Assessment Committee* (7), when he used this language in regard to an argument that premises used for storing, sorting, and stacking a certain class of goods amounted to use of the premises as a "workshop." He said ([1944] 1 All E.R. 501):

"An argument was put forward that the process of storing, sorting, packing and dispatch of these finished products was a process of adapting for sale so as to be in itself a process which would be sufficient to bring the hereditaments within the meaning of factory or workshop as defined in the Factory Acts. In my opinion, that argument cannot bear examination for a moment. All that is done is to sort, store and pack and dispatch these articles. Nothing is done to the articles themselves, and it is a complete misuse of language to say that that amounts to adapting them for sale. There is no adaptation whatsoever. The article remains precisely the same article after it is sorted and packed as it was before. That point, therefore, I can put aside."

In the present case, if it be necessary, I would be prepared to hold on the facts as found that there was here no adaptation for sale of the articles which emerged. I again exclude from consideration those minor activities relating to the anti-gas boots and so forth. Apart from them there was nothing which could, in my judgment, be fairly called any kind of industrial process with regard to these goods. I do not wish by that phrase to suggest a necessary test to be used in other cases, but it seems to me to be a brief way of emphasising, not inaccurately, the distinction that I draw between this case and *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assn., Ltd.* (3) and *Kaye (Dewsbury Revenue Officer) v. Burrows & Dewsbury Assessment Committee* (4). I think counsel for the valuation officer is entitled to say that in this case you start, not with an amorphous mass, but with an unarranged and unidentified aggregation of individual articles. At the end of the operations you have found what they were, identified them, and suitably arranged them, but you have done nothing more to them.

I think it is unnecessary to say anything about the correctness or otherwise of *Hines (Ipswich Revenue Officer) v. Eastern Counties Farmers' Co-operative Assn., Ltd.* (3). That case depended on the conclusions of fact which were

arrived at in regard to it. This case is also to be decided on its facts. I think that the tribunal, in deciding as it did, thought that what took place was but a stage in the wholesale business of the ratepayers, and that, therefore, the primary, principal, and substantial use of the premises was that of wholesale distribution, and that the tribunal inferentially negatived the argument that there was here an adaptation for sale. I think it was legitimate for the tribunal to find as a fact that there was in this particular case a primary use for wholesale distribution without necessarily finding that there was no adaptation for sale, and on that ground I should myself support the decision. In so far as it is necessary or appropriate in this case to express a view thereon, I think on the facts of this case that there was no adaptation for sale within the meaning of that phrase in s. 149 (1) (c) (iii) of the Factory and Workshop Act, 1901. For these reasons, therefore, I think that the ratepayers fail to show that the tribunal came to a wrong decision, and that the appeal should be dismissed.

BIRKETT, L.J.: I agree.

ROMER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Shasha & Hamwee*, Manchester (for the ratepayers); *Solicitor, Inland Revenue* (for the valuation officer).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Affirmed. C.A. [1952] 2 All E.R. 201.

Re LAMBTON'S MARRIAGE SETTLEMENT. MAY AND ANOTHER v. INLAND REVENUE COMRS.

[CHANCERY DIVISION (Harman, J.), November 29, 30, December 19, 1951.]

Estate Duty—Passing—Cesser of wife's annuity on husband's death—Wife becoming entitled to whole income of trust fund—Allowance for annuity—Finance Act, 1894 (c. 30), s. 5 (3) (as amended by Finance Act, 1938 (c. 46), s. 48).

By an ante-nuptial settlement made on July 20, 1912, certain funds, the property of the husband, were settled on trust during the joint lives of the husband and the wife to pay out of the income an annuity of £400 to the wife and to pay the rest of the income to the husband. Subject thereto, the income of the settled fund was payable to the survivor of the husband and wife during his or her life (or widowhood in the case of the wife) with remainder after the death of the survivor to the children of the marriage absolutely, with an ultimate limitation, in default of issue, to the husband. After the solemnisation of the marriage, certain further investments were transferred to the trustees on the trusts of the settlement. In 1949 the husband died, leaving him surviving his wife and two children of full age, and the Crown claimed estate duty on the entire funds without any allowance in respect of the wife's annuity.

HELD: the cesser of the wife's annuity and the creation in her of a new interest in the entirety of the income constituted a passing on the death of the husband of the "slice" of the trust fund required to produce the annuity under the Finance Act, 1894, s. 1, and, therefore, s. 5 (3) of that Act, as amended by the Finance Act, 1938, s. 48 (which provides that where the interest of any person "under a settlement fails or determines by reason of his death before it becomes an interest in possession and subsequent limitations continue to subsist the property shall not be deemed to pass on his death by reason only of such failure or determination), did not operate to exempt the "slice" from estate duty because the passing occurred apart from the failure of the husband's interest in the "slice."

Earl Cowley v. Inland Revenue Comrs. ([1899] A.C. 198), applied.
A.-G. v. Glossop ([1907] 1 K.B. 163), explained.

AS TO SETTLED PROPERTY IN WHICH THE INTEREST FAILED BEFORE POSSESSION, see HALSBURY, Hailsham Edn., Vol. 13, p. 249, para. 240; and FOR CASES, see DIGEST, Vol. 21, pp. 14, 15, Nos. 68-71.

Cases referred to:

- (1) *A.-G. v. Glossop*, [1906] 1 K.B. 284, *affd.* C.A., [1907] 1 K.B. 163; 76 L.J.K.B. 199; 95 L.T. 823; 21 Digest 14, 69.
- (2) *Cowley (Earl) v. Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, 27.
- (3) *De Trafford v. A.-G.*, [1935] A.C. 280; 104 L.J.K.B. 396; 153 L.T. 17; Digest Supp.
- (4) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; 37 B.W.C.C. 51; *affd.* H.L., [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 38 B.W.C.C. 48; 2nd Digest Supp.
- (5) *Braybrooke (Lord) v. A.-G.*, (1861), 9 H.L. Cas. 150; 31 L.J.Ex. 177; 4 L.T. 218; 25 J.P. 531; 11 E.R. 685; 21 Digest 94, 694.
- (6) *Inland Revenue Comrs. v. Harrison*, (1874), L.R. 7 H.L. 1; 43 L.J.Ex. 138; 30 L.T. 274; 21 Digest 110, 828.

ADJOURNED SUMMONS to determine whether, on the true construction of a marriage settlement, dated July 20, 1912, and of the Finance Act, 1894, and amending Acts, and in the events which had happened, estate duty became payable on the death of the Hon. Charles Lambton on Dec. 5, 1949, (a) on the principal value of the property comprised in the said settlement at the date of his death, or (b) on that value less the value of so much of the capital of the said property as was attributable at that date to the production of the yearly sum of £400 made payable by the said settlement to his wife, Marion Lavinia Lambton, during their joint lives, or (c) on that value less some other, and, if so, what, deduction in respect of the said yearly sum.

Sir Lynn Ungood-Thomas, K.C., and *J. A. Armstrong* for the plaintiffs, the trustees of the settlement.

Pennyquick, K.C., and *J. H. Stamp* for the Inland Revenue Commissioners.

Cur. adv. vult.

Dec. 19. **HARMAN, J.**, read the following judgment. By a settlement made on July 20, 1912, in consideration of the marriage then intended of the Hon. Charles Lambton to Marion Lavinia Garforth certain funds the property of the husband and by him transferred to trustees were settled on trust during the joint lives of the husband and the wife to pay out of the income an annuity of £400 to the wife and to pay the rest of the income to the husband. Subject to these limitations the income of the settled fund was made payable to the survivor of the husband and the wife during his or her life (or widowhood in her case) with remainder after the death of the survivor in the events which have happened to children of the marriage absolutely with an ultimate limitation in default of issue to the husband.

The marriage was solemnised shortly after the settlement, and in 1914 certain further investments were transferred to the trustees on the trusts of the settlement. The husband died in 1949, leaving him surviving his widow and two children of full age. The trustees of the settlement were then the plaintiffs and the trust funds were of a value of rather over £17,000. The amount of capital necessary to satisfy by its income the wife's annuity was about £11,000. On the husband's death, the Crown has claimed estate duty on the entirety of the funds as passing on his death without any allowance in respect of the wife's annuity on what has become known as the "slice" principle, and the question on this summons is whether that claim is justified.

It appears that for a number of years it has been the practice of the Crown in circumstances like these to allow a deduction on the principle mentioned and

the trustees claim that this practice is right and that the £11,000 ought to be deducted from the principal value of the property passing for estate duty purposes. The Crown, however, has been, it appears, recently advised that this deduction has been wrongly allowed in deference or supposed deference to the decision in *A.-G. v. Glossop* (1), and that the true view is that the whole property passes without any deduction and that *A.-G. v. Glossop* (1), so far as inconsistent with this, is wrong as being in conflict with the decision of the House of Lords in *Earl Cowley v. Inland Revenue Comrs.* (2) as followed in *De Trafford v. A.-G.* (3): The case was opened before me as a test case in which the Crown was willing to pay the costs of both parties having regard to its previous practice, and I was invited to disregard the decision in *A.-G. v. Glossop* (1), notwithstanding that it is a decision of the Court of Appeal. It was said that I am bound by the decision in *Young v. Bristol Aeroplane Co., Ltd.* (4) and by a recent pronouncement of LORD GODDARD, C.J., to the same effect, if I find a decision of the House of Lords inconsistent with a decision of the Court of Appeal even though later in date, to follow the former and reject the latter. This is a hard doctrine for a puisne judge where the contending courts are both appellate tribunals. Admittedly, the Crown has professed to follow *A.-G. v. Glossop* (1) for about thirty-five years without ever noticing that it was wrong, and I should be most unwilling to decline to follow so long established a decision if it does in fact apply to this case. I must, therefore, examine the decisions in question to see, if I can, what they do decide.

Now it is clear enough in fact that Mr. Lambton's widow is not by reason of her husband's death the richer by the whole income of the settled fund. She is only richer by that income less £400 a year which she already received out of the fund and will continue to receive. This, however, is, of course, not conclusive. There can be no doubt that in law the £400 a year payable to her during the joint lives of herself and her husband ceased on his death and that there has arisen a new interest in her, namely, a life interest (if she so long continue his widow) in the whole fund. Similarly, in *Earl Cowley's* case (2) a son was entitled to an annuity during his father's life out of the estate in which on his father's death he took a life interest, but the House of Lords nevertheless decided that no deduction in respect of the annuity was allowable. The case was mainly concerned with another question, *viz.*, whether a mortgage overriding the interests of both father and son could be deducted, and it was held that it could. The annuity point was very shortly dealt with and was described by the EARL OF HALSBURY, L.C., as hardly intelligible ([1899] A.C. 207). LORD WATSON said (*ibid.*, 208):

"With regard to the second deduction claimed by the appellant, I have had no difficulty in coming to the conclusion that the decisions of both courts below were right. Very little was said about the point in the argument of the learned counsel for the appellant, and, so far as I can see, their reticence was not injudicious. The annuity, the capitalised value of which forms the subject of the claim, was regularly paid to the appellant during his father's lifetime, and ceased to be payable on his death. No part of it formed a charge upon the equitable estate to which the appellant has succeeded, under the deed of resettlement, not in fee but in life-rent. In these circumstances I do not think it can, with any degree of plausibility, be maintained that the estate which passed to the appellant upon his father's death has been thereby diminished or affected."

LORD MACNAGHTEN said (*ibid.*, 216):

"As regards the minor point urged by Mr. Haldane, I think the claim to deduct the value of the £3,000 annuity must fail. There is no foundation for it; the property passed free from the annuity, and the Act makes no provision for any such allowance. There was a provision to that effect in the

Succession Duty Act. At any rate, s. 38 of that Act was so construed in this House: *Lord Braybrooke v. A.-G.* (5); *Inland Revenue Comrs. v. Harrison* (6). But there is no analogous provision in the Finance Act, 1894."

As for *De Trafford's* case (3), that simply purported to follow *Earl Cowley's* case (2). LORD RUSSELL OF KILLOWEN said ([1935] A.C. 288):

"The first [disputed point] is concerned with the annual sum of £8,000 of which the present baronet was in receipt and had been in receipt since he had attained the age of thirty-five years on Nov. 29, 1925. That annual sum, since it was only payable out of the annual income arising during his father's life, came to an end with his father's death; but on the happening of that event he became tenant for life in possession of the estates, and as such entitled, during his life, to the whole income arising therefrom subsequently to his father's death. In these circumstances it is argued by the appellants (who are the trustees and have accepted liability for the duty payable) that a notional portion of the estates (namely, so much as was required to produce £8,000 per annum) neither passed on the death of the late baronet within the meaning of s. 1 of the Finance Act, 1894, nor should be deemed to be included in property so passing by reason of s. 2 of that Act. Alternatively it is contended that no benefit accrued or arose to the present baronet by reason of the cesser of his right to receive the £8,000 a year. My Lords, these are contentions which in my opinion we are precluded by authority from adopting. I am unable to distinguish this case from *Earl Cowley v. Inland Revenue Comrs.* (2) . . . I see no distinction of substance on the facts; for the fact that the life estate had been divested from the tenant for life and vested in trustees during his life, can of itself cause no different answer to be given to the question what property passed on his death. The mortgage in the *Cowley* case (2) was outside and anterior to the settlement, and independent of it. The annual sum of £8,000 in the present case was payable out of income arising under the settlement. The reasoning which decided the first point in the *Cowley* case (2) cannot therefore apply. Nor can I see any justification for the exclusion of any portion of the estates from the property passing on the death. The present baronet's right to an annual sum of £8,000 gave him no right to the receipt of any particular items of the annual income, or to the income of any particular portion of the estates. His right to receive an annual sum of £8,000 ceased on the death of the late baronet; his right, which then arose, to receive all the rents was a new and a different right."

It is urged by the Crown that the principle here illustrated applies exactly to the present case and that the decision in *A.-G. v. Glossop* (1) must be wrong. In that case also there were two points decided, one concerning the Finance Act, 1896, which is not material here. The facts were that a joint fund consisting partly of a husband's property and partly of his wife's property was settled on trust to pay during their joint lives an annuity of £400 to the wife, and to pay the rest of the income to the husband. Subject thereto, the whole income was limited after the death of the wife to the husband for life and after his death to her for life with remainder to the children of the marriage, whom failing each fund reverted to the settlor of the fund. The wife survived the husband, and it was held that estate duty became payable on the part of the fund representing her fortune except the slice of it which produced her annuity of £400. That, indeed, seems at first sight very similar to the present case, and *Earl Cowley's* case (2) was cited to the court. WALTON, J., at first instance ([1906] 1 K.B. 284) held that *Earl Cowley's* case (2) would have applied but for s. 5 (3) of the Finance Act, 1894. The learned judge said (*ibid.*, 292):

"The Attorney-General contended that the judgment of the House of Lords in *Earl Cowley v. Inland Revenue Comrs.* (2) afforded an answer to the

contention of the defendants upon s. 5 (3). It is quite clear that this section was not referred to in the arguments or judgments in *Earl Cowley's* case (2). And I think it had no application to the facts in that case. *Earl Cowley's* case (2) shows that if s. 5 (3) did not apply to the facts of this case no deduction could be made in considering what property passed on the death of the husband in respect of the annuity of £400 a year payable to the wife during the lifetime of the husband. *Earl Cowley's* case (2) is not an authority upon the construction of s. 5 (3)."

It is clear, therefore, that in that court, at any rate, the decision in favour of the subject turns solely on s. 5 (3). In the Court of Appeal, SIR RICHARD COLLINS, M.R., was of the same opinion. He said ([1907] 1 K.B. 174):

"I come now to the cross-appeal in respect of that portion of the wife's fortune which WALTON, J., held not to be subject to estate duty. The learned judge has decided that 'the Crown is entitled to succeed except as to so much of the "wife's fortune" as is her share of the capitalised value of the fund which produced the income of £400 a year.' This part of the case turns on other considerations. The question is whether the case comes within s. 5 (3) of the Finance Act, 1894 . . ."

—and he then discusses that question. COZENS-HARDY, L.J., was, I think, of the same opinion (*ibid.*, 177), but it is said and has, I think, since been considered that FARWELL, L.J., went further. He said (*ibid.*, 180):

"Then, with regard to the second question, I also think that the learned judge was right. That question turns on s. 5 (3), of the Finance Act, 1894, which provides that, 'In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death.' In this case there was in the first place a trust, during the joint lives of the husband and wife, to pay out of the entire income an annuity of £400 to the wife and to pay the residue of the income to the husband, and, then, after the death of either of them, there was a trust to pay the whole income to the survivor. It seems to me clear that the husband failed to take any interest in possession in such part of the wife's fortune as is property attributable to the production of the £400 annuity. To my mind it is a perversion of language to say that, in the events that happened, the husband ever had an interest in possession in the whole income, subject only to a charge of £400. He never had anything but a right to receive the residue remaining after payment of the annuity of £400 to the wife; and the trustees would have been guilty of a breach of trust if they had let him into possession of the whole income on his undertaking to keep down the annuity. Counsel for the Crown likened the case to that of a charge, but, if there could be said to be any charge in favour of the wife, it would only be a continuing charge on income so that there would be a right to make up deficiency of income in one year by having recourse to the income of another year; but there is no charge on corpus, and no right in the husband to be let into possession."

In my judgment, the lord justice did base his decision on s. 5 (3) and did not intend to go any further. So long, therefore, as that section applies there seems to me no necessary inconsistency between *Earl Cowley's* case (2) and *A.-G. v. Glossop* (1) and I shall certainly follow the latter. The matter, however, does not rest there because in 1938, s. 5 (3) of the Act of 1894 was amended by the Finance Act, 1938, s. 48, by the addition of these words: "by reason only of the failure or determination of that interest." As the argument proceeded counsel for the Crown was inclined to limit his argument, so far as this court is concerned, to the point that this addition to the section has made it inapplicable, so that, even

if *A.-G. v. Glossop* (1) applied up to 1938, it had ceased to apply since then, and this, I think, is the real point for my decision. Now *A.-G. v. Glossop* (1) decided that the interest of the husband in the £400 a year failed because, his wife surviving him, it never became an interest in possession and, therefore, his interest in that property, *i.e.*, the slice producing the £400 a year, ought not to be deemed to pass on his death. The amending words confine the exemption to cases where the passing is brought about only by the failure of the interest. Now it seems to me that in the instant case the failure of the husband's interest in the slice did not bring about the passing of the property. It passed in fact, if I follow, as I am bound to do, LORD MACNAGHTEN's speech in *Earl Cowley's* case (2), under s. 1 of the Act of 1894 and not under s. 2, and what caused it to pass was the death of the husband which caused the determination of the wife's annuity and created in her a new interest in the entirety of the income.

It was argued before me for the subject that the fund must be looked at as divided between the husband and the wife as they each had an aliquot share in it, but I cannot accept this view, for it is clear that she had the prior charge, namely, £400 a year and that her husband only had whatever was left. The rise and fall of the income so long as it exceeded £400 a year did not affect the wife but only the husband and she was not a person sharing the income with him. In my judgment, therefore, the Crown's claim succeeds, not on the ground on which it was originally put, *viz.*, that *A.-G. v. Glossop* (1) is wrong, but that the amendment in 1938 of s. 5 (3) of the Act of 1894 has rendered it inapplicable.

Order accordingly.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Cooper & Jackson*, Newcastle-upon-Tyne (for the plaintiffs); *Solicitor of Inland Revenue*.

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re BUTT (deceased). BUTT v. KELSON AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.),
December 6, 10, 17, 19, 1951.]

Company—Shares held by trustees—Right of beneficiaries to inspect company's documents.

Trust and Trustee—Shares in limited company—Trustees shareholders and directors—Rights of beneficiaries to inspect company's documents.

A testator formed a private company to take over from him and develop certain properties. The voting power was confined to the 22,852 ordinary shares, all of which, except two qualification shares, were held by the testator. By his will the testator appointed the three defendants (two of whom were already directors of the company and the third of whom was appointed a director after the testator's death) to be his executors and trustees and directed that 750 ordinary shares were to be transferred to certain legatees in satisfaction of their pecuniary legacies. Of the rest of the shares, one thousand were to be held by the executors as trustees on certain trusts and the remainder formed part of the residuary estate. The plaintiff had a substantial interest in the residuary estate (largely in the income thereof), but he was not a registered shareholder of the company. The articles of the company provided that no member, not being a director, should have any right to inspect any account, book, or document of the company, except as conferred by statute or authorised by the directors or by resolution of the company in general meeting. The plaintiff claimed to be entitled, as a beneficiary under the will, to see all documents of the company to which the defendants had access as directors by reason of their trust shareholding.

HELD: the plaintiff was not entitled to call on the defendants to use their powers as directors as though they held those powers on trust for the plaintiff. The rights of the beneficiaries (as a whole) were that they should be treated as though they were the registered shareholders in respect of trust shares with the advantages and disadvantages (*e.g.*, restrictions imposed by the articles) which would be involved in that position, and they could compel the trustee directors, if necessary, to use their votes as the beneficiaries (or as the court, if the beneficiaries themselves were not in agreement), thought proper, even to the extent of altering the articles of association if the trust shares carried votes sufficient for that purpose.

AS TO RIGHT OF BENEFICIARY TO SEE ACCOUNTS AND DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. 33, p. 228, para. 410; and FOR CASES, see DIGEST, Vol. 43, pp. 861-863, Nos. 3067-3096.

Case referred to:

(1) *Re Cowin*, (1886), 33 Ch.D. 179; 56 L.J.Ch. 78; 43 Digest 863, 3091.

APPEAL by the defendants from a decision of HARMAN, J., dated June 11, 1951.

The plaintiff, as a beneficiary under the will of the testator, claimed to be entitled to inspect and take copies of papers, books, documents, and records, which had come into the custody, power, or control of the defendants, as directors of a private company, the bulk of the shares in which were held by the defendants as trustees of the testator's estate. HARMAN, J., made a declaration in favour of the plaintiff.

Sir Lynn Ungood-Thomas, K.C., and *T. A. C. Burgess* for the defendants, the trustees.

Cross, K.C., and *Newsom* for the plaintiff, the beneficiary.

SIR RAYMOND EVERSLED, M.R.: I will ask ROMER, L.J., to give the first judgment.

ROMER, L.J.: On Oct. 13, 1937, the testator formed a private company, the object of which was to take over from the testator and develop certain properties consisting of blocks of flats. The subscribers to the memorandum of association were the testator in respect of two shares, the first defendant (Mr. Kelson) in respect of one share, and the third defendant (Mr. Jutsum) also in respect of one share. The capital of the company was £115,000, divided into eighty thousand £1 preference shares and thirty-five thousand £1 ordinary shares. Of those, seventy-five thousand preference and 22,852 ordinary shares were issued. The voting power is confined (unless certain events happen which have not in fact happened) to the ordinary shares. The testator held all of the 22,852 ordinary shares, except the said shares held by the first and third defendants. These defendants were and are directors of the company. The testator was the chairman and managing director of the company, and had very wide and overriding powers. He made his will on June 13, 1944, and appointed the defendants his executors and trustees. By the will he gave certain legacies and annuities. He gave a £250 legacy to a grandson, £250 to a grand-daughter and £250 to the second defendant, who was another grandson of the testator. He directed his executors to transfer ordinary shares in the company to the legatees in satisfaction of their legacies. That was done after his death. In addition to these 750 shares, which were allocated in satisfaction of the legacies, the trustees were directed to retain one thousand ordinary shares on certain trusts. Subject to that, there was a residuary trust clause under which the plaintiff took certain interests in income and otherwise. He is to have an annuity of £250 from the death of the testator for fourteen years, and then, subject to certain other annuities and dispositions, he is to receive during the life of the first defendant three-tenths of certain income described by the testator in his will as the residue of the income of his residuary estate. Thereafter, at the expiration of fourteen

ars, he is to receive £1,000 and certain other benefits, including the right to receive after the death of the first defendant during his life three-tenths of the income of the ultimate residue of the testator's estate.

The testator died on Nov. 7, 1944. His will was proved by the first and third defendants on July 18, 1945, and there was power reserved to the second defendant to prove. On Sept. 3, 1946, the second defendant was appointed a director of the company and had two shares presented to him, as I understand on account of the shares to which he was entitled in respect of his legacy. On Sept. 11, 1946, the second defendant proved the will. The will contained a clause authorising the trustees to retain the shares of the company as authorised investments for the purposes of the trusts of the will, and, in fact, the shares have been retained. It will be seen that the plaintiff, although having a fairly substantial interest in the residuary estate, which includes the bulk of the shares in question, is not himself a shareholder of the company. He became dissatisfied with the time went on with the way in which the company was being managed by the defendants. Apparently he had some reason to suppose that the defendants were making a profit for themselves out of the management of the company's affairs. So he sought to get from the defendants, in their capacity as directors of the company, an inspection of the company's papers and other documents in order that he might ascertain how matters were proceeding. Although the directors, the trustees, were prepared to give some form of inspection and to show the plaintiff balance sheets and other such material—and, indeed, were prepared to show him all the documents which he would have been entitled to see had he himself been a registered shareholder of the company—they were not prepared to give him inspection or allow him to take copies of documents which came into their possession or under their consideration, not as shareholders, but as directors of the company. That did not satisfy the plaintiff.

The matter of the company's documents and papers is dealt with, to some extent, by the company's articles, and, in particular, under art. 121 there is the usual provision that the directors shall cause proper accounts to be kept and that the books of account shall be kept at the office or such other place as the directors may think fit and shall be always open to the inspection of the directors. Article 122 is of some importance. It provides:

"The directors shall from time to time determine whether, in any particular case or class of cases, or generally, and to what extent, and at what times and places and under what conditions or regulations, the accounts and books of the company, or any of them, shall be open to the inspection of members, and no member (not being a director) shall have any right of inspecting any account or book or document of the company, except as conferred by statute or authorised by the directors or by a resolution of the company in general meeting."

It is clear that, had the plaintiff been a shareholder of the company himself, he would have held his shares subject to the disability of inspection which is imposed by art. 122. Nevertheless, he said that his rights as a beneficiary against the trustee directors were wider than the rights which he would have had had he been a registered shareholder himself. As he could not persuade the directors to share his views, he issued his writ in this action on Nov. 10, 1950.

By the statement of claim, after setting out the relevant facts, he said:

"The defendants contend that the plaintiff is only entitled to receive from the defendants as the testator's executors and trustees such information only as to the affairs of the company as would be available to him if he was a shareholder therein but not a director thereof. The plaintiff contends that since substantially the whole of the share capital of the company forms part of the estate of the testator, and since the defendants are directors of the company now (and have respectively been since [the date mentioned earlier]) solely by virtue of their voting power in respect of the shares comprised in

such estate, each of their acts as directors of the company since such dates have been and are acts done in the execution of their duties as executors of the testator and trustees of his will and that all papers, books, documents and records which have since such dates come into the hands or into the power or control of the defendants as directors of the company or of any one of the defendants as a director of the company have come to them him or her as executors of the testator and trustees of his will and that accordingly the plaintiff as a beneficiary under such will is entitled to see all such papers, books, documents and records, and to take copies of them at his own cost."

In the prayer to the statement of claim he asks for a declaration to give effect substantially to the contentions which I have read.

When the matter came before HARMAN, J., he stated that the attitude of the defendants was that the plaintiff could see everything which came into their custody, power, or control by virtue of their shareholding in the company because they were shareholders *qua* trustees, but they refused to allow him to see anything which came into their hands as directors. The learned judge said:

"That, in my view, is entirely untrue. They are directors because they are trustees and for no other reason. It is true that two of these people were directors of the company before the death of the testator, but they have retired by rotation and have re-elected themselves by virtue of their shareholding in the trust estate and by virtue of no other right, title or interest. Why, if that which comes to them as shareholders by virtue of the trust shareholding is discloseable, that which comes to them as directors by virtue of the trust shareholding is not, I entirely fail to appreciate, but it may well be that the defendants have made too much of a concession and that they ought to make none, and I am asked to consider what is the right of a beneficiary in those circumstances. In this case I am not going to lay down any wide proposition of law, but, in my judgment, where there is no outside interest in the company (which is merely the creature of the testator, or the settlor, or, indeed, the creation of the trustees under the powers conferred on them by the will or settlement), the beneficiaries are no less entitled to see documents of that kind or to inquire into the company's accounts and affairs than they would be if the property in question were being managed by the trustees without the intervention of a company with limited liability. We are often reminded that a corporation is a personality independent of the corporators. That doctrine, however, can be carried far beyond its logical conclusion if it is going to be argued that where you get a company of this sort, in which nobody outside the estate has any interest, the trustees can put themselves into a position of security and secrecy merely by interposing a limited company between the beneficiaries and themselves."

The order so far as appealed from (because a part of it directed an account of profits made by the defendants and that has not been appealed from) is in the following terms:

"This court doth declare that so long as the plaintiff is beneficially interested in the property subject to the trusts of the will of the above named testator Robert Henry Coate Butt and so long as the defendants or any of them are directors of the company in the pleadings mentioned by virtue of their being registered holders of the shares in the company which are comprised in the testator's estate the plaintiff is entitled to inspect and take copies at his own expense of all papers books documents and records which shall come into or which have come into the custody power or control of the defendants or any of them as such directors or director."

The order gave liberty to apply "for production of the above mentioned documents."

The defendants have appealed against that order and the gist of their complaint is, first, that it does not distinguish between the position of the defendants merely as trustees, on the one hand, and the position of the defendants as directors of the company, on the other hand. Secondly, they say that it ignores the right of the shareholders in the company other than the trustees themselves, and the legatees to whom shares have been transferred. Counsel for the defendants said that it is vital to bear in mind the distinction between a business which is being carried on by trustees of an estate and a business which is being carried on by a limited liability company in which the trustees merely hold shares. The rights of the beneficiaries in the former case *prima facie* would be to see such documents and papers relating to the business as the trustees might have in their hands on the ground that in effect the beneficiaries are the owners of the business. That is a principle which has been well established and was recognised, for example, in *Re Cowin* (1). But, he says, where the business is carried on by a limited company and the beneficiaries are interested, not in the business itself but as *cestuis que trustent* of shares held by the trustees, they have no rights the beneficiaries have are to see that the trustees use the voting power attaching to the trust holding in the best interests of the beneficiaries themselves and the only control over the trustee directors which the beneficiaries can ask the court to enforce is a control operated through the medium of the shares. The right of a beneficiary, or of the beneficiaries if they are united, is to compel the trustees to use their voting power in the best interests of the trust estate in so far as the articles of association. But, he says, the beneficiaries have no right to regard the directors' powers as forming part of the trust estate. He says that it is precisely what the plaintiff in the present case is trying to do and what the court in *Re Manby*, J., has held that he is entitled to do.

After the form of declaration had been discussed from various angles, counsel for the plaintiff very rightly admitted that it went beyond what he could ask this court to uphold. The learned judge disclaimed any intention of laying down any general proposition of law and was obviously intending to confine his order (at least so I think) to a case where the whole of the shares of a private company were held by trustees for the benefit either of only one beneficiary or of two or three beneficiaries all of whom are exactly of the same mind as to what they want to have done. It appeared to him that in such a case it would be very wrong that the directors should set the beneficiaries at defiance and say: "Although you are virtually the owners of the company in equity, nevertheless we are not going to tell you what is going on, because we are directors." When one analyses this declaration one is confronted with a series of difficulties. A declaration in this form would result in a beneficiary who was not on the register being entitled to information which not only would not be available to him if he were a registered shareholder, but also might be very greatly prejudicial to the company and the interests of his fellow beneficiaries who might not wish him to have access to the documents at all. For example, one could readily imagine a case where a company was carrying on the exploitation of some secret process, and, if the principle underlying this declaration were to be right, a beneficiary, who himself was already carrying on a rival business or was contemplating doing so, could call on the trustee directors to furnish him with information which might be very detrimental to the company. It is to be observed that the declaration provides that:

"So long as the defendants or any of them are directors of the company . . . by virtue of their being registered holders of the shares."

That is, apparently, a reference to the fact that in this case the directors have more than fifty per cent. of the holding and can vote themselves into or out of office as they like. That would have to be altered in some sense so that it was limited to such times as the trust shareholding represented more than

fifty per cent. of the total issued capital. That would not be enough, however, because it may be that, if the plaintiff was to be entitled to the inspection he desired, the articles would have to be altered and the directors could not do that unless they held seventy-five per cent. of the issued capital and so could pass a special resolution. So, to meet that case the declaration would have to be varied so as to operate only so long as the director trustees held seventy-five per cent. of the issued capital by virtue of the shares comprised in the testator's estate. Again, the declaration makes no provision for the fact that other shareholders in the company might take a grave objection to the plaintiff being allowed to see documents which they themselves are not allowed to see—especially as he is not a shareholder of the company—and, more especially, that he should be allowed to take copies without being put on any undertaking, or any safeguard being provided, as to the use to which he would put them. Taking those and other considerations into account, counsel for the plaintiff was fain to admit that the declaration went further than he could legitimately ask this court to support, although it is to be observed that it goes no further than the declaration which in the statement of claim the plaintiff asked the court to make. I am not sure to what extent the learned judge intended the principle to apply that a beneficiary can call on a trustee director to furnish him with information and allow him inspection. Is it to be limited to cases where there are no outside interests in the sense that there are no interests apart from the trust interest, or is it to include cases (and, indeed, this is such a case) where, although there are no outside interests in that sense, nevertheless there are, or may be, conflicting interests as between the beneficiaries themselves? For myself, I think that, if one accepts the principle at all, it is difficult to confine it within any properly definable limit. In my judgment, it is a principle which it is dangerous to accept and which ought not to be accepted at all. It might, as I have indicated, result in very unfortunate consequences.

I think the true way of looking at the matter is that which was presented to this court by counsel for the defendants—that the beneficiaries are entitled to be treated as though they were the registered shareholders in respect of trust shares with the advantages and disadvantages (*e.g.*, restrictions imposed by the articles) which would be involved in that position and that they could compel the trustee directors, if necessary, to use their votes as the beneficiaries—or as the court, if the beneficiaries themselves are not in agreement—should think proper, even to the extent of altering the articles of association if the trust shares carry votes sufficient for that purpose. In the present case, the trust holding gives complete control over the management of the company, and the way in which I would approach the plaintiff's right in this matter would be that, if he (i), specifies the documents of the company which he wishes to see, (ii) makes out a proper case for seeing them, and (iii) is not met by any valid objection by the other beneficiaries or by the directors from the point of view of the company, the directors should give inspection, not because they, as directors, can be compelled to do so, but as a short circuit, if one may so describe it, to an order compelling them to use their voting powers so as to bring about what the plaintiff desires to achieve. If that be the right way of approaching this matter, I do not think any further difficulties arise in this case. If the plaintiff abandons the idea that he is entitled to call on these directors to use their powers as directors as though they held those powers on trust for him and if he realises that his rights in relation to the trust holding are as I have briefly described them, I do not think that any difficulty should arise. If difficulty does arise because some of the beneficiaries object to the plaintiff seeing a document which he wants to see or because the directors think that it is not right that the plaintiff should see it, he can make an application to have the matter determined by the court. Accordingly, I would propose that the declaration which has been made be discharged, but that there should be inserted into the order liberty to the plaintiff

to apply in these proceedings in relation to any document which he may hereafter desire to see and of which the defendants decline to give him inspection.

BIRKETT, L.J.: I agree.

SIR RAYMOND EVERSHED, M.R.: I also agree.

Appeal allowed.

Solicitors: *Waterhouse & Co.*, agents for *John Hodge & Co.*, Weston-super-Mare (for the defendants); *Darley, Cumberland & Co.* (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A. [1952] 2 All E.R. 32.

**THOMAS v. MARSHALL (INSPECTOR OF TAXES).
MARSHALL (INSPECTOR OF TAXES) v. THOMAS.**

CHANCERY DIVISION (Donovan, J., sitting as a judge of the Division), December 18, 20, 1951.]

Income Tax — Settlement — Transfer of assets — Deposits to child's account in Post Office Savings Bank and purchases of Defence Bonds for child — Absolute gift — Aggregation of settlements to determine whether income exceeds £5 a year — Finance Act, 1936 (c. 34), s. 21 (1), s. 21 (4), s. 21 (9) (b).

A father opened Post Office Savings Bank accounts in the names of his two infant unmarried children, and from time to time paid sums to the credit of those accounts. He also bought holdings of Defence Bonds in the names of the children. The total interest arising from each child's Post Office Savings Bank account exceeded £5 per annum, but the interest arising from each separate sum from time to time deposited did not. It was admitted that each separate sum constituted a separate settlement. On the question whether the interest arising from the Post Office Savings Bank accounts and from the Defence Bonds fell to be treated as the father's income for tax purposes under the Finance Act, 1936, s. 21 (1),

HELD: (i) the definition of "settlement" in s. 21 (9) (b) of the Act as including a "transfer of assets" was wide enough to cover a transfer by way of absolute gift, and, therefore, the deposits in the Post Office Savings Bank and the purchase of the Defence Bonds were "settlements" within the meaning of that sub-section and the income arising thereunder fell to be treated as the settlor's income for tax purposes under s. 21 (1).

Hood-Barrs v. Inland Revenue Comrs. ([1946] 2 All E.R. 768), applied.

(ii) in determining whether the aggregate income paid to or for the benefit of any one child exceeded £5 a year for the purpose of the exemption under s. 21 (4), the income arising by virtue or in consequence of all settlements to which s. 21 applied must be added together.

FOR THE FINANCE ACT, 1936, s. 21, see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 361, 363.

Cases referred to:

- (1) *Chamberlain v. Inland Revenue Comrs.*, [1943] 2 All E.R. 200; 25 Tax Cas. 317; 2nd Digest Supp.
- (2) *Vestey's Executors v. Inland Revenue Comrs.* *Vestey's Executors v. Colquhoun*, [1949] 1 All E.R. 1108; 31 Tax Cas. 1; 2nd Digest Supp.
- (3) *Inland Revenue Comrs. v. Morton*, 1941 S.C. 467; 24 Tax Cas. 259; 2nd Digest Supp.
- (4) *Hood-Barrs v. Inland Revenue Comrs.*, [1946] 2 All E.R. 768; 176 L.T. 283; 27 Tax Cas. 385; 2nd Digest Supp.

CASES STATED by general commissioners of income tax.

The taxpayer was assessed to income tax on interest arising from Post Office Savings Bank accounts in which he had deposited moneys in the names of his

infant unmarried children and from Defence Bonds which he had bought in their names. The assessments were made on the taxpayer in purported pursuance of s. 21 (1) of the Finance Act, 1936, which requires income arising by virtue or in consequence of certain settlements to be treated as the settlor's income for tax purposes. The general commissioners considered themselves bound by the decision in *Hood-Barrs v. Inland Revenue Comrs.* (4) to hold that the deposits and purchases were "settlements" within the meaning of s. 21 (1), notwithstanding that they constituted absolute gifts to the children. They held, however, that so much of the interest as arose from each separate deposit and did not exceed £5 a year was not to be treated as the settlor's income, as they considered that the "aggregate amount" mentioned in s. 21 (4) referred to the aggregate amount of income under each settlement regarded separately. The taxpayer appealed against the finding that the transactions constituted settlements, and the Crown against the finding that the income under the separate settlements was not to be aggregated.

C. Lawson for the taxpayer.

Pennycuik, K.C., and *R. P. Hills* for the Crown.

Cur. adv. vult.

Dec. 20. **DONOVAN, J.**, read the following judgment. The taxpayer appealed to the general commissioners for the division of the Tower of London against assessments made on him under case III of sched. D for the years 1942-43 to 1949-50 inclusive in varying amounts. Those assessments were in respect of interest paid on deposits in the Post Office Savings Bank and on three per cent. Defence Bonds. It was all treated as the taxpayer's income for income tax purposes.

The taxpayer has two infant and unmarried children, Michael and Heather. On Dec. 20, 1933, he put £50 in the Post Office Savings Bank in the name of Michael. On May 28, 1936, he put £50 in the same bank for Heather. Thereafter, he put further sums in the same bank for each of them. Various drawings were made from time to time and expended for the children's benefit. By Dec. 31, 1948, there was left in the bank £844 odd for Michael and £844 odd for Heather. The accounts are in their respective names. On May 24, 1945, the taxpayer bought £1,000 three per cent. Defence Bonds for each of Michael and Heather. These bonds were absolute gifts to the children by him, as were the sums he paid into the Post Office Savings Bank.

The Inspector of Taxes treated the interest on the moneys in the Post Office Savings Bank and the interest on the bonds, both of which items of interest are not income of the taxpayer in fact, as nevertheless being his income for the purposes of income tax. This was done in purported obedience to s. 21 (1) of the Finance Act, 1936. That section, so far as material, provides as follows:

"Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person."

Sub-section (9) provides:

"In this section . . . (b) the expression 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets."

It may be convenient here to say that in 1938 further legislation was enacted with a view to the prevention of tax avoidance by means of settlements, and Part IV of the Finance Act, 1938, contained the relevant provisions. Section 41 (4), which appeared in Part IV, provided:

"For the purposes of this Part of this Act . . . (b) the expression 'settlement' includes any disposition, trust, covenant, agreement or arrangement . . ."

The definitions of "settlement" in s. 21 (9) (b) of the Finance Act, 1936, and s. 41 (4) (b) of the Finance Act, 1938, are, therefore, identical, save for the omission in the latter provision of the expression "transfer of assets."

The taxpayer resisted the Crown's claim, and said that outright gifts such as were made in this case are not "settlements" within the meaning of the definition contained in s. 21. In support of that contention, he argued before the commissioners, to whom he appealed, that the House of Lords had defined, in a sense favourable to him, the meaning of "settlement" for the purposes of Part IV of the Finance Act, 1938, in two cases, namely, *Chamberlain v. Inland Revenue Comrs.* (1) and *Vestey's Executors v. Inland Revenue Comrs.* *Vestey's Executors v. Colquhoun* (2), and that these decisions are of equal application to the word "settlement" in s. 21 of the Act of 1936. The commissioners decided against the taxpayer on these points, and he now appeals to this court.

Before me, additional arguments were deployed with which I will deal. The case of *Chamberlain* (1) did not call for a decision as to what constitutes a "settlement" within the expanded definition of that term contained in s. 41 (4) (b) of the Finance Act, 1938. The question at issue was: What was the property comprised in the settlement? LORD THANKERTON says this ([1943] 2 All E.R. 202):

"I may premise that, in seeking the due application of the Finance Act, 1938, s. 38, each case is apt to depend on its own facts, and other cases are not likely to be of material assistance. Further, it seems to me that, while the word 'settlement' is defined in the widest terms, the more crucial point is likely to be the determination of what the 'property comprised in the settlement' consists of in the particular case. The present case affords, in my opinion, a good illustration of this point, and the question may be thus stated. Did the property comprised in the settlement consist of the whole assets of Staffa, or is the property comprised in the settlement to be found separately comprised in each of the five deeds of settlement, the formation of Staffa being part of the arrangement conceived by the appellant, whereby a convenient and profitable investment was made available for the moneys respectively settled under the five deeds of settlement?"

The case decided that only the property comprised in the five deeds was the "property comprised in the settlement." In the course of his speech in the same case, LORD MACMILLAN said this (*ibid.*, 203):

"In order that the income of the Staffa Investment Co. may, under the Finance Act, 1938, s. 38 (2), be treated as the income of the appellant, that income must be shown to be income arising under a settlement made by the appellant from property comprised in the settlement; it must further be shown that the settlement or some provision thereof is revocable or otherwise determinable, and that, if such revocation or determination should be effected, the appellant or his wife would become beneficially entitled to the whole or part of the settled property or to the whole or part of the income of the settled property. The term 'settlement' includes any disposition, trust, covenant, agreement or arrangement (s. 41 (4) (b)) and has thus a wider meaning than in the vocabulary of the strict conveyancer. The first, and, indeed, the decisive question in the case is whether the appellant made a settlement comprising the whole assets of the Staffa Investment Co."

After stating the facts in the case, LORD MACMILLAN continued (*ibid.*, 204):

"The contention of the Crown, which was upheld by the Special Commissioners and has been affirmed by LAWRENCE, J., and the Court of Appeal, is that the formation and structure of the Staffa Investment Co., together with the sale agreement of Dec. 23, 1935, the settlement of Mar. 10, 1936, and the four settlements of Dec. 7, 1936, 'constitute an arrangement and a settlement within the Finance Act, 1938, s. 41 (4) (b).' LAWRENCE, J., in

affirming the decision of the Special Commissioners, did not deliver a reasoned opinion as it was admitted before him that the case was governed by the decision of the First Division of the Court of Session in the Scottish case of *Inland Revenue Comrs. v. Morton* (3). I find myself unable to agree with the Crown's contention. I accept the view that the statutory expansion of the term 'settlement,' which includes an 'arrangement,' justifies and, indeed, requires a broad application of s. 38 of the Act of 1938, but a settlement or arrangement to come within the statute must still be of the type which the language of the section contemplates. I agree with LORD MONCRIEFF that the settlement or arrangement must be one whereby the settlor charges certain property of his with rights in favour of others (*Inland Revenue Comrs. v. Morton* (3))."

Relying on these last words, the taxpayer says that only property charged with rights in favour of others is a settlement within the meaning of s. 21 of the Finance Act, 1936, and that, therefore, an out-and-out transfer is not such a settlement, for the property so transferred is not charged with rights in favour of others.

The validity of this argument depends in the first place on what LORD MACMILLAN meant by the expression "charged with rights." If he meant what conveyancers usually mean by that term, then an absolute gift would be excluded. LORD MACMILLAN in fact went on, in my view, to explain what he meant by "charged with rights," for he proceeded thus (dealing with a settlement for the purposes of the section) (*ibid.*):

"It must comprise certain property . . . it must confer the income of the comprised property on others, for it is the income so given to others that is to be treated as, nevertheless, the income of the settlor."

An out-and-out gift satisfies those conditions just as much as a gift conferring limited interests, and, in view of this and of the circumstance that the case did not call for such a decision, I find it impossible to construe LORD MACMILLAN's words as laying down the proposition that the definition of "settlement" in the Act of 1938, as expanded, can be ignored, and the word given the more restricted meaning that it usually bears. LORD MACMILLAN himself says that the expanded definition requires that the word "settlement" shall be given a meaning wider than the ordinary one. It is, I think, useful to point out that LORD ROMER said this in the same case (*ibid.*, 207):

"Although, therefore, it may be possible to say, in view of the Finance Act, 1938, s. 41 (4) (b), that on Mar. 10, 1936, there came into existence a compound settlement in the form of an arrangement consisting of the forming of Staffa, the agreement for the sale to it of the 470 shares in Commercial Structures, the trust deed of that date and the subscription by the trustees of 350 ordinary shares, the property comprised in that settlement consisted of nothing but the last mentioned shares."

Here, again, LORD ROMER indicates the difference between the issue which arose in the *Chamberlain* case (1), and the one which arises in the case now before me.

I have already noticed that the definition of "settlement" contained in s. 21 (9) of the Finance Act, 1936, includes the words "transfer of assets," which do not appear in the definition contained in the Act of 1938 which the House of Lords was considering in the *Chamberlain* case (1), but I do not found my decision on that, although the difference between the two definitions is there, for what it is worth. Each definition contains, however, the word "disposition," and what transfer of assets there could be which would not also be a disposition, I do not know.

The view I have just expressed regarding what was decided, and not decided, in the *Chamberlain* case (1) disposes of the argument by the taxpayer here that

the House of Lords in *Vestey's* case (2) had endorsed what LORD MACMILLAN said in the former case. If my interpretation of LORD MACMILLAN's speech be right, that argument carries the matter no further. For *Vestey's* case (2), so far as here relevant, was also a decision on the Act of 1938, and again the House of Lords did not have to decide the exact meaning of the definition of "settlement" in that Act. Once more the question was: What property was comprised in the settlement? In view of the expanded meaning given to the word "settlement" by the statute, it would be just as fallacious to conclude that, once you had determined that question, you had also determined what the settlement was, as it would be to conclude that once you knew what rooms were comprised in a house you knew precisely what the house was.

The taxpayer argued that the words "disposition, trust, covenant" and so on in the expanded definition are simply indications by the legislature of the ways in which a settlement, strictly so-called, can be effected. The language of the definition is wholly adverse to such a construction. Moreover, it is not easy to picture the legislature telling us that one of the ways in which you can make a strict settlement is by "an arrangement." On the other hand, there is sense, though little clarity, in the legislature saying that an arrangement, as a consequence of which a taxpayer diverts some of his income, may be a settlement for the purposes of the section. Counsel for the taxpayer next argued that s. 21 of the Finance Act, 1936, dealt only with the settlement of income—for example, the settlement of an existing annuity. I can find no warrant in the language of the section for holding that it does not cover the case where capital is settled and income from such capital is paid to or for the benefit of an infant and unmarried child of the settlor. The indications are the other way: see sub-s. (8), where a distinction is drawn between income and assets, and the definition of "settlor" in sub-s. (9) containing a reference to "funds" provided for the purposes of the settlement, the word "funds" being obviously wide enough to cover capital. Then it was said that, in a case of an out-and-out transfer of assets, the settlement is both created and terminated at the same moment, and, therefore, no income can arise from any settlement to be caught by s. 21. The case was instanced of a father first making a parol trust of property in favour absolutely of his child, and then actually transferring the property to the child. The parol trust, it is said, would itself be a settlement within the definition of s. 21 (9). A subsequent transfer would put an end to that settlement, leaving nothing. There was, in fact, no parol trust in the present case, but, in any event, I do not regard the argument as sound. I should have thought the transfer simply implemented the trust, and in any event the two things can be considered together for the purposes of s. 21 as together constituting the settlement.

So far, I have considered the matter independently of any authority directly bearing on the taxpayer's contention. But the decision of the Court of Appeal in *Hood-Barrs v. Inland Revenue Comrs.* (4), a decision of the Court of Appeal given after the decision of the House of Lords in *Chamberlain's* case (1), is directly in point and binds me. No doubt, in these circumstances, it would have been easier simply to have said that, but, in deference to the vigour and the courage of the argument for the taxpayer, I have considered the matter in the first place independently of that decision. I do not think the verdict in the Court of Appeal was in any way at variance with the decision of the House of Lords in *Chamberlain's* case (1), or with the passage from LORD MACMILLAN's speech on which reliance was placed. My reasons have already been given.

Finally, it was contended for the taxpayer that absurd results would follow if one treated any transfer of assets to a child as being within s. 21. Suppose a business was transferred by father to son. Is that caught? Again, if stock-in-trade is transferred absolutely, and then sold by the child, can it be said that income is "paid" to a child by virtue or in consequence of the settlement? It is his income already. And what about the case of a purchase for full consideration by a child from its father? I agree that neither the transfer of a business

nor a sale for full consideration is specifically exempt, but I refrain from indicating any views on the problems they present, for the case I am considering raises none of them. They have long been matters of interest and speculation, and they had better be left to be dealt with if and when the occasion arises.

As regards the argument that income had not been "paid" to or for the benefit of the child, the decision in *Hood-Barrs* case (4) must be taken as negating it. I think that the commissioners were right in deciding against the taxpayer on the question whether s. 21 applied at all.

I now turn to the Crown's appeal. Section 21 (4) of the Finance Act, 1936, provides as follows:

"Income paid to or for the benefit of a child of a settlor shall not be treated as provided in sub-s. (1) of this section for any year of assessment in which the aggregate amount of the income paid to or for the benefit of that child, which, but for this sub-section, would be so treated by the foregoing provisions of this section, does not exceed £5."

It is said in the Stated Case that it is agreed between the parties that the accounts in the Post Office Savings Bank were not a settlement within the meaning of s. 21. I suppose that means simply that the relevant entries in the bank books were not a settlement, for it is agreed that each deposit by the taxpayer is a separate settlement within the meaning of the section, assuming that he failed on his main point. The taxpayer contends that you must look at each settlement separately and ask: Is the total income under that settlement in the year £5 or less? If so, s. 21 does not apply. The Crown maintains that if there is more than one settlement on a child which comes within s. 21, then you look at all the income arising in the year under all the settlements to see whether the total is £5 or less. Section 21, I may recall, opens with these words: "Where, by virtue or in consequence of any settlement to which this section applies," and it goes on to enact that, other conditions being fulfilled, the income paid to or for the benefit of a child shall be treated as the settlor's income. That means, obviously, the income which arises under "any" such settlement which is so paid or applied. So that, if there were four settlements, each producing, let us say, £1 of income in the year which was paid to or for the benefit of a child, all that £4 is caught by s. 21 (1). Now, however, comes sub-s. (4), and that speaks of the aggregate income which would, but for the sub-section itself, be caught by s. 21. What is that, except, in the example I have given, £4? Now, says sub-s. (4), since that aggregate interest is less than £5, sub-s. (1) shall not apply. All that seems perfectly clear, but the taxpayer says: "No; you take each settlement separately." In the example I have given, of course, it would make no difference if you did. But it would make a difference if, instead of each settlement producing £1, it produced £4. I can see no warrant for this contention at all. The expression is "the aggregate amount of the income . . . which . . . would be so treated by the foregoing provisions of this section," which means which would be treated as the settlor's income. In the case of more than one settlement, what can that mean except the aggregate of the income arising under them all? Otherwise, the word "aggregate" is meaningless. I ought to say that I was told at the Bar that this was not the taxpayer's contention in the first place, but was suggested to him by the clerk to the commissioners. The commissioners accepted it. I am afraid I must reject it.

Taxpayer's appeal dismissed. Crown's appeal allowed.

Solicitors: *Tyrrell Lewis & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

THRASYVOULOS IOANNOU AND OTHERS v. PAPA
CHRISTOFOROS DEMETRIOU AND OTHERS.

RIVY COUNCIL (Lord Morton of Henryton, Lord Reid and Lord Tucker),
October 31, November 1, 5, 6, 7, December 5, 1951.]

document—Admissibility in evidence—Continuous record—Public document—
Report of inquiry by surveyor of land registry as to rights of irrigation—
Filing with documents of similar nature—Inquiry not held with object that
report be made public—Report not at all times open to public inspection—
Evidence Act, 1938 (c. 28), s. 1 (1) (i) (b).

The appellants were inhabitants of a village in Cyprus situated at a point where two rivers united to form the river K. The respondents' village lay at the mouth of the river K. In 1941 the appellants diverted water from one of the upper rivers into irrigation channels over their land. The respondents claimed that by ancient user they were entitled to the full natural flow of the river K., including that of the upper rivers. In support of this claim they tendered in evidence a document dated Aug. 13, 1901, and produced by a witness from the local land registry, which consisted of a report and "reference" by a surveyor of the registry, since dead, after an inquiry made by him under Law 5 of 1880 of the laws of Cyprus on the instructions of the registrar-general into (*inter alia*) the rights of the respondents to the water. Since its date the document had been kept in the office of the Land Registry in a file containing a collection of reports on the water of the river K., and the respondents contended that it was, therefore, admissible as forming part of a "continuous record" within the meaning of s. 4 (1) (a) (ii) of the Evidence Law of Cyprus (No. 14) of 1946, which is in the same terms as s. 1 (1) (i) (b) of the Evidence Act, 1938. Alternatively, it was contended that the document was admissible as a public document under the English rules of evidence at common law which had been made applicable to Cyprus.

HELD: (i) the mere existence of a file containing one or more documents of a similar nature dealing with the same or a kindred subject-matter did not necessarily make the contents of the file a continuous record within the meaning of s. 4 (1) (a) (ii), and, therefore, the document was not admissible under that section.

(ii) for a document to be admissible as a public document it should not only be available for public inspection, but should also have been brought into existence for that purpose; in the present case, it had not been proved that the inquiry was held with the object that the report should be made public or that the report was at all times open to public inspection; and, therefore, it was not admissible in evidence on that ground: *dictum* of LORD BLACKBURN in *Sturla v. Freccia* (1880) (5 App. Cas. 643), applied; doubts expressed by VAUGHAN WILLIAMS, L.J., in *Mercer v. Denne* ([1905] 2 Ch. 558), not approved; nor had it been shown, as was necessary, that it was the duty of the surveyor to inquire into and report on the matters dealt with in the document: *Nothard v. Pepper* (1864) (17 C.B.N.S. 49, 52) and *A.-G. v. Antrobus* ([1905] 2 Ch. 194), applied.

AS TO PUBLIC DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 656-698, paras. 726-769; and FOR CASES, see DIGEST, Vol. 22, pp. 314-350, Nos. 3072-3548.

Cases referred to:

- (1) *Sturla v. Freccia*, (1880), 5 App. Cas. 623; 50 L.J.Ch. 86; 43 L.T. 209; 44 J.P. 812; 22 Digest 314, 3072.
- (2) *Irish Society v. Derry (Bp.)*, (1846), 12 Cl. & Fin. 641; 8 E.R. 1561; 22 Digest 350, 3543.

- (3) *Arnold v. Bath & Wells (Bp.)*, (1829), 5 Bing. 316; 7 L.J.O.S.C.P. 120; 130 E.R. 1083; 22 Digest 338, 3391.
- (4) *Pettit v. Lilley*, [1946] 1 All E.R. 593; [1946] K.B. 401; 115 L.J.K.B. 385; 175 L.T. 119; 110 J.P. 218; 2nd Digest Supp.
- (5) *Duncan v. Cammell Laird & Co., Ltd.*, [1942] 1 All E.R. 587; [1942] A.C. 624; 111 L.J.K.B. 406; 166 L.T. 366; 2nd Digest Supp.
- (6) *Mercer v. Denne*, [1905] 2 Ch. 538; 74 L.J.Ch. 723; 93 L.T. 412; 70 J.P. 65; 22 Digest 382, 3907.
- (7) *Nothard v. Pepper*, (1864), 17 C.B.N.S. 39; 144 E.R. 16; *sub nom. Northard v. Pepper*, 10 L.T. 782; 42 Digest 708, 1254.
- (8) *A.-G. v. Antrobus*, [1905] 2 Ch. 188; 74 L.J.Ch. 599; 92 L.T. 790; 69 J.P. 141; 22 Digest 382, 3911.

APPEAL by the inhabitants of the village of Kakopetria, Cyprus, from a decision of the Supreme Court of Cyprus, dated Apr. 6, 1950, confirming an order of the district court of Nicosia, dated Nov. 6, 1948, whereby it granted an injunction to the respondents, the inhabitants of the village of Petra, restraining the appellants from unlawfully interfering with the water rights of the respondents.

The respondents alleged that by ancient user they were entitled to the full natural flow of certain rivers, and they supported their claim by the production of a document which, they contended, was admissible as a "continuous record" under the law of evidence obtaining in Cyprus (in the same terms as the Evidence Act, 1938), or as a public document under the English rules of evidence at common law which had been made applicable to Cyprus. Both the district court and the Supreme Court admitted the document on both grounds.

Harvey, K.C., and *Megaw* for the appellants.

Pearson, K.C., *J. C. Clerides* (of the Bar of Cyprus) and *K. D. Potter* for the respondents.

Dec. 5. **LORD TUCKER:** This appeal arises out of litigation between the inhabitants of two villages in Cyprus concerning their rights to the water of the river Karkotis for the purpose of irrigating their lands. The plaintiffs in the action were the present respondents (hereafter referred to as "the Petrans") and the defendants the present appellants (hereafter referred to as "the Kakopetrians").

The village of Petra is situate at the mouth of the river Karkotis some twelve miles distant as the crow flies to the north of Kakopetria which lies just above the confluence of two rivers called Ayios Nicolaos and Karvounas which unite at this spot to form the river Karkotis. There was some dispute at the trial whether the name Karkotis applied to one or both of the two confluent rivers above Kakopetria or was confined to the river below the junction. It was, however, agreed by counsel on both sides that this dispute had no bearing on any issue before the Board and, accordingly, it will be convenient to confine the use of the word Karkotis to the river below the confluence and to refer to the two confluent rivers by the names Ayios Nicolaos and Karvounas. Between Kakopetria and Petra there are some ten or eleven other villages on the banks of the Karkotis river. These villages (with the exception of Galata) draw their water supply for irrigation purposes from the Karkotis by means of dams, sluices and channels by which the water is diverted in the required direction. The village of Petra claims that it relies for this purpose on four dams situate in or near the villages of Evrychou, Tembria and Korakou a few miles up stream. In the Ayios Nicolaos river there are four dams, two of which are said to serve the village of Galata, which is the first village just below the confluence, and the other two are claimed by Kakopetria, as also are two other dams in the Karvounas river. One of the two dams in the Ayios Nicolaos is called the Frantziko dam and was the scene of the incidents giving rise to the present litigation. The summer of 1941 was dry and on May 27 and 28 in that year the

Kakopetrians diverted the water or part of it at the Frantziko dam into the Kakopetrian irrigation channels despite the protests of watermen who were present at the spot and who had been deputed by the Petrans to attend for the purpose of ensuring that the whole of the water of the river was allowed to flow down without interception so as to reach their dams at Evrychou, Akkou and Tembria. The writ in this action was issued by the Petrans on 26, 1941, and the issue between the parties may for present purposes be fully and sufficiently stated as follows. The Petrans claimed that by ancient law they were entitled to have for their own use the full natural flow of the water of Karkotis, including the full natural flow of the water of the upper rivers of Ayios Nicolaos and Karvounas, between certain specified times on certain days of the week at certain seasons of the year. The Kakopetrians, on the other hand, contended that the Petrans had no such right, but that they by ancient and uninterrupted user had the right to take from certain dams and sluices in the rivers Ayios Nicolaos and Karvounas (including, in particular, the Frantziko dam) such quantity of water as is proportionate to the area of irrigable land in Kakopetria, *viz.*, approximately three hundred donums being the equivalent of one hundred acres.

The present appeal is concerned with the admissibility of a certain document which was tendered in evidence by the Petrans at the trial before the district court of Nicosia. The document was received in evidence and its admissibility was upheld by the Supreme Court of Cyprus who, however, gave the appellants leave to appeal to His Majesty in Council. The district court granted the Petrans an injunction in the terms claimed, and this judgment was confirmed on appeal, subject to a slight variation in the terms of the injunction, to the effect that the Kakopetrians are restrained from unlawfully interfering with the respondents' rights to take or irrigate their lands from the water of or running through the rivers Ayios Nicolaos, Karvounas and Karkotis and/or of the dams Ayios Nicolaos, Frantziko, Appliki and Karidhi at the times specified in the statement of claim.

The document tendered and received in evidence is called "Report and Reference of Salim Effendi" and is in two parts, the first being the report signed and dated Aug. 13, 1901, and the second headed "Reference" and signed and dated Aug. 10, 1901. Annexed to this document is a sketch which shows the course of the rivers from above the confluence at Kakopetria down to the mouth of the Karkotis at Petra. On it there are a number of spots marked with numbers from one to twenty-eight and the reference contains explanations of these numbers. The report is headed L.E. 164 with the figures /900 beneath and is addressed to the registrar-general. It begins as follows:

"In compliance with your instructions respecting the inquiries to be made to the taxims [divisions], etc. of the running water of Petra described in papers L.E. 164/900 I have the honour to report . . ."

The report proceeds to deal with the rights of the inhabitants of Petra *inter se* to the Karkotis water. It later states that Petra water was never assessed for *verghi* (tax), but the lands irrigated by it were assessed at a higher rate than those which were not irrigated by this water. It concludes as follows:

"Although the water of Petra has not been separately assessed for *verghi* during the Tahrir Emlak it is perfectly clear that the value of the water is assessed with the lands which can be irrigated by this water, but notwithstanding to that the Muhtar and the commission of Petra gave a village certificate on behalf of the villagers of Petra declaring that the water running to their village of Petra has never been assessed to *verghi* and they agree that the value described in the attached certificate may be assessed on every four of water. They gave this V. certificate for the anticipation that the water be registered in the names of the present holders as Mulk so as to

enable them to deal with as they like. I prepared 148 forms showing the present possessors of the water of Petra and enclosed herewith."

The report—as distinct from the reference—contains no mention of the rights of the Kakopetrians or of the rights of Petra village *vis-à-vis* Kakopetria or any of the other intervening villages. The document was produced by a witness from the Land Registry from a file which he said related to local inquiries made in respect of Karkotis water. He added "This local inquiry was made under Law 5 of 1880." He stated that Salim was a surveyor of the Land Registry and that he is now dead. Since the date of the report it had been kept in the office of the Land Registry. Objection having been taken to the admissibility of this document the court adjourned to enable the witness to ascertain how the local inquiry was held and whether it was for record purposes or otherwise. On the resumption the witness did not produce any instructions in writing given to Salim, but stated:

"It was made on the instructions of the director of the L.R.O. to register those lands which were sold or purchased and for the other lands to make a note that they have the right of irrigation."

In cross-examination the witness stated that Salim's instructions were the same as those given to Yusuf Zia which he produced. This document is dated Aug. 11, 1893, and relates to the registration of water at Flasso, Linou and Katydata which are villages on the Karkotis river. The instructions refer to previous instructions which had not been properly carried out and conclude

"Please make a list of water other than that flowing from sources and running through wells entered separately in the Field Books of Flasso, Linou, Katydata, and explain why you did not follow your instructions."

Law 5 of 1880 gives power in s. 1 to the High Commissioner to direct a survey. By s. 2 he can appoint a director of survey. Section 3 requires owners and others to attend and give information when required with liability to be fined if they refuse. Section 4 gives power to enter lands for the purpose of survey and by s. 8 occupants are required to point out boundaries. Such was the material before the district court on which the admissibility of this document fell to be decided.

For the Petrans it was contended before the Board that the document was admissible under s. 4 of Law 14 of 1946 of the Laws of Cyprus (the Evidence Law, 1946) which corresponds with the provisions of s. 1 and s. 6 (2) of the English Evidence Act, 1938. Further, or alternatively, it was submitted that it was admissible as a "public document" under English common law rules of evidence which are made applicable to Cyprus by s. 3 of Law 14 of 1946 which enacts:

"Save in so far as other provision is made in this Law or has been or shall be made in any other Law in force for the time being, every court, in the exercise of its jurisdiction in any civil or criminal proceeding, shall apply, so far as circumstances may permit, the law and rules of evidence as in force in England on Nov. 5, 1914."

The material parts of s. 4 of Law 14 of 1946 are as follows:

"(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—(a) if the maker of the statement either—(i) had personal knowledge of the matters dealt with by the statement; or (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might

reasonably be supposed to have, personal knowledge of those matters; and subject to sub-s. (2) of this section, if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead . . . ”

Section (2) provides that the court may, if satisfied that undue delay or expense would otherwise be caused, admit the statement in evidence notwithstanding that the maker of the statement is available but is not called as a witness, and that the original document is not produced, if a certified copy is produced in lieu thereof. Sub-section (5) provides:

“For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances . . . and the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.”

The district court admitted this document under s. 4 of Law 14 of 1946. They

“These exhibits, apart from being ancient documents (being prepared on Aug. 10, 1901), satisfy the requirements of s. 4 of Law 14 of 1946.”

Little later they say:

“These have been produced from the archives of the Land Registry, *i.e.*, they were in proper custody and we have no doubt that these documents are purported to be a continuous record.”

In the judgment of the Supreme Court the matter was dealt with in the following passage:

“The document which seems to have had most influence on the trial court and which has certainly influenced us, was a report accompanied by a map made by a surveyor in the Lands Office, on the instructions of his superiors, on Aug. 13, 1901. It is an official document, produced from proper custody and it is nearly fifty years old. It was admitted by the district court under s. 4 of the Evidence Act, 1946, and also as an ancient document. Whether or not this document is part of a continuous record, as mentioned in s. 4 (a) (ii) of the Law, seems at least doubtful, but the maker must be supposed to have had personal knowledge of some at least of the matters that the records, particularly the physical situations that he describes and records in his map. Moreover, the document is an ancient document produced from proper custody. We think, therefore, that the trial court was right in admitting both the report and the map and there is no reason to think that the court gave improper weight to them.”

There appears to have been some confusion in both courts as to the ground for admitting this document apart from the provisions of s. 4 of Law 14 of 1946. It was not contended before the Board that its admissibility depended on its being an “ancient document,” though its age and production from proper custody dispensed with the requirement of formal proof provided it was otherwise admissible in evidence. The ground on which its acceptance is sought to be justified—apart from s. 4 of Law 14 of 1946—is that it is a “public document” in the meaning of these words as appearing from a long line of English authorities. Before considering these contentions it may be convenient at this point to set out an extract from the reference which contains the statements the admission in evidence of which was clearly the purpose for which this document was tendered, to which statements both the district court and the Supreme

Court attached considerable weight as tending to corroborate the evidence of the plaintiffs' witnesses. The first three paragraphs of the reference referring to the sketch plan are as follows:

"No. 1 represents the dam of the channel called Frandjiko through which the people of Kakopetria take their water every day except Tuesday. They take their water from the Karioti river and convey it through the aforesaid channel by blocking up the river with brushwood and stone so much as the channel could carry. The people of Kakopetria take their water on Saturday, Sunday, Monday, Wednesday and Thursday from the appearance in their village of Pleiades till the sunrise, and on Friday from the appearance of Pleiades until the shadow of a standing man will approach 7 feet, a.m., from the spot standing to the shadow of his head. They continue to take their water in the aforesaid time from June 14 to Aug. 14, and from Aug. 15 to June 13 of the following year they commence to take their water from the appearance of Orion's belt instead of Pleiades."

Apart from the question of the admissibility of this document, counsel for the Petrans contended that he had concurrent findings of fact in his favour which could be supported even if the document should have been excluded. Their Lordships have carefully considered the judgments of the district and the Supreme Court from this angle, but have reached the clear conclusion that this document played a large part in the determination of the questions of fact and that it is, to say the least, open to considerable doubt whether in the absence of this document the trial court would have arrived at the same conclusion. If, therefore, this document was not properly received in evidence a new trial cannot be avoided. Their Lordships will, accordingly, proceed to address themselves to the question of the admissibility of this document as the determining factor in this appeal.

The applicability of s. 4 of Law 14 can be dealt with quite shortly. Counsel for the respondents did not contend that the report and reference together with the attached sketch was of itself a "continuous record" within the meaning of the section, but he argued that the document came from a file which contained a collection of inquiries and reports on one subject-matter, *viz.*, Karkotis water, and was, therefore, admissible as forming part of a record purporting to be a continuous record. Their Lordships are unable to accept this submission. The evidence with regard to the file was very scanty and amounted to little more than that it appeared to contain the instructions given to Yusuf Zia in connection with the registration of water at Flasso, Linou, and Katydata in the year 1893. Without attempting to give a definition of "continuous record" it is sufficient to say that the mere existence of a file containing one or more documents of a similar nature dealing with the same or a kindred subject-matter does not necessarily make the contents of the file a "continuous record" within the meaning of the section. It is not necessary to consider in this connection whether in any event the court could reasonably infer that there was any duty imposed on Salim to record the matters set out in the opening paragraphs of the reference, but this question will be dealt with hereafter in relation to the admissibility of the exhibit as a public document. Their Lordships are, accordingly, of opinion that the necessary foundation for the admissibility of this document under s. 4 of Law 14 of 1946 was never established.

It remains to consider its admissibility as a "public document." Public documents in this connection may be classified under different heads, but the class with which the Board is now concerned is that class which comprises documents which are brought into existence as a result of a survey, inquiry or inquisition carried out or held under lawful authority and it is to this class of document that the observations which follow are confined. The classic authority on this question is the speech of LORD BLACKBURN in *Sturla v. Freccia* (1). That case was concerned with the report of a committee appointed by a public

partment of a foreign State and acted on by the government of that State, it held to be inadmissible as a public document. LORD BLACKBURN, referring to the judgment of PARKE, B., in *Irish Society v. Derry (Bp.)* (2), used these words (5 App. Cas. 643):

"Now, my Lords, taking that decision, the principle upon which it goes, is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world . . . But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."

Referring to *Arnold v. Bath & Wells (Bp.)* (3) he said (*ibid.*, 646):

"The bishop made his visitation, and recorded it with the wish and intent that it should be kept publicly as a register, to be seen by everybody in his diocese. If the bishop had not the right to make such an inquiry, so as to make it evidence in future, that is another affair; but if he had, then he was a public officer performing what he thought a public duty, with the view and intent it should be public."

These passages stress the dual requirements that the document should not only be available for public inspection, but that it shall also have been brought into existence for this very purpose, and LORD BLACKBURN was explaining his interpretation of the judgment in *Irish Society v. Derry (Bp.)* (2) where PARKE, B., in the year 1846 had said (12 Cl. & Fin. 668):

"In public documents, made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not."

Nine hundred years later LORD GODDARD, C.J., sitting as a member of the Appellate Division in *Pettit v. Lilley* (4), had occasion to consider this language of PARKE, B., in the light of LORD BLACKBURN's speech in *Sturla v. Freccia* (1) and said ([1946] 1 All E.R. 595):

"In my opinion, it is quite clear that PARKE, B., did not mean to lay down that every document that may be prepared by a servant of the Crown for the information of His Majesty is a public document. It may be that the words 'for the information of the Crown, or all the King's subjects who may require the information they contain' should be read as meaning 'for the information of the Crown, that is to say, all the King's subjects who may require the information they contain.' But however that may be, he was there dealing with documents of record in the courts. Many documents are prepared for the information of the Crown (*i.e.*, the Executive), which are of a highly confidential nature and it is well known, as has recently been held by the House of Lords, that the Crown has an absolute right to object to produce any document on the ground that it would be against the public interest so to do: see *Duncan v. Cammell Laird & Co., Ltd.* (5). It is difficult, therefore, to see how a document to which the public can have no access and which the Crown can refuse to produce under a *subpoena* could by any possibility be described as a public document."

Later, LORD GODDARD observed (*ibid.*, 596):

"It seems to me clear from LORD BLACKBURN's speech that to be a public document it must be one made for the purpose of the public making use of it. Its object must be that all persons concerned in it may have access to it."

Save for the doubts expressed by VAUGHAN WILLIAMS, L.J. ([1905] 2 Ch. 558) (which doubts were not shared by the other two members of the Court of Appeal, *viz.*, STIRLING and COZENS-HARDY, L.J.J.) in *Mercer v. Denne* (6) whether LORD BLACKBURN's speech may not have been expressed in rather too wide terms, his definition has now been generally accepted for over seventy years and their Lordships can see no reason for attempting to qualify it in any respect.

A number of cases prior in date to *Sturla's* case (1) were cited by leading counsel for the respondents in support of his submission that the document, being a revenue survey made for the Crown under a public statute, was admissible as a public document made in the public interest regardless of whether it was preceded by a public inquiry or was subsequently available to the public. If this were the true test it would be contrary to LORD BLACKBURN's definition, but their Lordships find nothing in the authorities relied on which is necessarily inconsistent with *Sturla's* case (1) which, as stated above, they regard as containing an authoritative statement of the law as to the admissibility of this class of document.

Applying LORD BLACKBURN's test to the document in question their Lordships consider that it was not shown by the plaintiffs in the action either intrinsically from the contents of the document itself or from other evidence (i) that a judicial or semi-judicial inquiry was ever held by Salim as to the rights of the Kakopetrians to Karkotis water or as to the conflicting claims of Petra and Kakopetria to such water; (ii) that the inquiry in fact held by Salim was held with the object that his report thereon should be made public; or (iii) that the report was in fact at all times open to public inspection or that an inference to this effect should be drawn from the fact that it was produced in evidence without objection by the Land Registry authorities. Furthermore, they are of opinion that, in any event, it was not established that it was any part of the duty of Salim to record the matters set out in the opening paragraphs of the "reference" which have been set out above, and they consider that it is implicit in the authorities and, indeed, it was expressly so stated in *Nothard v. Pepper* (7) (17 C.B.N.S. 49, 52) and *A.-G. v. Antrobus* (8) ([1905] 2 Ch. 194) that the statements in a document tendered in evidence as a public document should be statements with regard to matters which it was the duty of the public officer holding the inquiry to inquire into and report on.

For these reasons, their Lordships are of opinion that the report and reference were wrongly admitted in evidence, and they will, accordingly, humbly advise His Majesty that this appeal should be allowed and the judgments of the district court of Nicosia and the Supreme Court of Cyprus set aside and the action remitted to the district court for a new trial.

Appeal allowed.

Solicitors: *E. F. Turner & Sons* (for the appellants); *Bischoff & Co.* (for the respondents).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

v. GOVERNOR OF BRIXTON PRISON AND ANOTHER.
Ex parte PAWEL SLIWA.

JUDGMENT OF APPEAL (Singleton, Birkett and Romer, L.J.J.), December 3, 4, 20, 1951.]

n—Deportation—Order that alien “shall be deported”—Validity—Aliens Order, 1920 (S.R. & O., 1920, No. 448), art. 12 (1).

On Oct. 6, 1950, the Home Secretary made an order that the applicant, an alien, “shall be deported from the United Kingdom and shall remain thereafter out of the United Kingdom,” and further directed that he should be placed in the custody of a police officer until deportation. In September, 1951, the order was served on the applicant, who was detained in order to be placed on board a Polish ship. It was contended that the order was invalid and the applicant’s detention unlawful because (i) the order did not “require” him to leave the United Kingdom and, therefore, failed to comply with art. 12 (1) of the Aliens Order, 1920, and (ii) that he was not given an opportunity of leaving the United Kingdom voluntarily and thereby enabled to escape deportation to Poland.

HELD: under the Aliens Order, 1920, art. 12 (1), the Home Secretary had power to make an order compelling an alien to leave the United Kingdom, as distinguished from requesting him to do so; there was no provision in the order of 1920 that before a compulsory order was made against an alien he must first be given the opportunity of leaving, and no special form of deportation order was provided; and, therefore, the order made against the applicant was valid.

R. v. Home Secretary. Ex p. Chateau Thierry (Duke) ([1917] 1 K.B. 922), applied.

AS TO THE DEPORTATION OF ALIENS, see HALSBURY, Hailsham Edn., 1, pp. 484-488, paras. 820-827; and FOR CASES, see DIGEST, Vol. 2, pp. 194-Nos. 542-553, and Digest Supp.

FOR THE ALIENS ORDER, 1920, see HALSBURY’S STATUTORY INSTRUMENTS, Vol. 2, p. 7.

as referred to:

) *R. v. Home Secretary. Ex p. Chateau Thierry (Duke)*, [1917] 1 K.B. 552; *revsd.* C.A., 1 K.B. 922; 86 L.J.K.B. 923; 116 L.T. 226; 81 J.P. 125; 2 Digest 196, 552.

) *R. v. Home Secretary. Ex p. Bressler*, (1924), 131 L.T. 386; 88 J.P. 89; Digest Supp.

PEAL of applicant from a decision of the Divisional Court (LORD GODDARD, HILBERY and SLADE, JJ.), dated Oct. 18, 1951.

the applicant, who was detained in Brixton prison under a deportation order made by the Secretary of State for Home Affairs, applied for a writ of *habeas corpus* on the ground (i) that the order was bad because it did not comply with the words of art. 12 (1) of the Aliens Order, 1920, and did not give the applicant the option to leave the country voluntarily; (ii) that the order was not served on the applicant; and (iii) that he was a political refugee opposed to the present Polish government and it was intended to send him on board a Polish ship on Oct. 5, 1951. The order was as follows: “Whereas the Aliens Restriction Acts, 1914 and 1919. Deportation Order made by the Secretary of State in pursuance of powers conferred by the Aliens Restriction Acts, 1914 and 1919, and art. 12 of the Aliens Order, 1920. Whereas under art. 12 (6) (c) of the Aliens Order, 1920, I deem it to be conducive to the public interest to make a deportation order against Pawel Sliwa, an alien, in pursuance of the above mentioned powers I hereby order that the said Pawel Sliwa shall be deported from the United Kingdom, and shall remain thereafter out of the

United Kingdom. And further, I direct that, from and after the service of this order upon the above-named alien he shall, until he can be conveniently conveyed to and placed on board the ship on which he is to leave the United Kingdom . . . be in custody."

The Divisional Court refused the application on the ground (i) that the order was made in proper form and that the alien had no right of choosing the country where he wanted to go; (ii) that the order was served on the applicant; and (iii) that the choice of the country to which the alien was to be deported was left by Parliament to the Home Secretary; and, therefore, what happened after the alien was put in the ship was a matter which did not concern the executive government or the court. The applicant appealed to the Court of Appeal where only the first point was argued.

Weitzman, K.C., and *Ogilvie Jones* for the applicant.

J. P. Ashworth for the respondents.

Cur. adv. vult.

Dec. 20. The following judgments were read.

SINGLETON, L.J.: This is an appeal from an order of the Divisional Court by which a motion for a writ of *habeas corpus* on behalf of one Pawel Sliwa, an alien, was refused. The applicant is now in custody under an order of the Secretary of State for Home Affairs. The order was made on Oct. 6, 1950, though it was not served until almost a year later. It purports to be made under the Aliens Restriction Acts, 1914 and 1919, and art. 12 of the Aliens Order, 1920.

Three questions were raised before the Divisional Court, but only one of them was argued before us and this can be stated shortly. It is claimed that the order of deportation made by the Secretary of State is bad in that it is not in form an order under art. 12 of the Aliens Order, 1920. It is said that art. 12 (1) gives the Secretary of State power to make an order requiring an alien to leave and thereafter to remain out of the United Kingdom, whereas the order made does not "require" any such thing, but orders that the applicant be deported. Therefore, it is submitted, the order is not an order within art. 12 (1), nor does it become such merely because the order contemplated is referred to in the article as a deportation order.

The Aliens Restriction Acts, 1914 and 1919, are to be read together, and they have been reviewed year by year. Section 1 of the Act of 1914 provided that restrictions might be imposed on aliens by Order in Council, and, by para. (c), that provision might be made by the order for the deportation of aliens from the United Kingdom. The Aliens Restriction (Consolidation) Order, 1916 (S.R. & O., 1916, No. 122), made under the Act, by art. 12 (1) provided that the Secretary of State might order the deportation of any alien, and that any alien with respect to whom such an order was made should forthwith leave the United Kingdom, and art. 12 (2) provided that where an alien was ordered to be deported under the order, he might, until he could, in the opinion of the Secretary of State, be conveniently conveyed to and placed on board a ship about to leave the United Kingdom, be detained in such manner as the Secretary of State directed, and, while so detained, be deemed to be in legal custody.

This article was considered in *R. v. Home Secretary. Ex p. Duke of Chateau Thierry* (1), where VISCOUNT READING, C.J., said ([1917] 1 K.B. 556) that the alien

" . . . must have the opportunity of leaving this country when the order for deportation is made, and he may go to any country he pleases."

In the Court of Appeal a different view of the order was taken: see SWINFEN EADY, L.J. ([1917] 1 K.B. 931), PICKFORD, L.J. (*ibid.*, 933), and BANKES, L.J. (*ibid.*, 936). I cite a short passage from the judgment of PICKFORD, L.J. (*ibid.*, 933):

" The Secretary of State has two courses open to him. If he considers it safe to leave the alien at large he may rest himself only on sub-s. (1), and then

It seems to me the alien is at liberty to choose his ship and his destination. If, on the other hand, he considers it right that the alien should not be left at large, he may act under sub-s. (2) and detain him as therein provided."

In 1919 there was a change made in art. 12 (1), and that change was maintained in the order of 1920 which is now in force and under which the Secretary of State acted in the present case. Article 12 provides:

"(1) The Secretary of State, may, if he thinks fit, in any of the cases mentioned in this article make an order (in this order referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the United Kingdom. (2) An order made under this article may be made subject to any condition which the Secretary of State may think proper. (3) An alien with respect to whom a deportation order is made shall leave the United Kingdom in accordance with the order, and shall thereafter so long as the order is in force remain out of the United Kingdom. (4) An alien with respect to whom a deportation order is made, or a certificate is given by a court with a view to the making of a deportation order, may be detained in such manner as may be directed by the Secretary of State, and may be placed on a ship about to leave the United Kingdom, and shall be deemed to be in legal custody whilst so detained, and until the ship finally leaves the United Kingdom . . . (6) A deportation order may be made in any of the following cases . . . (c) If the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien."

It will be seen that the wording of art. 12 (1) differs from the wording of the order of 1916. Now the Secretary of State may make an order requiring an alien to leave and to remain thereafter out of the United Kingdom. The order here is still referred to as a deportation order.

It is a little surprising that, notwithstanding the change in art. 12 (1), the form of order used by the Home Office has remained just as it was previously, apart from an alteration made consequent on the judgment of BANKES, L.J., in *R. v. Home Secretary. Ex p. Bressler* (2). The order in the present case is an order that Pawel Sliwa shall be deported from the United Kingdom . . . followed by directions for his detention meanwhile. Article 12 (6) of the order of 1920 sets out the cases under which an order may be made, and the present case fell under para. (c). Great importance was attached by counsel for the applicant to the change in the form of art. 12 (1). He submitted that as it now stands (a) it presupposes a document or notice addressed to the alien, and (b) it is intended to give the alien an opportunity to leave the United Kingdom voluntarily on receiving notice under art. 12. There is some force in this argument, but I feel that it does not pay sufficient regard to art. 12 (4), under which an alien with respect to whom a deportation order is made

" . . . may be detained in such manner as may be directed by the Secretary of State, and may be placed on a ship about to leave the United Kingdom, and shall be deemed to be in legal custody whilst so detained . . . "

There is no reason why the Secretary of State should not use art. 12 (1) and art. 12 (4) together if he thinks fit so to do. In other words, once an order is made under art. 12 (1) the Secretary of State may direct detention of the alien under art. 12 (4). Virtually the power of the Secretary of State is just the same as it was under the order of 1916, though the wording of art. 12 has been changed. In the present case, if the Secretary of State thinks it right, the alien is given an opportunity to leave. The order in this case was made on Oct. 6, 1950, and clearly the alien was aware of it. The alien, in fact, applied for a passport at the Polish Consulate in London in November, 1950. The order was not served on him until Sept. 28, 1951. Thus, the position of the alien is just the same as it would have been if the order had been made in the terms in which counsel for the applicant submits that it ought to

have been in order to comply with art. 12 (1). It is not directed to the alien, but it names him, and it was served on him. It is an order and makes it clear what is required. The latter part of it contains provision for his detention meanwhile, and the facts deposed to by the alien and his legal adviser would seem to show that he was given an opportunity to make arrangements for his departure from this country, though I do not consider that the Secretary of State was bound to allow that.

The objection raised is a technical one, based on the wording of the order. It is none the worse for that if it is sound. I think it fails, and I state my reasons shortly. (i) That which the Secretary of State is empowered to do is to make an order as distinguished from a request. (ii) An order requiring a person to leave envisages compelling him to leave. The Secretary of State can thus make an order which compels the alien to leave. Whatever else can be said about the order, it is clear on that point. (iii) No special form of order is provided for use. That which was served was headed: "Deportation Order" (*vide* art. 12 (1)) and the powers under which it was made are set out. (iv) I do not think that there is any more substance in the argument that under the order of 1920 the alien *must* be given an opportunity to leave than there was in that addressed to the court under the order of 1916. To my mind, art. 12 (4) disposes of that. I am in favour of dismissing the appeal.

BIRKETT, L.J.: In the ordinary way I should have been content to express my agreement with the judgment that has just been delivered, but as the appeal is concerned with the liberty of a foreigner who alleges that he has particular reason to fear being deported to Poland I will state my own view quite briefly. The submission of counsel for the applicant was that the order of Oct. 6, 1950, made by the Secretary of State was a bad order, and his client was, therefore, illegally detained in custody. The order of Oct. 6, 1950, purported to be made in pursuance of powers conferred by the Aliens Restriction Acts, 1914 and 1919, and art. 12 of the Aliens Order of 1920.

Counsel for the applicant emphasised the importance of the difference between the wording of the Aliens Restriction (Consolidation) Order, 1916, and the Aliens Order, 1920. Under art. 12 of the order of 1916 the Secretary of State was empowered to "order the deportation of any alien," and the alien should "forthwith leave and thereafter and so long as the order remained in force remain out of the United Kingdom." Article 12 (1) of the Aliens Order of 1920 empowered the Secretary of State to make an order "requiring an alien to leave and to remain thereafter out of the United Kingdom." The order made in this case does not follow the wording "requiring an alien to leave," but uses the words "shall be deported from the United Kingdom," and it is on that ground that counsel for the applicant submits that the order is bad in law. The Secretary of State, he says, should have made an order addressed to the alien requiring him to leave the United Kingdom, and he has not done so, but has made an order of deportation in the words: "He shall be deported from the United Kingdom." We listened to considerable argument on the meaning of the words "requiring him to leave the United Kingdom," and I think the meaning of the words must be that for which counsel for the respondents contended, that is, "which requires" him to leave. Counsel for the applicant suggested that the words were more in accordance with a request to leave rather than an order to leave.

The order of 1920 has been in force for over thirty years, and the order of Oct. 6, 1950, followed the form which has been used throughout that period. It seems to me to be of importance to observe that the powers of the Secretary of State under the orders of 1916 and 1920 to order the alien to be detained in custody until he can be placed in a suitable ship and deported are substantially the same, although there is a slight difference in the wording. If, for example, the words "requires you to leave" had been in the order of Oct. 6, 1950, the Secretary of State could have ordered the detention of the alien immediately

the service of the order, and he could have been kept in custody until placed aboard a suitable ship. This seems to be opposed to the view, for which counsel the applicant contends, that the wording of the order of 1920 prescribes nothing in the nature of a request to leave addressed to the alien. I must say I think it unfortunate that in a matter of such very great moment man's liberty it should be possible for a point of this kind to arise so that of the judges in the Divisional Court, SLADE, J., should have thought it imperative to put on record the doubts and difficulties he felt in concurring in decision. On careful consideration of the whole matter I am of opinion that order of Oct. 6, 1950, was a valid order. I do not think that the Aliens Order, by the change in language gave to the alien the opportunity to leave the country of his own accord, and only thereafter was the power of deportation to be exercised. I do not think that the absence of the words "I require you to leave" from the order of Oct. 6, 1950, makes the order invalid, nor do I think the presence of the words "shall be deported" does so either. I think that the Secretary of State exercising his powers under art. 12 (6) (c) of the order of 1920, which gave him power to make a deportation order if he deemed it to be conducive to the public good, was not bound to use the words: "I require you to leave," but by ordering the deportation of the alien made an order which required the alien to leave.

ROMER, L.J.: I agree with the judgments which have just been delivered.

Appeal dismissed.

Solicitors: *Miles Griffiths & Co.* (for the applicant); *Treasury Solicitor* (for the respondents).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re MARJORIBANKS' INDENTURE. FRANKLAND v. MINISTRY OF HEALTH AND ANOTHER.

COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.J.J.),
December 5, 6, 19, 1951.]

National Health Service—Hospital—Transfer of property—"Held by trustees solely for the purposes of that hospital"—Power of trustees to sell property and apply proceeds of sale to other charitable purposes—National Health Service Act, 1946 (c. 81), s. 6 (1).

By a deed, dated June 27, 1884, land which was the site of a home for incurables was conveyed to trustees on trust to sell any part thereof (not being the main building used for the patients of the home), if authorised thereto by a resolution of the committee of management of the home, and to sell the whole, or any part thereof, if authorised thereto by a resolution of the subscribers to the fund out of which land for the home was bought and the home endowed (such resolution being consequent on resolutions of the committee and subscribers to the effect that by reason of insufficiency of funds, or for any other reason, the home should be closed), and on trust in the meantime to permit the land to be used for the purposes of the home. On the sale of the land or any part thereof, the income of the invested proceeds of sale would be applicable *inter alia* to the payment of pensions to persons who, though suffering from some incurable malady, did not receive treatment or services at the home, and, on the sale of the whole land (viz., on the contingency of the enterprise of the home ceasing to exist), the trust property would be applicable for such other charitable purposes as the committee and the subscribers might determine. On July 4, 1948, i.e., immediately before the appointed day (July 5, 1948) under the National Health Service Act, 1946, the land was used by the trustees for the purposes of the home.

HELD: under the deed of 1884 the land was held by the trustees on July 4, 1948, solely for the purposes of the home for incurables, notwithstanding (a) the remote remainder in favour of other charitable purposes to be determined on the contingency of the home ceasing to exist, or (b) the provision enabling income of the invested proceeds of sale to be applied in payment of pensions to persons suffering from some incurable malady, and, therefore, the land was an interest "held immediately before" July 5, 1948, "by trustees solely for the purposes of" a voluntary hospital, within the meaning of s. 6 (1) of the Act of 1946, and passed to the Minister of Health on that date under the sub-section.

Ministry of Health v. Fox ([1950] 1 All E.R. 1050), approved in part.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 6 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 339.

Cases referred to:

(1) *Ministry of Health v. Fox*, [1950] 1 All E.R. 1050; [1950] Ch. 369.

(2) *Marlborough (Duke) v. A.-G.* (No. 2), [1945] 1 All E.R. 165; [1945] Ch. 145; 2nd Digest Supp.

APPEAL by the plaintiff from an order of WYNN-PARRY, J., dated June 7, 1950.

The plaintiff, a member of the general committee of the Royal Midland Counties Home for Incurables at Leamington Spa, suing on behalf of himself and all the other members of the committee, took out a summons to determine whether, on the true construction of a trust deed, dated June 27, 1884, and of the National Health Service Act, 1946, s. 6 (1), and on the footing that the home was a hospital within the meaning of the Act, land which immediately before July 5, 1948, was vested in the second defendant, Lloyds Bank, Ltd., as the trustee under the deed, and formed the site of the home was on that date transferred to and vested in the Minister of Health by virtue of s. 6 (1) of the Act. By the deed the land was conveyed to trustees on trust to permit it to be used for the purposes of the home. The deed empowered the trustees to sell the land in the event of the home ceasing to exist, and, on the sale of the land, the trust property was to be applicable for such other charitable purposes as might then be determined. It was contended by the plaintiff that s. 6 (1) of the Act of 1946 had no application to the land as the trusts affecting it were not limited to the purposes of the home for incurables. WYNN-PARRY, J., held that on July 4, 1948, the land was held by the trustee solely for the purposes of a voluntary hospital, within the meaning of s. 6 (1), and, therefore, on July 5, 1948, it vested in the Minister of Health under the sub-section.

Russell, K.C., and *H. E. Francis* for the plaintiff.

Sir Lynn Ungood-Thomas, K.C., and *Denys B. Buckley* for the first defendant, the Ministry of Health.

Raymond Walton for the second defendant, Lloyds Bank, Ltd. (the trustee).

Cur. adv. vult.

Dec. 19. **SIR RAYMOND EVERSHED, M.R.**, read the following judgment of the court. The question raised by the present proceedings is whether a few words in the National Health Service Act, 1946, s. 6 (1):

"... interests held immediately before [July 5, 1948] ... by trustees solely for the purposes of that hospital ..."

on their true interpretation apply so as to have vested in the Minister of Health on the date mentioned (being the appointed day within the meaning of the Act) certain land previously, and (if the order under appeal be wrong) still, vested in the second defendant, Lloyds Bank, Ltd., which land has for some two generations been the site of an institution in Leamington known as the Royal Midland Counties Home for Incurables. WYNN-PARRY, J., held that it had so vested. He followed his own previous decision in *Ministry of Health v. Fox* (1), in which

he had based his conclusion on the view that the words we have quoted to be construed exclusively by reference to the user to which the land in question was in fact being put on July 4, 1948, and without reference to any "purposes" or trusts which might at any future date become operative by virtue of the deed or deeds of trust affecting the land or otherwise. The defendant, The Bank, Ltd., has maintained a passive attitude in the proceedings, but the plaintiff sues on behalf of the committee of management of the home established by an indenture of June 27, 1884, by which the land in suit was conveyed to the predecessors in title of the defendant bank, and he now appeals to this court against the judgment and order of WYNN-PARRY, J. In the court below the plaintiff was (by reason of the earlier decision of the same judge) restrained to limit his argument to an attempt to distinguish the present case on the facts from *Ministry of Health v. Fox* (1). In this court counsel for the plaintiff have, more boldly, challenged the validity of the reasoning on which *Ministry of Health v. Fox* (1) is based. The burden of their case is that s. 6 (1) of the Act of 1946 has no application to a case (such as the present and that of *Ministry of Health v. Fox* (1)), where, on reference to the relevant trust deed, it appears that trusts exclusively limited to the purposes of the particular institution are not the only trusts which the deed in all circumstances comprehends.

The material terms of the deed of June 27, 1884, are as follows. There were three parties to it, the trustees of the second part being the trustees of the land and the trustees of the third part being the so-called endowment trustees. The first recital is:

Whereas an institution known as the Midland Counties Home for the Destitute at Leamington (hereinafter referred to as 'the home') has been carried on and is now carried on under rules published in regard thereto a copy of which rules as circulated for the year 1883 and indicating the objects of the home and the regulations affecting the same (so far as the same are necessary to be hereinafter referred to) is set forth in sched. I to these presents and the expression 'the rules' hereinafter used means the rules or other the regulations for the time being validly enacted and made binding for the government of the home . . . "

The third recital is:

And whereas considerable sums of money have been received by way of donations and subscriptions to enable the committee and the board of management to carry on and extend the home as indicated by the rules and whereas further sums are expected to be received hereafter And whereas part of the moneys received as aforesaid were in pursuance of the objects for which the same were subscribed expended in the purchase of lands and hereditaments situate at Leamington Priors and known as the Arboretum and the said lands and hereditaments were by the several indentures specified in sched. II to these presents conveyed to the said William Marjoribanks and other persons] and it is intended that the same shall be held by the trustees (hereinafter called 'the general trustees') upon the trusts hereinafter mentioned . . . "

The last two recitals are:

And whereas it was the intention of donors and subscribers of the moneys so received as aforesaid that such of these moneys as have not been invested in land and buildings as aforesaid might if required be used for the current expenses of the home and it is intended that all such moneys which have not been so invested or expended or are not required for the current expenses of the home together with the proceeds of sale of such furniture and property as shall be sold as last aforesaid and together with any further moneys which may hereafter be specifically subscribed or given for this

purpose or may in accordance with the rules be devoted to this purpose shall be held by trustees (hereinafter called 'the endowment trustees') upon the trusts hereinafter declared And whereas the parties hereto of the second part have consented to be the first general trustees and the parties hereto of the third part have consented to be the first endowment trustees."

Then comes the operative part:

"Now this indenture witnesseth that in consideration of the premises they the said William Marjoribanks, James Lancaster Ranking and George Radcliffe as trustees and according to their estate as such do and each of them doth hereby convey unto the parties hereto of the second part all those lands and hereditaments situate at Leamington Priors aforesaid and known as the Arboretum . . . to hold the said lands hereditaments and premises . . . unto and to the use of the said parties hereto of the second part in fee simple and to hold the said furniture to the use of the said parties hereto of the second part absolutely upon trust that they or other the general trustees for the time being shall if authorised thereto by a resolution of the committee sell any part or parts (not being the main building used for the patients of the home) of the said land buildings furniture and premises in the manner hereinafter mentioned and with the powers and subject to the declarations hereinafter contained and shall if authorised thereto by a resolution of the subscribers sell the whole or any part whatsoever of the said lands buildings furniture and premises for the time being subject to the trusts of these presents in the manner hereinafter mentioned and with the powers and subject to the declarations hereinafter contained And shall in the meantime permit the same to be used for the purposes of the home and in accordance with the rules . . ."

Later, the deed proceeds:

"And it is hereby declared that the moneys to arise from any such sale as aforesaid shall be applied first in payment of the expenses of such sale and other (if any) the unpaid expenses of the general trustees and subject thereto the proceeds of sale of any sale made under the authority of a resolution of the committee shall be paid to the endowment trustees or applied under the authority of a resolution of the committee to any purposes to which the endowment fund might be lawfully applied with the like authority and the proceeds of sale of any sale made under the authority of a resolution of the subscribers shall be applied in such manner for the purposes of the home as shall be directed by a resolution of the subscribers and subject to such direction shall be paid to the endowment trustees and held upon the trust affecting the funds in their hands."

The trusts of the endowment fund include that the endowment trustees

" . . . shall pay the income of such investments to the treasurer or such other person as may be appointed in that behalf by resolution of the committee".

The deed continues:

"And upon further trust that the endowment trustees shall (if and when directed by a resolution of the committee confirmed by a resolution of the subscribers to convert into money any investments specified in such resolution for the purchase of land or the erection of buildings or the acquisition of property for the purpose of the home) sell and convert into money the investments specified in such resolution . . . And upon further trust that if and when a resolution of the committee shall have been passed to the effect that by reason of insufficiency of funds or for any other reason the home should be closed and such resolution shall have been confirmed by a resolution of the subscribers the endowment trustees shall hold the trust fund then in their hands (including any proceeds of sale of the said lands

buildings and other property) upon such trusts in favour or for the benefit of charitable objects in the Midland counties or some of them as may be directed by any scheme proposed and passed by a resolution of the committee and confirmed by a resolution of the subscribers or in default of such direction in such manner as may be directed by the Charity Commissioners for England and Wales."

Finally, there is a declaration that

" . . . every regulation for the government of the home shall from time to time be deemed to have been validly enacted if passed by a resolution of the committee and confirmed by a resolution of the subscribers."

Since the date of the deed the rules, certain of which are set out in the schedule to the deed, have at some date and in some manner not stated in the evidence been in some respects altered. Under the rules in force immediately before the appointed day the second, or "objects", clause of the rules was as follows:

"The object shall be to give relief by admission to the home or by pensions as hereinafter provided, to persons of good character, of limited or reduced income who are suffering from incurable or chronic diseases, or incapacity owing to injury or wounds . . ."

From the provisions of the deed which we have recited it, therefore, appears that the income of the invested proceeds of sale of the land in question or any part thereof, if sold, would be applicable (*inter alia*) to the payment of all pensions to persons who, though suffering from some incurable malady, do not receive any kind of medical treatment or services at the home itself, and, in fact, some part of the income of the endowment fund mentioned in the deed (to a transfer to himself of which the Minister of Health makes no claim) is now being so applied, and (ii) that, in the event of the enterprise of the home ceasing to exist, the trust property would be applicable for such other charitable purposes as the committee and subscribers might determine. It is on these two characteristics that counsel for the plaintiff has hung his argument. Both being comprised within the terms of the deed, neither (says he) can properly be described "solely for the purposes" of the home—the second obviously, and the first because the payment of the pensions is wholly distinct from and unconnected with the physical institution of the home, to which alone, by reason of the context and the definition of s. 79 (1) in the Act of 1946, the words "that hospital" in the vital phrase in s. 6 (1) can be related.

The material parts of s. 6 (1) are:

"Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital . . . being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital . . ."

Counsel for the plaintiff sought to derive some support for his general argument from reference to the provisions relating to local authority hospitals in s. 6 (2) of the Act corresponding to the provisions of s. 6 (1) relating to voluntary hospitals. The opening phrases of s. 6 (2) differ from those of s. 6 (1), but the formula which we are called on to construe occurs in both. Counsel for the plaintiff also drew attention to the fact that s. 9 (4) of the Act (which exempts in its operation premises used temporarily by local authorities for hospital purposes) does so by exempting such premises from the term "hospital" and by reference to the formula in question. In our judgment, these considerations do not materially assist in the solution of the present problem.

On the other side, counsel for the Ministry of Health, by way of prelude to his main answer to counsel for the plaintiff, made two submissions particular to the facts of the case, *viz.*, (i) that, on a proper view of the terms and intent of the deed, there was no trust for sale at all, so that consideration of the trusts

affecting the proceeds of any sale was irrelevant; and (ii) that in any case, and contrary to its apparent effect, already noticed, the deed did not permit the application of any part of the capital or income of the proceeds of sale of land towards payment of pensions, such an application not being contemplated or provided by the rules specified in the schedule to the deed. We are unable to accept either of these submissions. As was observed by this court in *Duke of Marlborough v. A.-G.* (No. 2) (2), it is now too late to reverse the direction taken by the courts as regards the conveyancers' technique of the primary trust for sale, and we cannot see any sensible or logical basis for distinguishing the present case from that, e.g., of a disposition of land on trust for sale if requested by or with the consent of the first tenant for life. As regards the second preliminary point taken by counsel for the Ministry of Health, the court must, as it seems to us, assume that the changes in the rules of the home were validly made and within the amending powers originally conferred. The word "rules" in the deed itself will, therefore, by definition include the now existing rules. Moreover, the purchase of the site of the home did not absorb the whole of the sums originally subscribed, the balance being employed to establish the endowment fund.

The matter, then, turns on the proper application of the few and simple words

" . . . being interests held immediately before the appointed day by trustees solely for the purposes of that hospital . . . "

to the premises of the Royal Midland Counties Home for Incurables then subject to the trusts of the deed of 1884 which we have recited and, so far as material, construed. The arguments have presented us with a choice between two extreme views, and each has itself—quite properly—been subjected to the test of extreme cases with a view to showing that each, in such cases, tends to unreality or absurdity. Thus, it is, in our judgment, the most formidable of the criticisms directed to the view of WYNN-PARRY, J., as expressed in *Ministry of Health v. Fox* (1), that in a case in which land is held on trusts for the purposes of a hospital for some limited period and thereafter for some other public or private purposes, the effect of the Act would be to destroy those later interests, which, in the case of private interests, would be equivalent to an expropriation for which no kind of compensation is provided. Moreover, as it seems to us, the view taken in *Ministry of Health v. Fox* (1) by WYNN-PARRY, J., appears to treat the word "held" as equivalent to "used in fact." In his judgment now under appeal the learned judge cited the passage from his judgment in *Ministry of Health v. Fox* (1) where he said ([1950] 1 All E.R. 1055):

"In my view, the sense of this series of provisions is that one takes one's stand once and for all on the appointed day and sees for what purpose the property was being held then, and, if the property was then being held for purposes of the hospital and for no other purposes in fact, that is an end of the matter, and property falling within that description passes under the sub-section to the Minister."

He then proceeded to say, in his judgment now under appeal:

"As I have already observed, it is the fact, and it is not disputed, that at the appointed day the premises concerned were being used solely for the purpose of . . . the home."

On the other hand, the plaintiff's argument appears to have (at least) the effect of excluding from the Act altogether every case of hospital land held under the terms of a trust deed which contains any provision directed to the application of the trust property to some other purpose in the possible event of the discontinuance for any reason of the specified "hospital" trust, and, unless, in looking for the existence of such possibilities, it is illegitimate to look outside the express provisions of the relevant trust instrument—notwithstanding the absence of any language in s. 6 (1) of the Act of 1946 requiring such a confinement of the search—the exempting effect of the phrase under discussion might well,

under the doctrine of resulting trust, extend to a large proportion of the land sold on July 4, 1948, on trust for the purposes of voluntary hospitals.

Neither of the extreme views, when so examined and tested, appears readily to conform to the intention naturally attributable to Parliament. But, in our judgment, it is unnecessary for the court to choose between the two alternatives presented. The relevant words require, as we think, in each case the simple question to be asked and answered in reference to July 4, 1948: "On that day, for what purposes did the trustees hold the land?" In the present case the proper answer would have been: "For the purposes of the Royal Midland Counties Home for Incurables and no other." In our judgment, that answer could be plainly in conformity with common sense. Nor can we think that its faithfulness would in any sense be qualified by the presence of the remote remainder in favour of other charitable purposes determined by the committee and subscribers on the contingency of the home ceasing to continue or by the provision enabling income of the invested proceeds of sale to be applied in payment of pensions, for, in our view, the payment of such pensions, though distinct from the activities of the home as a physical entity, is nevertheless fairly to be regarded as a purpose of the home, whether regarded from its material or institutional aspect. It is a purpose so closely connected with, and so much a part of, the purposes of the home as such that it must, in our judgment, necessarily cease if for any reason the home itself ceased to exist.

In our judgment, a similar question posed in reference to the maternity home which was the subject-matter in *Ministry of Health v. Fox* (1) would have properly obtained a corresponding answer. In that case the argument against the Ministry rested on the presence in the deed constituting the home of a clause providing:

"The trustees shall apply and deal with all moneys which shall arise from any sale mortgage or other disposition of the said premises either for the general purposes of the maternity home aforesaid or for such other public charitable purpose and in such manner as the trustees shall think fit . . ."

Both in this case, therefore, and in *Ministry of Health v. Fox* (1), we think that the requirements of s. 6 (1) were satisfied at the relevant date and that a contrary result would give to the material language of the sub-section an altogether unnatural and artificial preciseness. As we have said, every case must, in accordance with the well-established principle of English law, be determined on its own facts and we find it unnecessary (as it might be embarrassing) to attempt any exposition of the terms of the sub-section that would anticipate the answer in all cases. We take one example suggested in the course of the argument—that premises held on trust for the purpose of providing hospital services to men wounded in the second world war and on the exhaustion of that purpose (as must necessarily happen in a relatively short time) on trust for some educational purpose, the premises being in fact used for the former purpose on July 4, 1948. In that case an answer to the relevant question which referred only to the former purpose and neglected to make any reference to the latter would, in our judgment, fail to satisfy the ordinary requirements of common sense or accuracy. We, therefore, think that WYNN-PARRY, J., rightly answered the question raised by the present case, and that he rightly concluded the question raised by *Ministry of Health v. Fox* (1), though, for the reasons which we have given, we think the grounds of his judgment went further than were required by the answer which he gave and further than we are prepared ourselves to go. In our judgment, the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Farrer & Co.*, agents for *Field & Sons*, Leamington Spa (for the plaintiff); *Solicitor, Ministry of Health* (for the first defendant); *Farrer & Co.* (for the second defendant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

COMMISSIONER OF STAMP DUTIES OF NEW SOUTH WALES v. WAY AND OTHERS.

[PRIVY COUNCIL (Lord Normand, Lord Oaksey and Lord Radcliffe), October 30, 31, November 1, December 10, 1951.]

Estate Duty—"Trust to take effect after death"—*Reservation of benefit*—*New South Wales Stamp Duties Act, 1920-1949, s. 102 (2) (a) (c) (d).*

The Stamp Duties Act, 1920-1949, of New South Wales by s. 102 (2) charges to duty on the death of any person: "(a) All property which the deceased has disposed of . . . by will or by a settlement containing any trust in respect of that property to take effect after his death . . . Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust . . . (c) Any property passing under any settlement, trust or other disposition of property made by the deceased . . . (i) by which an interest in or benefit out of or connected with that property, or in the proceeds of sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (iii) by which the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim that property or the proceeds of the sale thereof. (d) Any property comprised in any gift made by the deceased at any time . . . of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not . . ."

On Sept. 5, 1928, the deceased made a trust disposition under which the deceased, as settlor, transferred and assigned to himself and two others certain funds and property ("the trust fund") to be held by them as trustees on trust to pay and apply the trust fund and its annual income towards lawful charitable purposes under the heads of "(a) education, (b) the relief of poverty in Australia, and (c) the general benefit of the community in Australia not falling under the preceding head", but subject to certain provisions including: "3. The time manner and the head or heads under which the application and appropriation of the said trust fund and the said income shall be made and all other details and particulars as to such application and appropriation shall be in the absolute discretion of the trustees but during the lifetime of the settlor subject to his direction and approval and the settlor places on record his belief that it will be found advisable to have completely distributed the trust fund and wound-up the trust within ten or fifteen years. . . . 24 The trustees may also apply and appropriate any property belonging to the trust in its then present condition for any trust purposes and may also use any of the moneys of the trust either corpus or income or both in purchasing any land or land and buildings or in erecting buildings or in altering or in improving buildings to be used or applied for any such purpose. The trustees may whether during the lifetime of the settlor or afterwards and shall during the lifetime of the settlor if he so directs apply and appropriate any property including moneys belonging to the trust for the purposes of acquiring by purchase or exchange from the settlor or his executors any real or personal property valued for the purposes of such purchase

or exchange at a sum at least five per cent. below the valuation of such real or personal property so acquired as ascertained by some independent valuator appointed by the trustees other than the settlor."

HELD: (i) the settlement created one trust and could not be said, by virtue of cl. 3, to be a trust for one group of beneficiaries before the deceased's death and another group thereafter so as to fall within s. 102 (2) (a); nor was a mere right of selection, such as that in cl. 3, a trust to take effect after the deceased's death within s. 102 (2) (a).

Burrell & Kinnaird v. A.-G. ([1936] 3 All E.R. 758), distinguished.

Rabett v. Stamp Duties Comr. ([1929] A.C. 444), explained.

(ii) the deceased's power of direction under cl. 24 was to be taken to be fiduciary because, in its context, it was merely a right to secure that his views would, in the event of disagreement, prevail over the views of the other trustees, and there was, therefore, no ground for regarding it as a benefit or interest of the kind with which s. 102 (2) (c) and (d) were concerned, but, whether or not the power was fiduciary, it did not amount to a reservation to the deceased of any interest in the trust fund or of a right to reclaim or restore it to himself so as to bring it within the charge to duty under s. 102 (2) (c) or (d).

EDITORIAL NOTE. Cases in New South Wales which fall under the New South Wales Stamp Duties Act, 1920-1949, s. 102 (2) (a), would, if occurring in England, usually be charged to duty under the Finance Act, 1894, s. 1, or, possibly, s. 2 (1) (b) or s. 2 (1) (d). There was in the present case no change in the composition of the group of beneficiaries in connection with the deceased's death, and that circumstance distinguishes *Burrell & Kinnaird v. A.-G.* (1), a case under s. 1 of the Act of 1894. Paragraphs (c) and (d) of s. 102 (2) of the New South Wales Act correspond roughly with the Customs and Inland Revenue Act, 1881, s. 38 (2) (c) and s. 38 (2) (a) respectively, as amended by the Customs and Inland Revenue Act, 1889, s. 11 (1). The comparable charging provision in England would be s. 2 (1) (c) of the Act of 1894.

Cases referred to:

- (1) *Burrell & Kinnaird v. A.-G.*, [1936] 3 All E.R. 758; [1937] A.C. 286; 106 L.J.K.B. 134; 156 L.T. 36; Digest Supp.
- (2) *Rabett v. Stamp Duties Comr.*, [1929] A.C. 444; Digest Supp.

APPEAL by the Crown from a decision of the High Court of Australia reversing decision of the Supreme Court of New South Wales.

The Crown claimed that death duties were payable in connection with the death of Sir Robert Gillespie, deceased, who died on Aug. 2, 1945, under the Stamp Duties Act, 1920-1949 (of New South Wales), s. 102 (2) (a), or, alternatively, under s. 102 (2) (c), or, alternatively, s. 102 (2) (d), in respect of funds settled by the deceased by a trust disposition dated Sept. 5, 1928. The Supreme Court of New South Wales upheld the claim under s. 102 (2) (a) by a majority, and upheld the Crown's contentions in relation to s. 102 (2) (c) and (d) unanimously.

Sir Frank Soskice, K.C., and *Gahan* for the Crown.

G. E. Barwick, K.C. (of the Australian Bar) and *J. H. A. Sparrow* for the taxpayers.

Dec. 10, 1951. **LORD RADCLIFFE:** This appeal relates to a claim for death duties on the death of one Robert Winton Gillespie who died on Aug. 2, 1945. The property which is said to be subject to the claim consists of certain funds which at the date of his death were held on the trusts of a settlement for charitable purposes made by him many years previously. Two clauses in that settlement are founded on by the appellant, the Commissioner of Stamp

Duties for the State of New South Wales, as bringing the trust funds within the charge to duty imposed by the Stamp Duties Act, 1920-1949 (to use its current citation), of New South Wales.

The material section for the purposes of the claim is s. 102 of that Act. Alternative claims are preferred under sub-s. (2) (a), sub-s. (2) (c), each of the three sub-divisions of which is relied on, and sub-s. (2) (d). The relevant portions of the section are thus as follows, it being common ground that, if these trust funds fall within any of the categories there described, they will be liable to A a charge for duty:

“(2) (a) All property which the deceased has disposed of . . . by will or by a settlement containing any trust in respect of that property to take effect after his death . . . Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust . . . (c) Any property passing under any settlement, trust or other disposition of property made by the deceased . . . (i) by which an interest in or benefit out of or connected with that property, or in the proceeds of sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (iii) by which the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim that property or the proceeds of the sale thereof. (d) Any property comprised in any gift made by the deceased at any time . . . of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not . . .” B C D

At first sight it is not easy to see what there is in the settlement made by Sir Robert Gillespie which could bring its funds within the charging provisions of this section. The settlement, which was made on Sept. 5, 1928, was a trust disposition under which Sir Robert, as settlor, transferred and assigned to himself and two other gentlemen certain specified funds and property to be held on the trusts and subject to the conditions and provisions set out in the deed. In effect, the trust fund was to be held by the trustees on trust to pay and apply it and its annual income towards lawful charitable purposes under the heads of E

“(a) educational, (b) the relief of poverty in Australia, and (c) the general benefit of the community in Australia not falling under the preceding head,” F

but subject to such provisions and conditions as were set out in later portions of the document. G

Two of such provisions are put forward as bringing the property within the charge of s. 102. The first is a clause, cl. 3, which immediately follows the declaration of the charitable purposes. It runs:

“3. The time manner and the head or heads under which the application and appropriation of the said trust fund and the said income shall be made and all other details and particulars as to such application and appropriation shall be in the absolute discretion of the trustees but during the lifetime of the settlor subject to his direction and approval and the settlor places on record his belief that it will be found advisable to have completely distributed the trust fund and wound up the trust within ten or fifteen years.” H

The appellant argues that the effect of this clause is that on the settlor's death, when his power of direction and approval necessarily determined, a trust took effect after his death within the meaning of s. 102 (2) (a), because a new trust arose for the objects of the charity, those objects being thereafter selected by the existing trustees freed from the settlor's power of direction and approval.

The second provision, cl. 24, occurs, inappropriately, in a chapter of the deed entitled "Application of income." It immediately precedes a clause dealing with the trustees' powers of investment and it runs as follows:

"24. The trustees may also apply and appropriate any property belonging to the trust in its then present condition for any trust purposes and may also use any of the moneys of the trust either corpus or income or both in purchasing any land or land and buildings or in erecting buildings or in altering or in improving buildings to be used or applied for any such purpose. The trustees may whether during the lifetime of the settlor or afterwards and shall during the lifetime of the settlor if he so directs apply and appropriate any property including moneys belonging to the trust for the purposes of acquiring by purchase or exchange from the settlor or his executors any real or personal property valued for the purposes of such purchase or exchange at a sum at least five per cent. below the valuation of such real or personal property so acquired as ascertained by some independent valuator appointed by the trustees other than the settlor."

The appellant argues that the effect of this clause is to reserve to the settlor an interest in or benefit out of or connected with the trust property or a right to reclaim or to restore it to himself, and that, by one or other of the trusts offered by s. 102 (2) (c) and (d), the appellant is entitled to succeed in his claim for duty.

It will be convenient to deal first with cl. 3 and s. 102 (2) (a) and to defer consideration of cl. 24, the effect of which depends, primarily, on a conclusion as to the construction that ought to be placed on its words. The appellant's argument on s. 102 (2) (a) succeeded with the majority of the Supreme Court of New South Wales. It was rejected on appeal by the High Court of Australia. The basis of the Supreme Court's decision was that the settlement contained two trusts, one for those recipients of charitable bounty whom the settlor might select during his life, the other, "to take effect after his death," for those recipients whom the trustees might select in the period following on his death. The situation was thus likened to that which arose in *Burrell & Kinnaird v. G.* (1), although it must be observed that *Burrell's* case (1) was a decision as to what constitutes a "passing" of property for the purposes of s. 1 of the Finance Act, 1894, of the United Kingdom and it has no direct bearing on the meaning of the words "to take effect after death" in the Stamp Duties Act of New South Wales. The High Court, on the other hand, treated the settlement as creating one trust and one trust only, a trust for charitable purposes, and this trust, in their view, took effect immediately the settlement was created and continued as one despite the fact that during its continuance different persons might have the right or duty of deciding in what manner the trust funds were to be applied.

Their Lordships agree with the view of the High Court. First, this trust was not in any true sense a trust for different groups of beneficiaries. It was from beginning to end a trust for charity or specified charitable purposes, and those persons who may from time to time receive payments or other benefits out of the trust funds are less beneficiaries than objects of the charitable purpose. This circumstance alone distinguishes the case from *Burrell & Kinnaird v. G.* (1), in which the situation that had to be considered was one where there were two groups of beneficiaries, changing in their composition on the occasion of a death, though including persons common to each group. The real issue

was whether the trust fund as a whole ought to be treated as passing notwithstanding the continuing membership of those persons. Here there was no separate trust for any new group of owners that took effect after the settlor's death. But, secondly, it is apparent from the judgment of JORDAN, C.J., which expresses the views of the majority of the Supreme Court, that the two trusts which he extracted from the provisions of cl. 3 consisted as much of the powers of selection exercisable first by the settlor and then by the remaining trustees as of the trusts properly called for the charitable purposes which the trust deed defined. To look at the matter in this way is to treat a mere right or duty of exercising a discretion or taking a decision in the course of the administration of the trust as if it were itself a trust to take effect after the death within the meaning of s. 102 (2) (a). Their Lordships do not think that this is a sound construction of that sub-section, nor do they think that the decision of the Board in *Rabett v. Stamp Duties Comr.* (2), which clearly weighed with the Supreme Court in their decision, ought to be regarded as an authority for such a proposition.

In *Rabett's* case (2) the settlement to be considered was a marriage settlement of personality in common form. The death which was said to attract duty was that of the husband and settlor, and, since the wife had been given the first life interest in the settled fund, the situation of affairs as at the husband's death was that the wife's life interest, already in possession, continued to subsist, and, as there were surviving children of the marriage, their interests in reversion remained interests in reversion, but subject to the effect of any appointment which the wife might make in exercise of the special power of appointment among children and remoter issue created by the settlement. Even if the children's interests alone were to be considered it would be difficult to say of such a settlement that it did not contain a trust to take effect after the settlor's death. Nor was such an argument preferred until the case came to be argued before the Board. Until then it had been assumed that a claim for duty did arise, the issue being whether the whole value of the settled property ought to be included in the dutiable estate or only so much of that value as exceeded the value of the widow's life interest. That, indeed, was the sole question which the Commissioner of Stamp Duties had submitted for the consideration of the court. LORD BUCKMASTER, who delivered the opinion of the Board, dealt with the appeal without strictly distinguishing between the two lines of argument. The foundation of his decision is to be found in the following words ([1929] A.C. 448):

"... but the words of the section do not provide that the duty only attaches to property in respect of which the trust arises or takes effect on the death of the settlor but after his death, and their Lordships see no escape from the conclusion that property of the deceased settled by an instrument which contains trusts that take effect after and by reference to his death is to be deemed part of the estate."

This conclusion was sufficient to dispose of the appeal.

Difficulty has arisen because of certain words that LORD BUCKMASTER went on to use in meeting one branch of the argument that, even if the settled property itself was deemed to pass, the value of the widow's life interest ought to be deducted from the dutiable estate. He said (*ibid.*):

"Nor can their Lordships assent to the view that as the testator might, had he thought fit, have given his wife in cash the present value of her life interest and then settled the remainder, the result is the same when he adopted a different method of disposition. The section assumes that the testator has disposed of the property, and the only condition required for duty to attach is that the settlement contains trusts to take effect after his death. In the present case the trusts that took effect after his death were: (1) a trust enabling his widow alone to sell and vary investments;

(2) a trust enabling her if the joint power was unexercised to appoint among the children by deed or will; and (3) a trust for the benefit of the children in default of appointment and subject to their mother's life interest; and these trusts affected the whole settled property, and not that part only which would be left if the value of the wife's life interest were taken away."

Their Lordships have given careful attention to this passage, but they are satisfied that it ought not to be taken as a decision that each of the three provisions which are listed under the heads (1), (2) and (3) constitutes by itself a trust to take effect after the death for the purposes of s. 102 (2) (a). What LORD BUCKMASTER was concerned to establish was that there was a trust within the meaning of the section that affected the whole settled property and not merely the "value" represented by the value of the reversions. This is plainly right. So long as there was one such trust, it did not matter whether there were others as well, and it is only fair to assume that, had LORD BUCKMASTER intended to give a binding decision as to the status of each of the "trusts" that he mentions, he would have been altogether more precise in his language. On the contrary, he seems to have been at no pains to state them accurately. Trust No. (1) was neither a trust nor even a power. Under the settlement, a copy of which has been made available to their Lordships in this appeal, the widow had nothing but the usual right to give or withhold her consent to a proposed change of investment. Trust No. (2) was not a trust. It was the usual special power of appointment among children or remoter issue. No doubt, had there been an appointment, there would have been a trust for the appointees and LORD BUCKMASTER's language may have been intended to extend to such a trust. Trust No. (3) was, of course, a trust. Having regard to these considerations their Lordships are of opinion that the first branch of the appellant's argument must fail.

Clause 24 of the trust deed is not in itself a complete piece of machinery. But the mere fact that it is formally incomplete is no reason for reading into it more than the provisions of the clause actually contain. Its main purport, at least, is reasonably clear. It is to afford authority for the use or application of trust funds for certain purposes or in certain ways that would not otherwise be permissible. It is thus something analogous to, but not the same as, the investment clause which immediately follows. The second half of the clause is designed to authorise the use of trust funds for the purpose of acquiring property from the settlor who was in the inception, and was, no doubt, likely to remain, one of the trustees. But for the power of direction given to the settlor the nature of the clause would be quite plain. There has, however, been engrafted on the authority thus given to the trustees a right for the settlor during his lifetime to require that trust funds shall be applied to the purpose of such an acquisition, and it is argued that this right to control the action of the trustees brings the trust property within one or other of the categories of s. 102 (2) (c) and (d). This contention prevailed with all the members of the Supreme Court of New South Wales who held that an interest in the settled property had been reserved to the settlor during his life. It was rejected by the High Court partly on the ground that the power of direction given to the settlor was a fiduciary power to be exercised only for the benefit of the settlement and partly because, whatever the power was, it did not amount to a reservation to the settlor of an interest in the settled property or of a right to reclaim or restore it to himself.

Their Lordships are of opinion that the views of the High Court are well founded, and it is unnecessary to make any material addition to what is said in the judgment of WILLIAMS, J., which gives the reasons of the court. The settlor's power of direction is to be taken as fiduciary because, in its context,

it is merely a right to secure that his views would, in the event of disagreement, prevail over the views of the other trustees. It was not, of course, inevitable that he would always remain a trustee during his life, but the circumstances were such that it was natural to assume that he would. Even if he did not, the question that he was given power to decide was the question how trustees should apply their trust funds, and in the absence of express provision to the contrary the presumption would be that his decision was to be given for the benefit of the settlement, not of himself. Indeed he had inserted in the clause a stipulation that, if the trust did acquire property from him, it must be on terms that would be to his own pecuniary disadvantage and to the trust's advantage. It was argued that the presence of this stipulation showed that his direction was regarded as non-fiduciary, since otherwise it would not need to be controlled by this limitation. But this can hardly be. The stipulation operates even if the trustees acquire property from him without a direction, so it is not aimed at his special power of direction, and it seems a curious way of establishing that a power is beneficial to show that by its terms it cannot be exercised in a way that affords a benefit.

If the power of direction is, as their Lordships think, a fiduciary one, there is no ground for regarding it as the kind of benefit or interest with which s. 102 (2) (c) and (d) are concerned. Apart from that, however, the power is not one that amounts to an interest in or benefit out of or connected with the trust property. It does not extend far enough to reach the trust property. All that it could do would be to substitute the settlor's decision that trust funds should be used to acquire property from himself for a resolution of the other trustees to the same effect. Given the achievement of that resolution, the settlor would have no power under the clause to decide what items of the trust fund should be used for that purpose. The decision on that point would lie with the trustees generally, and, if they decided to proceed by way of exchange, not of purchase, it would be for them again to decide at what value they would be prepared to release the item or items selected in exchange for the settlor's property valued as the trust deed requires. All this goes to show that, whether the settlor's power of direction was fiduciary or not, it was not in any event such a power as gave him any hold over the trust funds. Their Lordships were pressed with the consideration that the settlor could at least achieve this much—by tendering property of his own worth five per cent. more than the value of the whole trust property (assuming that to be capable of undisputed appraisal) and by exercising his power of direction he could make sure of recovering any single item of the trust funds since he would be entitled to get back the whole. But this is at best to describe an incidental consequence of the power of direction, rather than to describe the nature of the power itself, and it does nothing to establish that a right is a benefit when it can only be exercised to the detriment of its holder. Whether or not a power having such a possible consequence could properly be described as a right to restore to the holder or to reclaim the settled property within the meaning of sub-s. (2) (c) (iii), it cannot amount to such a right if the settlor can only act by way of effecting a change of investment in the interests of the settlement.

Their Lordships will humbly advise His Majesty that the appeal from the order of the High Court of Australia dated Aug. 18, 1949, should be dismissed. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors: *Light & Fulton* (for the Crown); *Ashurst, Morris Crisp & Co.* (for the taxpayers).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

USHER v. BARLOW.

COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.),
November 16, 29, December 20, 1951.]

Copyright—Artistic work—Wall plaque produced before Jan. 1, 1950—Capable of registration under Patents and Designs Act, 1907—Exclusion from registration after Jan. 1, 1950—Copyright Act, 1911 (c. 46), s. 22 (1)—Registered Designs Act, 1949 (c. 88), s. 1 (4)—Designs Rules, 1949 (S.I., 1949, No. 2368), r. 26 (2).

Design—Validity of Designs Rules, 1949 (S.I., 1949, No. 2368), r. 26 (2).

In an action for infringement of the copyright in a wall plaque which had been produced and published by the plaintiff before Jan. 1, 1950, the defendant pleaded that under the Copyright Act, 1911, s. 22 (1), at the date of the publication no copyright could subsist in the plaque because at that date it was capable of being registered under the Patents and Designs Act, 1907, and neither the Registered Designs Act, 1949 (which was passed on Dec. 16, 1949, and came into operation on Jan. 1, 1950), nor r. 26 (2) of the Designs Rules, 1949 (which was made on Dec. 16, 1949, and came into operation on Jan. 2, 1950) had the effect of altering that position.

HELD: (i) under the Copyright Act, 1911, *prima facie* copyright subsisted in the plaque as an "original artistic work" within s. 1 (1) and s. 35 (1) of the Act, but, down to Jan. 1, 1950, under s. 22 (1) of the Act the plaque was excluded from copyright under the Act since it was capable of being registered under the Patents and Designs Act, 1907; the Act of 1907, however, was repealed as from Jan. 1, 1950, by the Registered Designs Act, 1949, s. 48 and sched. II, and, in view of that repeal, from that date it could not be said that the plaque was capable of being registered under the Act of 1907.

(ii) under s. 38 (1) of the Interpretation Act, 1889, and s. 48 (7) of the Act of 1949 the reference in s. 22 (1) of the Act of 1911 to the Patents and Designs Act, 1907, must be construed as referring to the Act of 1949, and by r. 26 (2) of the Designs Rules, 1949, made under s. 1 (4) and s. 36 (1) of the Act of 1949, wall plaques were excluded from registration under that Act.

(iii) section 37 of the Interpretation Act, 1889, was not confined to the exercise between the passing and coming into operation of an Act of powers without which the Act could not come into operation at all, but was apt to authorise the making of such rules as the Designs Rules, 1949, as affording material on which the Act could operate and so being "expedient for the purposes of bringing the Act into operation at the date of the commencement thereof", and, therefore, these rules were valid.

R. v. Minister of Town & Country Planning. Ex p. Montague Burton, Ltd., [1950] 2 All E.R. 282, applied.

(iv) therefore, the plaque was no longer excluded by s. 22 (1) of the Copyright Act, 1911, from being the subject of copyright under that Act.

FOR THE INTERPRETATION ACT, 1889, s. 37 and s. 38, see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 228, 229; FOR THE COPYRIGHT ACT, 1911, s. 22, see *ibid.*, vol. 4, p. 800; FOR THE REGISTERED DESIGNS ACT, 1949, s. 1, see *ibid.*, Vol. 17, p. 723.

Cases referred to:

- (1) *R. v. Minister of Town & Country Planning. Ex p. Montague Burton, Ltd.*, [1950] 2 All E.R. 282; 114 J.P. 411; 2nd Digest Supp.
- (2) *Pytram, Ltd. v. Models (Leicester), Ltd.*, [1930] 1 Ch. 639; 99 L.J.Ch. 381; 143 L.T. 227; Digest Supp.

APPEAL by the defendant from an order made by SIR LEONARD STONE, V.-C., in the Palatine Court of Lancaster on Sept. 12, 1951, in an action for alleged infringement of copyright in a wall plaque.

The Special Case submitted to the court raised as a point of law the question whether copyright in a plaque known as "A Garden Interior" was incapable of subsisting on July 19, 1951, the date of the issue of the writ in the action. In the agreed statement of facts it was stated that: (i) the plaque was produced and published before Jan. 1, 1950; (ii) at the date when the plaque came into existence it was intended by the plaintiff that it should be reproduced in more than fifty single articles by a process of making a model in clay, and thence a rubber mould, and lastly therefrom the plaques in plaster; and (iii) the plaque was not registered as a design under the Patents and Designs Acts, 1907 to 1919, because the Comptroller of the Patents Office would not register wall plaques as designs under those Acts. The pictures or sketches made before the work began were made for no other purpose than as part of the process of making the plaque.

In his statement of claim the plaintiff pleaded that the defendant had infringed his copyright by offering for sale a plaque which was a reproduction or colourable imitation of the plaintiff's plaque. He asked for damages for infringement of copyright and conversion and for an injunction to prevent the further reproduction or sale of the plaque. The defendant contended that the material date was that of the publication of the plaintiff's plaque, and that, as that was before Jan. 1, 1950, and the design was then capable of registration under the Act of 1907, copyright under the Copyright Act, 1911, was excluded under s. 22 (1) of the latter Act.

The Vice-Chancellor held that, on the facts stated in the Special Case, copyright in the design of the plaque was not incapable of subsisting under the Copyright Act, 1911, on the date of the issue of the writ, July 19, 1951. He said that the decision of the Comptroller of the Patents Office not to register wall plaques as designs was not binding on the court, and it was clear that before Jan. 1, 1950, the design of the plaque could have been registered. As that had not been done, up to Jan. 1, 1950, the Copyright Act, 1911, did not apply to the plaque. On that date, however, there came into operation the Registered Designs Act, 1949, and by r. 26 of the Designs Rules, 1949 (S.I., 1949, No. 2368), made under the Act, designs to be applied to wall plaques were expressly excluded from registration. The Patents and Designs Act, 1907, was repealed by the Patents Act, 1949, and the Registered Designs Act, 1949, which, with certain modifications, re-enacted Part II of the Act of 1907 dealing with the registration of designs. The question turned on the construction to be placed in the circumstances on s. 22 (1) of the Copyright Act, 1911, having regard to the state of the law on July 19, 1951, the date of the writ. The Interpretation Act, 1889, s. 38, provided that where an Act repealed and re-enacted, with or without modifications, any provision of a former Act, reference to the repealed provisions should, unless a contrary intention appeared, be construed as a reference to the provisions so re-enacted. Therefore, in the Copyright Act, 1911, s. 22 (1), the words "capable of being registered under the Patents and Designs Act, 1907," must now be read as "capable of being registered under the Patents Act, 1949, or the Registered Designs Act, 1949", and by r. 26 of the rules of 1949 designs for wall plaques were not capable of being registered.

During the argument in the Court of Appeal the validity of the Designs Rules, 1949, was called into question and the hearing was adjourned to hear counsel for the Board of Trade on this point.

FitzHugh for the defendant.

P. I. Bell for the plaintiff.

The Attorney-General (Sir Lionel Heald, K.C.) and P. J. S. Bevan as amici curiae.

Cur. adv. vult.

Dec. 20. The following judgments were read.

SIR RAYMOND EVERSHERD, M.R.: In my judgment, this appeal fails and should be dismissed. On the main question argued, namely, that of

the effect of s. 22 of the Copyright Act, 1911, in the light of the new Registered Designs Act, 1949, I desire to add nothing to the judgment of JENKINS, L.J., which I am about to read. On the matter raised during the argument, on which the Attorney-General assisted us as *amicus curiae*, namely, the question of the validity of r. 26 of the Designs Rules, 1949, I also agree with the conclusion of JENKINS, L.J., though I am bound to say that I have felt greater difficulty respecting it than he has. So far as this particular rule is concerned, it seems to me that the problem is in many respects different from that considered by this court in *R. v. Minister of Town & Country Planning. Ex p. Montague Burton, Ltd.* (1). In that case the effect of the repeals in the Town and Country Planning Act, 1947, would have had the result that all the machinery which had operated under the previous Act would have ceased to be effective unless some step were taken to keep it alive. In other words, on the coming into operation of the new Act there would have been an administrative vacuum and pending applications would have lost all force and effect. The direction, therefore, issued by the Minister had the effect of preserving the validity of those applications and of securing that when the new Act came into force it would operate effectively.

I agree, accordingly, on the authority of that case, that the phrase in s. 37 of the Interpretation Act, 1889,

“so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof,”

extends to something more than that which is requisite to enable the Act to come into operation at all. In other words, I think, particularly having regard to the words “or expedient,” that the section covers such steps as would be required to enable the Act to operate effectively. My difficulty in the present case has been caused by the fact that the rule-making power in s. 1 (4) of the Registered Designs Act, 1949, clearly contemplates that from time to time, as the Board of Trade may think proper, provision may be made, while the Act is in operation, for excluding from registration certain types of design, and I have not found it easy to persuade myself that in order to enable the Act effectively to operate it was requisite to exclude from registration a type of design which for many years had, apparently, been within the ambit of the previous legislation, but which the registrar had in practice not accepted for registration. I should, therefore, for myself have felt difficulty in treating as valid a rule made by virtue of s. 1 (4), and solely relating to an exclusion under that sub-section. If such a rule were validated by the language of s. 37 of the Interpretation Act, 1889, it would appear to me difficult to give any sensible effect to the words “for the purpose of bringing the Act into operation,” etc. In the present case, however, the rule in question is part of a larger body of rules made under the general powers of s. 36 of the Registered Designs Act, 1949, and clearly justifiable as “expedient”, if not “necessary”, so as to give the new Act a working machinery when it came into operation. That being so, I do not think it would be right to pick out one rule because, taken in isolation, that rule might be said to fail to satisfy the requirements of s. 37 of the Interpretation Act, 1889. I have been satisfied on the whole that in its context, as part of a general body of rules providing the machinery for the effective operation of the new Act, this rule can fairly be said to satisfy the conditions of validity.

JENKINS, L.J. (read by SIR RAYMOND EVERSLED, M.R.): This is an appeal by the defendant from a judgment of the Vice-Chancellor in the Palatine Court of Lancaster, dated Sept. 12, 1951, which decided in favour of the plaintiff a question of law raised in an agreed statement of facts, pursuant to Ord. 32, r. 1, of the rules of that court, in an action brought by the plaintiff against the defendant for infringement of the plaintiff's copyright in a wall plaque known as “A Garden Interior”. The question of law raised for the Vice-Chancellor's decision was whether, on the facts appearing on the agreed statement of facts,

copyright in this plaque was, at the date of the issue of the writ in the action, *i.e.*, July 19, 1951, incapable of subsisting, on the grounds that the plaque was (a) a design capable of being registered under the Patents and Designs Act, 1907, and (b) was used and intended to be used as a model or pattern to be multiplied by an industrial process.

The two grounds stated in the question are, in effect, the grounds on which certain designs are, by s. 22 of the Copyright Act, 1911, excluded from copyright under that Act, s. 22 (1) being in these terms: A

“ This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.” B

Sub-section (2) provides for the making of rules. The case may be said to turn on (a) the position as regards copyright of the plaintiff's plaque down to Jan. 1, 1950, when the Registered Designs Act, 1949, came into operation; and (b) the effect (if any) on that position of the Registered Designs Act, 1949, and the rules made thereunder, the Registered Designs Act, 1949, and the Patents Act of the same year having repealed (with certain immaterial exceptions) the whole of the Patents and Designs Acts, 1907 to 1946, and the Registered Designs Act, 1949, having re-enacted, with important modifications, the provisions of the Patents and Designs Act, 1907 (as amended by subsequent legislation), relating to registered designs. I do not think that anything turns, for the purposes of the present case, on the intermediate Patents and Designs Act, 1949, which came into operation on Jan. 1, 1950, immediately before, and with immaterial exceptions was forthwith repealed by, the Patents Act, 1949, and the Registered Designs Act, 1949. C D

The agreed statement of facts is, shortly, to the effect that the plaque in question was produced and published prior to Jan. 1, 1950; that at the date when the plaque came into existence it was intended by the plaintiff to be reproduced in more than fifty single articles; that the plaque was not registered as a design under the Patents and Designs Acts, 1907 to 1919, because the Comptroller of the Patent Office would not register wall plaques as designs under those Acts; that the method of manufacture of such plaques (which need not be described in detail) comprised the modelling by hand in clay or plasticine of the desired subject in relief on a flat base, followed by a process resulting in the production of a rubber mould, from which any desired number of casts of the plaque could be taken in plaster, the finished article being the plaster cast after painting by hand. The result, as I understand it, is a coloured pictorial scene moulded in relief on a flat and approximately circular plate or disc and intended for hanging on a wall by way of decoration. The reference in the agreed statement to the plaintiff's intention to reproduce the plaque in more than fifty single articles shows it to be common ground that the conditions laid down by the Designs Rules, 1932, pursuant to s. 22 (2) of the Copyright Act, 1911, under which a design is to be deemed to be used as a model or pattern to be multiplied by any industrial process within the meaning of s. 22 (1) are fulfilled in the present case, as, indeed, is suggested by the process of manufacture as described in the agreed statement. E F G

It is not open to doubt that the plaque in question was an “ artistic work ” within the meaning of the Copyright Act, 1911, having regard to the definition of that expression contained in s. 35 (1) of the Act. The originality of the plaque as an artistic work is not in dispute. *Prima facie*, therefore, the plaque was, and is, a proper subject of copyright under s. 1 of the Copyright Act, 1911, but as the law stood down to Jan. 1, 1950, the plaque was excluded from copyright by the provisions of s. 22 of the Act, if it was capable of being registered under the Patents and Designs Act, 1907. H

This turns on the definitions of "design" and "article" contained in s. 93 of the Patents and Designs Act, 1907, as amended by s. 19 of the Patents and Designs Act, 1919, which are in these terms. I read, first, s. 93 of the Act of 1907, which contains the following definition of "article":

" 'Article' means (as respects designs) any article of manufacture and any substance artificial or natural, or partly artificial and partly natural."

Section 19 of the Act of 1919 substitutes for the definition of "design" in the earlier Act the following definition:

" 'Design' means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device."

Comprehensive as these definitions are, it appears that the difficulty of drawing an exact line between designs proper to be registered under the Patents and Designs Act, 1907, and those which were proper subjects of copyright under the Copyright Act, 1911, had long been recognised. The question is discussed at length in COPINGER AND SKONE JAMES ON THE LAW OF COPYRIGHT, 8th ed., p. 72 *et seq.*, where the writers, in effect, point out that on a literal reading of the above-quoted definitions such articles as engravings of pictures, photographs, and Christmas cards would, where more than fifty copies were produced, be capable of being registered as designs under the Act of 1907 and, therefore, excluded from copyright under the Act of 1911 which, in his submission, could not have been the intention of the legislature. The writer's own view of the question is stated at p. 72, in these terms:

" It is submitted, however, that the fundamental distinction between a 'design' and a simple 'artistic work' lies in the applicability of the former to another article; that is to say, an artistic work is bought purely and simply for its artistic properties, an article to which a design has been applied is bought not simply because of the artistic qualities of the design, but because of the utility of the article apart from the design, and that this distinction may be implied from the obvious purpose of the Designs Acts, and from the use of the words 'pattern or ornament', which are not properly applicable to such designs as are not merely appurtenances, but are the essence of the thing created. For example, the plate from which an engraving is to be printed is intended to be applied to a sheet of paper or other material, but an engraving is not usually purchased for the material on which it is printed. Therefore, engravings are *prima facie* entitled to protection under the Copyright Act."

Similar observations also appear in earlier editions of the same work.

The Comptroller, in refusing registration of the plaque here in question, would seem to have been in effect accepting the distinction drawn in the passage quoted above and taking the view that such a plaque was in the same category as the engraving instanced in the text-book, with the immaterial substitution of mould, plaster and paint, for plate, paper and ink. If the view on which I take the Comptroller to have acted was the right view, then the plaque was never capable of registration under the Patents and Designs Act, 1907, but at all times was, and is, a proper subject of copyright under the Copyright Act, 1911, and was never excluded from such copyright by s. 22 of that Act. On this footing the question raised in the case would clearly call for an answer in the sense that copyright was capable of subsisting in the plaintiff's plaque at the date of the issue of the writ in the action, and the Registered Designs Act, 1949, would have no bearing on the result. If, on the other hand, the view which I have ventured

to impute to the Comptroller was wrong and the plaque was capable of registration as a design under the Act of 1907, the position of the plaque as regards copyright under the law as it stood before Jan. 1, 1950, was this: (i) The plaque was capable of registration as a design under the Act of 1907, and, as it was admittedly intended for reproduction in more than fifty single articles, it was excluded from copyright under the Act of 1911; but (ii) the plaque had not been so registered, and (iii), having been published, it was disqualified from being so registered inasmuch as s. 49 of the Act of 1907 restricts registration to new and original designs "not previously published in the United Kingdom", and, therefore, (iv) the plaintiff could neither claim copyright protection for his plaque under the Copyright Act, 1911, nor obtain such protection by registration under the Patents and Designs Act, 1907. On this view, the question raised can only be answered in the plaintiff's favour if it can be shown that the Registered Designs Act, 1949, and the rules made thereunder, read in conjunction with the Copyright Act, 1911, and, in particular, s. 22 of that Act, have had the effect of extending to the plaintiff's plaque copyright under the Act of 1911, from which it was previously excluded by s. 22 of that Act read in conjunction with the Patents and Designs Act, 1907.

The learned Vice-Chancellor declined to regard the question whether the plaque was capable of being registered under the Act of 1907 as concluded for the purposes of these proceedings by the Comptroller's refusal to register it, and, having considered this question himself, he came to the conclusion that the plaque was capable of being so registered. In so holding he founded himself largely on the decision of CLAUSON, J., in *Pytram, Ltd. v. Models (Leicester), Ltd.* (2), where the "artistic work" in respect of which copyright under the Copyright Act, 1911, was claimed was a model of a wolf cub's head produced in papier-mâché from a mould and intended to be displayed as a totem on the tops of poles by the Boy Scouts Association. CLAUSON, J., held this to be a design capable of registration under the Act of 1907 and as such excluded from copyright under the Act of 1911, by virtue of s. 22 of that Act. Assuming that decision to have been correct and assuming that there is no sufficient reason for holding that for this purpose there can be any relevant distinction between a model of a wolf cub's head produced in papier-mâché from a mould and a plaque bearing a pictorial scene in relief produced in plaster from a mould, in my judgment, the result is still the same, namely, that the plaintiff is now entitled to copyright in the design in question, having regard to the effect of the Registered Designs Act, 1949, and the rules made thereunder.

The Registered Designs Act, 1949, provides by s. 1:

"(1) Subject to the following provisions of this section, a design may, upon application made by the person claiming to be the proprietor, be registered under this Act in respect of any article or set of articles specified in the application. (2) Subject to the provisions of this Act, a design shall not be registered thereunder unless it is new or original and in particular shall not be so registered in respect of any article if it is the same as a design which before the date of the application for registration has been registered or published in the United Kingdom in respect of the same or any other article or differs from such a design only in immaterial details or in features which are variants commonly used in the trade. (3) In this Act the expression 'design' means features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which in the finished article appeal to and are judged solely by the eye, but does not include a method or principle of construction or features of shape or configuration which are dictated solely by the function which the article to be made in that shape or configuration has to perform. (4) Rules made by the Board of Trade under this Act may provide for excluding from

registration thereunder designs for such articles, being articles which are primarily literary or artistic in character, as the Board think fit."

"Article" is defined by s. 44 (1) (so far as relevant), as meaning "any article of manufacture." Section 48 (1), effects certain repeals, including (with material exceptions) the whole of the Patents and Designs Acts, 1907 to 1946. The remaining sub-sections of s. 48 include the following, to which reference could be made:

"(2) Subject to the provisions of this section, any Order in Council, rule, order, requirement, certificate, notice, decision, direction, authorisation, consent, application, request or thing made, issued, given or done under any enactment repealed by this Act shall, if in force at the commencement of this Act, and so far as it could have been made, issued, given or done under this Act, continue in force and have effect as if made, issued, given or done under the corresponding enactment of this Act . . . (4) Any design registered before the commencement of this Act shall be deemed to be registered under this Act in respect of articles of the class in which it is registered . . . (6) Any document referring to any enactment repealed by this Act shall be construed as referring to the corresponding enactment of this Act. (7) Nothing in the foregoing provisions of this section shall be taken as prejudicing the operation of s. 38 of the Interpretation Act, 1889 (which relates to the effect of repeals)."

Section 49 (2) provides that the Act (which was passed on Dec. 16, 1949)

" . . . shall come into operation on Jan. 1, 1950, immediately after the coming into operation of the Patents and Designs Act, 1949."

Section 36 confers on the Board of Trade the general rule-making power to which s. 1 (4) has reference. The relevant rules are contained in the Designs Rules, 1949. They were made on Dec. 16, 1949, laid before Parliament on Dec. 22, 1949, and expressed to come into operation on Jan. 2, 1950. Rule 26, made pursuant to s. 1 (4) of the Act, provides as follows:

"There shall be excluded from registration under the Act designs to be applied to any of the following articles, namely . . . (2) wall plaques and medals."

Apart from the question raised in the course of the hearing as to the validity of the rules, it is plain that, even if the plaque had not been disqualified from registration under the Act of 1907 by reason of its publication, it became incapable of registration under the Act of 1907 on Jan. 1, 1950, when the Patents Act, 1949, and the Registered Designs Act, 1949, came into operation and repealed the Act of 1907 and amending Acts. It is also plain that, even if the plaque had not been so disqualified, it became incapable of registration under the Registered Designs Act, 1919, on Jan. 2, 1950, when the Designs Rules, 1949, came into operation, by virtue of the express exclusion from registration of "wall plaques and medals" effected by r. 26 (2).

What effect, if any, did these consequences of the 1949 legislation have on the position of the plaque as regards copyright under the Copyright Act, 1911. The plaque, as an "original artistic work", *prima facie* carried copyright under the Act of 1911 unless excluded therefrom by s. 22. Down to Jan. 1, 1950, it was so excluded, because, on the hypothesis under discussion, it was capable of registration under the Patents and Designs Act, 1907. That exclusion surely ceased to have effect when the Act of 1907 was repealed and replaced by the Registered Designs Act, 1949, and the rules made thereunder, with their express exclusion from registration of wall plaques and medals. A design can hardly be said to be "capable" of registration under a repealed enactment. Moreover, s. 48 (7) of the Act of 1949 contains an express saving of

" . . . the operation of s. 38 of the Interpretation Act, 1889 (which relates to the effect of repeals)."

Section 38 (1) so far as material for the present purpose, provides as follows:

"Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

I take it that the effect of this provision in the present case must be (as the Vice-Chancellor held) that the references in s. 22 of the Copyright Act, 1911, to the Patents and Designs Act, 1907, must be construed as references to the Registered Designs Act, 1949, no contrary intention appearing in the relevant legislation. The plaque, not being capable of registration under the Act of 1949, is, therefore, no longer excluded by s. 22 of the Act of 1911 from copyright under that Act, and the result, in my opinion, must be (as the Vice-Chancellor held) that, being in other respects duly qualified for copyright under the Act of 1911, the plaque did, by virtue of the legislation of 1949, acquire the copyright from which (I am assuming) it had previously been excluded.

Counsel for the defendant would not, I think, have been disposed to challenge this conclusion, but for the fact that the plaque had been published before Jan. 1, 1950, and thus disqualified from registration under the Act of 1907. This argument, as I understand it, was really in the nature of an argument *ab inconvenienti*. It was in substance to the effect that it could not have been intended to confer, as it were by a side wind, copyright on a design which had been capable of registration under the Patent and Designs Act, 1907, and, therefore, excluded from copyright under the Copyright Act, 1911, had not been registered under the Act of 1907, had lost its claim to such registration by being published, and had thus (perhaps in some cases many years ago) become common property, which anybody could "pirate" at will.

If s. 38 of the Interpretation Act, 1889, has the effect above attributed to it on s. 22 (1) of the Copyright Act, 1911, as, in my view, it must, the result stated above seems to me to be inescapable. Effect could only be given to the exception, mentioned by counsel for the defendant, of published designs registrable under the Act of 1907, but not under the Act of 1949, by an arbitrary re-modelling of s. 22 of the Act of 1911, for which I can see no justification and which, for my part, I would have great difficulty in formulating, and, if it could be done, I am by no means satisfied that other difficulties, not less formidable than those suggested by counsel for the defendant, might not ensue. Clearly, if s. 22 of the Act of 1911 were treated as still referring to the Act of 1907, the utmost confusion would result. Moreover, I think that the argument based on inconvenience and unreasonableness is one to which undue weight should not be attributed. It must be borne in mind that r. 26 of the rules of 1949 deals only with what may be described as marginal cases, the proper treatment of which as between registration under the Act of 1907 and copyright under the Act of 1911 had long been a matter of doubt. Rule 26 may be described as giving statutory effect to what had previously been the practice of the Comptroller in these doubtful cases. In these circumstances it is not, I think, unreasonable that designs such as the plaintiff's plaque, registrable (but published without registration) under the Act of 1907, particularly when, as in the plaintiff's case, they were so published owing to the Comptroller's refusal to register them, should by virtue of the 1949 legislation become subjects of copyright under the Act of 1911, from which they had only been excluded by their doubtful (and in practice officially unrecognised) capability of registration under the Act of 1907.

There remains the question raised in the course of the argument concerning the validity of the Designs Rules, 1949. That is obviously a question of great public importance, and the court invited and obtained the assistance of the Attorney-General on it at an adjourned hearing. The validity of the rules made, as they were, between the passing and the coming into operation of the Registered

Designs Act, 1949, depends on s. 37 of the Interpretation Act, 1889, which is in these terms:

"Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation."

Reference should also be made to s. 36 (1) of the same Act, which provides:

"In this Act, and in every Act passed either before or after the commencement of this Act, the expression 'commencement', when used with reference to an Act, shall mean the time at which the Act comes into operation."

The question was, in effect, whether on the true construction of s. 37 rules such as r. 26 of the Designs Rules, 1949, could be held to be "necessary or expedient for the purpose of bringing" the Registered Designs Act, 1949, "into operation" within the meaning of the section. In my opinion, the answer should be in the affirmative. I think the point is covered in principle by what was said in this court in *R. v. Minister of Town & Country Planning. Ex p. Montague Burton, Ltd.* (1), where the effect of s. 37 was considered in relation to the Town and Country Planning Acts of 1944 and 1947. In that case TUCKER, L.J., said [1950] 2 All E.R. 285):

"In my view, s. 37 applies to the present case. It clearly gives power to take the necessary steps to set up the machinery for bringing the Act of 1947 into operation as well as for doing such an act as appointing a day for the Act to come into operation. The words in s. 37 dealing with regulations, byelaws, notices, prescribed forms, and so forth, make it, I think, clear that matters of that kind may be dealt with under the provisions of s. 37 so that the necessary machinery will function as soon as the Act comes into operation and things shall not come to a standstill by reason of the repeal of an existing Act. In the present case these applications were pending under s. 1 of the Act of 1944. I think that that is just the kind of thing which is contemplated by s. 37 of the Interpretation Act, 1889, and that, having regard to the provisions of para. 16 of sched. X, the order contained in the letter of June 16, 1948, was a valid order, although it was made before the appointed day."

SQUITH, L.J., said (*ibid.*):

"I agree. I think that the only point of substance raised by counsel for the applicants was when he argued that s. 37 of the Interpretation Act, 1889, did not apply because the giving of the directions contained in the letter of June 16, 1948, was not necessary or expedient for the purpose of bringing the Act of 1947 into operation. He appeared to submit that nothing could be necessary or expedient for this purpose except such a thing as fixing the appointed day. I cannot agree that the words should receive so restricted an interpretation. It seems to me that the preservation of applications made under the Act of 1944 was necessary and expedient for the purpose of giving the Act of 1947 material on which to operate, and that this is enough to satisfy the words 'for the purpose of bringing the Act into operation'."

The legislation with which that case was concerned was of an entirely different character from the legislation here in question. Nevertheless, I think it does involve a decision of general application to the effect that s. 37 is not confined to the making of rules and so forth without which the Act in question would be wholly incapable of coming into operation. Moreover, on consideration of the question *de novo*, and apart from the guidance afforded by the case just quoted, it seems to me that s. 37, on its true construction in accordance with the natural meaning of the language used, is apt to authorise the making of rules such as those here concerned between the passing and the coming into operation of the relevant Act. As pointed out by TUCKER, L.J., in the passage cited above, the section extends to a comprehensive enumeration of matters: "Orders in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws." Clearly many of these matters are matters requiring to be dealt with under the Act when in operation, in order that it may operate effectively, rather than matters without which the Act cannot come into operation at all. Further, the vital words of the section are

"so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof."

If the section had been confined to matters without which the Act could not come into operation at all, the words "or expedient" would, so far as I can see, have been not only otiose, but wholly inappropriate. A matter without which an Act cannot come into operation at all is necessary for the purpose of bringing it into operation, and cannot be anything less than that. A matter which is merely expedient for the purpose of bringing an Act into operation is by definition not necessary for that purpose. It is a matter without which the Act can come into operation, but with which the Act will come into operation more conveniently or effectively.

The view which I have formed is, I think, reinforced by the application to s. 37 of the definition of "commencement" contained in s. 36 (1). So applied it makes s. 37 read:

"... necessary or expedient for the purpose of bringing the Act into operation at the date or the time at which the Act comes into operation,"

which must, I think, mean "at the date fixed or prescribed as the time at which the Act comes into operation". In relation to Acts which themselves fix the date on which they are to come into operation (such as the Registered Designs Act, 1949) as distinct from Acts in which such date is left to be fixed by some rule-making authority, this becomes a wholly idle provision if the section is regarded as limited to that which is necessary (in the strict sense) to bring about the coming into operation of the Act, meaning thereby simply the bringing of the Act as such into force. In cases like the present, nothing could be said to be "necessary" or even "expedient" for that limited purpose beyond passively awaiting the arrival of the date fixed by the Act itself. The truth is, I think, that "operation" is used in the section in two different senses, namely, the sense in which it appears in the definition of "commencement" and in the sense of "effective operation," and I think that in the phrase "bringing into operation" it is used in the latter sense. On this view s. 37 should be construed as extending to whatever is necessary or expedient for the purpose of bringing the Act into effective operation at the date fixed or prescribed as the time at which the Act comes into operation.

It would obviously be in the highest degree inconvenient in the present case if the making of rules under s. 1 (4) of the Act of 1949, prescribing the designs to be excluded from registration under the Act, had to await the coming into operation of the Act, as this would inevitably involve a period of confusion and uncertainty, even to the point of bringing the machinery of registration to a standstill. I should add that I am satisfied that the rules must be assumed to

been made after the passing of the Registered Designs Act, 1949, which, will have been observed, took place on the same day, that is, Dec. 16, 1949. Accordingly, in the view I take the doubt raised as to the validity of the rules ill-founded. For these reasons I hold that this appeal fails and should be dismissed.

MORRIS, L.J.: I have had the advantage of reading and considering the judgment prepared by JENKINS, L.J., and I express my concurrence with the conclusions and the reasoning of it. Until I had considered the submissions pressed to us by the Attorney-General I entertained doubt as to the validity of r. 26 of the Designs Rules, 1949. I am, however, in agreement with the conclusion in regard to this matter expressed by JENKINS, L.J., though I have not shared and share the difficulties felt by SIR RAYMOND EVERSHED, M.R., which has been indicated in his judgment.

Appeal dismissed.

Solicitors: Charles Russell & Co., agents for Skelton & Co., Manchester (for plaintiff); Turner, Osborn & Chatterton, agents for T. H. Hinchcliffe & Son, Manchester (for the defendant); Solicitor, Board of Trade.

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

JACKSON v. MAYFAIR WINDOW CLEANING CO., LTD. AND ANOTHER.

QUEEN'S BENCH DIVISION (Barry, J.), October 22, 23, 24, November 1, December 21, 1951.]

Cases—County court—Action commenced in High Court—Less than £100 recovered—Whether action founded on contract or on tort—Chandelier damaged by negligence of person contracting to clean it—County Courts Act, 1934 (c. 53), s. 47 (1) (b) (i) (ii).

In the course of its being cleaned by a cleaners under contract with the owner a chandelier fell from the ceiling of a room in the owner's flat. In an action for damages for negligence brought in the High Court against the cleaning company the court held that the company had failed to exercise sufficient care in the cleaning and gave judgment for the owner for £90. On the question of costs,

HELD: as the cause of action was not nonfeasance or failure of the company to clean the chandelier at the time or in the manner stipulated by their contract, but arose out of an obligation to take reasonable care to keep safe and not to damage property with which their workmen had to deal, the owner's claim was founded on tort and not on contract. The plaintiff's costs, therefore, were not restricted by the County Courts Act, 1934, s. 47 (1) (b) (i), relating to actions in contract where less than £100 was recovered, to the costs to which she would have been entitled if the action had been brought in a county court.

Turner v. Stallibrass ([1898] 1 Q.B. 56), and *dictum* of GREER, L.J., in *Jarvis v. Moy, Davies, Smith, Vandervell & Co.* ([1936] 1 K.B. 405), applied. *Steljes v. Ingram* (1903) (19 T.L.R. 534), and *Jarvis v. Moy, Davies, Smith, Vandervell & Co.* ([1936] 1 K.B. 399), distinguished.

AS TO DISTINCTION BETWEEN ACTIONS OF TORT AND ACTIONS OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 32, p. 160, para. 227; and FOR CASES, see DIGEST, Vol. 42, pp. 968-971, Nos. 8-28.

Cases referred to:

(1) *Turner v. Stallibrass*, [1898] 1 Q.B. 56; 67 L.J.Q.B. 52; 77 L.T. 482; 42 Digest 968, 8.

- (2) *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399; 105 L.J.K.B. 309; 154 L.T. 365; Digest Supp.
 (3) *Steljes v. Ingram*, (1903), 19 T.L.R. 534; 42 Digest 970, 24.
 (4) *Wilson v. Brett*, (1843), 11 M. & W. 113; 152 E.R. 737; *sub nom. Willson v. Brett*, 12 L.J.Ex. 264; 12 Digest, Replacement, 251, 1949.
 (5) *Candler v. Crane, Christmas & Co.*, [1951] 1 All E.R. 426; [1951] 2 K.B. 164.

ACTION for damages for negligence against the first defendants and for damages for breach of contract against the second defendant.

The plaintiff had contracted with the second defendant to overhaul her chandelier and five months later with the first defendants to clean it. In the course of the cleaning the chandelier fell from the ceiling. The court held that the second defendant had improperly carried out the work under her contract and that servants of the first defendants had failed to exercise sufficient care in the cleaning and awarded the plaintiff £90 damages against both defendants. The defendants contended that the plaintiff's claim against the first defendant, though framed in tort, was founded on contract, and that, therefore, under the County Courts Act, 1934, s. 47 (1) (b) (i), the plaintiff, having recovered more than £40 but not more than £100, should be limited to the costs to which she would have been entitled if the action had been brought in a county court. The plaintiff contended that the claim was founded on tort, and, therefore, that s. 47 (1) (b) (i) of the Act of 1934 had no application and costs on the High Court scale could be awarded.

Harold J. Brown for the plaintiff.

Jukes for the first defendants.

S. M. Stewart for the second defendant.

Cur. adv. vult.

Dec. 21. **BARRY, J.**, read the following judgment. In this case the plaintiff recovered damages amounting to £90 against both defendants for the damage done to her cut glass chandelier which fell from the ceiling of a room in her flat while it was being cleaned by a servant or servants of the first defendants. Five months before its fall the chandelier in question had been overhauled by the second defendant, who had been instructed to put it into good condition. On the evidence I held that the work entrusted to the second defendant had been improperly carried out and that the fall of the chandelier was partially attributable to this default. I also reached the conclusion that the servants of the first defendants had failed to exercise sufficient care in the cleaning of the chandelier.

After judgment had been given in the plaintiff's favour, a question was raised under s. 47 (1) of the County Courts Act, 1934, as to the costs which she was entitled to recover. Section 47 (1) provides:

"Where an action is commenced in the High Court which could have been commenced in a county court, then, subject to the provisions of sub-s. (3) . . . (b) if the plaintiff recovers—(i) in the case of an action founded on contract, a sum of £40 or upwards but less than £100; or (ii) in the case of an action founded on tort, a sum of £10 or upwards but less than £50; he shall not be entitled to any more costs of the action than those to which he would have been entitled if the action had been brought in a county court."

Sub-section (3) provides:

"In any such action as aforesaid, whether founded on contract or tort, the High Court or a judge thereof (or where the matter is tried before a referee or officer of the Supreme Court, that referee or officer), if satisfied—(a) that there was sufficient reason for bringing the action in the High Court . . . may make an order allowing the costs or any part of the costs thereof on the High Court scale or on such one of the county court scales and under such one of the columns in the scale as he may direct."

The defendants contended that the plaintiff's action against both of them was "founded on contract," and that, on consequence, having recovered less than £100 but more than £40, she was only entitled to her costs on the appropriate county court scale. Counsel for the plaintiff maintained that her claim was founded on tort and that she was entitled to receive an award of costs on the High Court scale. Alternatively, he asked me to make a special order awarding High Court costs under s. 47 (3) of the County Courts Act, 1934. So far as the first defendants are concerned, I can find no good grounds for making an order under that sub-section, and it, therefore, becomes necessary to consider the real nature of the plaintiff's claim against these defendants. I need not refer in detail to her claim against the second defendant, as his counsel, if I may say so, very rightly conceded that, if the plaintiff's claim against the first defendants were, in truth, founded on tort, there were excellent grounds for the plaintiff's decision to join as client, the second defendant, in the High Court action, and that, in such circumstances, he could not resist a special order as to costs under s. 47 (3). Both on the writ and in the statement of claim the plaintiff's claim against the first defendants is clearly pleaded in tort, that is to say, she claims for damages for negligence. This does not, however, by any means conclude the matter. It has often been pointed out, there is a considerable "no man's land" of debated ground between contract and tort and some causes of action may properly be pleaded either as torts or as breaches of contract. I have to look at the true substance of this action and to decide on which side of the line it falls. The test to be applied was clearly and shortly formulated by A. L. SMITH, L.J., in *Turner v. Stallibrass* (1), as follows ([1898] 1 Q.B. 58):

"The rule of law on the subject, as I understand it, is that, if in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but, on the other hand, if, in order successfully to maintain his action, it is necessary for him to rely upon and prove a contract, the action is one founded upon contract."

The facts which were under consideration by the court in *Turner's* case (1) were, it is true, concerned with the relationship between a bailor and bailee, but the test enunciated by A. L. SMITH, L.J., is, I think, one of quite general application. It was re-stated in equally clear terms by GREER, L.J., in *Jarvis v. Moy, Davies, Smith, Vandervell & Co.* (2) ([1936] 1 K.B. 405):

"The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

That there was a contract between the plaintiff and the first defendants is, of course, not in dispute. Moreover, the acts complained of might well have been treated as a breach of that contract. What I have to ask myself, however, is whether, in essence, the plaintiff must rely on that contract in order to establish her claim or whether she can properly treat the contract as a mere matter of history, explaining the presence of the defendants' workman in her flat, and establish a breach of duty independent of any obligations undertaken by the defendants to her under that contract. In my judgment, the present claim falls within the latter category. The plaintiff does not complain of mere nonfeasance, nor does she say that the defendants failed to clean her chandelier at the time or in the manner stipulated by their contract. Her case is based on a broader duty, independent of any contractual obligation undertaken by the defendants. She says that if the defendants, through their workmen, interfere with her property—whether with or without her permission and whether in pursuance

of a contract or otherwise—they are under an obligation not to damage that property as a result of their negligence, or, in other words, they are bound to take reasonable care to keep it safe. This is, I think, the true foundation of the plaintiff's claim.

I reach that conclusion largely because I am satisfied that, on the evidence in this case, the plaintiff would have been equally entitled to recover damages had the defendants carried out this work gratuitously or had the contract for cleaning been made by some third party, not her agent, on which contract she could found no right of action. In either of those hypothetical cases the defendants would, I think, owe a duty to the plaintiff—independently of contract—to take due care not to damage her property. Any breach of this duty would render them liable to an action for negligence.

Counsel for both defendants, in very clear and forceful arguments, submitted that a duty to take care, independent of contract, arose only when certain special relationships between the parties had been established. These relationships were, they said, now exhaustively defined by the decided cases and could not be extended to include the relationship existing between the plaintiff and the defendants in the present case. The relationships to which they referred included bailee and bailor, surgeon or dentist and patient, carriers and passengers or the owners of goods consigned for carriage, and certain other relationships which are more fully referred to by PHILLIMORE, J., in *Steljes v. Ingram* (3). Counsel for the first defendants pointed out that the Court of Appeal in *Jarvis v. Moy, Davies, Smith, Vandervell & Co.* (2) had refused to include amongst these relationships that existing between a stockbroker and his client. As SLESSER, L.J., said in that case ([1936] 1 K.B. 407),

“ . . . a stockbroker does not exercise a ‘public calling’ in the sense in which that term is used as applied to carriers and certain other occupations.”

Now, I do not for one moment propose to hold that a window cleaner or chandelier cleaner exercises a “public calling” or falls into any of the categories referred to in the cases I have mentioned. Persons exercising “public callings” and others who enter into certain special relationships may, apart from contract, have certain positive duties imposed on them, which the law does not impose in the case of other professions or trades. That is not to say that all other persons or persons involved in all other professions or trades are absolved from the purely negative duty of not damaging another person's property by their negligence. The facts in *Steljes*' case (3) and *Jarvis*'s case (2) were quite different from the present one. In the absence of a contract, the architect, in the one, was under no duty to supervise the erection of the house, nor was the stockbroker, in the other, to buy or sell shares on any particular date or at all. The complaint in each case arose from the breach of a positive obligation imposed by contract and by contract only. Very different considerations would have arisen in the latter case if, for example, the stockbroker had negligently burned some valuable document belonging to the plaintiff.

The second point taken by counsel for the two defendants was largely based on certain passages in my judgment in the present case, in which I stressed the fact that the first defendants had held themselves out as experts in the cleaning of chandeliers and that, in consequence, their workmen were bound to exercise a high degree of skill and care. This obligation, it was said, could only arise *ex contractu*, and, apart from contract, no particular skill in or knowledge of the cleaning of chandeliers could be imputed to the defendants' workmen. I cannot accept this argument. The law is, I think, correctly stated in HALSBURY'S LAWS OF ENGLAND (Hailsham edn.), vol. 23, at p. 586. Paragraph 837 appears on that page and refers to gratuitous service and reads thus:

“Where a person, not professing to be skilled in the particular matter, undertakes to do an act for another, without reward, he is only bound to

exercise honestly that care which he, as an ordinarily prudent man, would exercise if acting for himself. He is not to be held liable for a mistake, or for an error of judgment, which a reasonably prudent man might commit, or for mere non-success. Where a person skilled in a particular matter gratuitously undertakes to do something involving the exercise of skill, he must do it to the best of his skill, which must be such as a person skilled in such matters may reasonably be expected to possess."

Authority for the latter proposition is to be found in the old case of *Wilson v. Pett* (4). As indicated by DENNING, L.J., in his dissenting judgment in the recent and much discussed case of *Candler v. Crane, Christmas & Co.* (5), the doctrine has an even more venerable ancestry. DENNING, L.J., says ([1951] All E.R. 433):

"Thus FITZHERBERT in his *NEW NATURA BREVIVM* (1534) 94D, says that ' . . . if a smith prick my horse with a nail . . . I shall have my action upon the case against him, without any warranty by the smith to do it well . . . for it is the duty of every artificer to exercise his art rightly and truly as he ought '."

The fact that the other members of the court came to a different conclusion in the case from that arrived at by DENNING, L.J., does not, I think, imply any dissent from that short passage in DENNING, L.J.'s judgment, which consists merely of a quotation and one comment on the *NEW NATURA BREVIVM*.

For these reasons, I have come to the conclusion that the plaintiff's claim was founded on tort and that she is entitled to High Court costs as against the first defendants, that is to say, she is to be awarded costs and there is no reason suggested in this case that the costs should not follow the event. As to the costs against the second defendant, I have no hesitation in making a special order under s. 47 (3) of the County Courts Act, 1934, that costs against the second defendant should also be on the High Court scale.

Judgment for the plaintiff against both defendants with costs on the High Court scale.

Solicitors: *Gordon, Dadds & Co.* (for the plaintiff); *Rowley, Ashworth & Co.* (for the first defendants); *H. L. Lumley & Co.* (for the second defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

IBBS v. HOLLOWAY BROTHERS, LTD.

[KING'S BENCH DIVISION (Devlin, J.), December 20, 1951.]

Practice—Estimated length of trial—Duty of solicitors—Substantial error in estimate—Transfer of case from short non-jury list to long non-jury list—Solicitors of both parties ordered to pay costs thrown away—R.S.C., Ord. 36, r. 29 (6).

Costs—Payment by solicitor personally—Error in estimate of length of trial—Transfer of case from short non-jury list to long non-jury list—R.S.C., Ord. 36, r. 29 (6).

An estimate of the length of the trial of a case, furnished by parties to the clerk of the King's Bench Division lists under R.S.C., Ord. 36, r. 29 (6), must be reasonably accurate, and in case of doubt it is the duty of the solicitors to obtain the opinion of counsel on the matter. This applies particularly where a case of a type normally placed in the long non-jury list, such as a Factory Act case, is placed in the short non-jury list.

Where it ought to have been apparent that a case was not a proper one for the short non-jury list in which it had been placed, the costs of each party thrown away by the adjournment on its transfer to the long non-jury list were ordered to be paid by his solicitors personally. No order was made for costs as between party and party, although the plaintiff had given the original estimate of duration, the duty of making such estimate being imposed by the rule on all parties.

EDITORIAL NOTE. A case is entered in the short cause list where the estimated length of the trial is not more than two hours, in the short non-jury list where it is not more than four hours, and in the long non-jury list where it exceeds four hours. Where it comes to the knowledge of solicitors before trial that by reason of its probable length a case is not in the proper list, they should take immediate steps by summons or application to the court to have it transferred to the appropriate list. An application by consent may be made to the clerk of the lists who will place it before the judge in charge of the lists: see R.S.C., Ord. 36, r. 1A, r. 1B and r. 29 and notes. On the duty of parties under r. 29 (6), see the observations of VISCOUNT CALDECOTE, C.J., at [1944] W.N. 36 and cf. *Wood v. London County Council*, [1940] 4 All E.R. 156, cited in the note to that paragraph in the ANNUAL PRACTICE.

ACTION in the short non-jury list for damages for negligence and breach of statutory duty.

The plaintiff had been injured in an accident in the course of the reconstruction of a bombed-out warehouse on which he was employed by the defendants and he alleged that there had been a breach of the Building (Safety, Health and Welfare) Regulations, 1948, regs. 5, 6, 7 (1) (2), 9 (1), 12 (1) (4), and a failure at common law to provide or use a safe system of work. The solicitors for the plaintiff estimated the probable duration of the case as four hours and it was placed in the short non-jury list. When the case came on for trial it became apparent that the estimate was inadequate and that the case would require to be transferred to the long non-jury list, and the question arose of the costs thrown away through the adjournment thereby occasioned.

Marven Everett for the plaintiff.

Stephen Chapman for the defendants.

DEVLIN, J.: It is now clear that this case is of such a compass that it can only be properly dealt with in the long non-jury list, and, accordingly, I propose to make an order transferring it to that list. It is a claim for damages for an accident that occurred on a building and is what may be described as a Factory Act type of case. The plaintiff alleges a breach of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), which

It is necessary to investigate what is the meaning of the word "scaffold" in reg. 3 (2), and there is a concomitant common law claim for an alleged failure to provide a safe system of work or to use a safe system of work, for the safety of employees. That is the type of case which is normally to be found in the long non-jury list, because experience has shown that the usual case of the kind almost invariably lasts more than one day, although there may be exceptional cases which occupy a very short time on fact and in which there is no difficulty about law, and which, therefore, can be dealt with in a day or less. The ordinary place where one finds Factory Act cases is in the long non-jury list. This case in its early stages was entered in the short non-jury list, and four hours was given by the solicitors for the plaintiff as the estimate of its duration. I should have thought that even at that stage that estimate was probably accurate, but I am more concerned with the increase in the estimated length of the case as it proceeded.

In an endeavour to deal with this type of difficulty R.S.C., Ord. 36, r. 29 (6), provides:

"It shall be the duty of all parties to any cause or matter entered in any of the said lists to furnish without delay to the officer by whom the list is kept all available information relating to any settlement, or likelihood of settlement, of the cause or matter, or affecting the estimated length of the trial."

That order was not complied with in this case. It was completely ignored. It must have become apparent as the case proceeded that the estimate of four hours was quite inadequate, but no effort was made to comply with the paragraph.

It is always difficult to transfer a case to the long non-jury list. All the witnesses have attended, their day has been interfered with, costs are thrown away, and there is always a temptation to a judge to go on with the hearing to save those costs. But the time has come, at any rate in Factory Act cases, when action must be taken, because it is really not fair on those parties who have the right and normal thing in putting Factory Act cases down in the long non-jury list that those who put them down in the short non-jury list should be able to have their actions disposed of before those who have attended more fully to the rules. It is for that reason, and not because I could not have finished the case, if necessary, that I have taken the action that I have done in this case. Of course, circumstances might arise in which a judge had another case fixed on the following day and it would be quite impossible to finish the case which he had started. That is why it is so important that these estimates should be reasonably accurate.

What I have to consider is: Who is to bear the costs thrown away? Is it to be the parties themselves, or is it to be the solicitors who, in my judgment, are responsible for the error which has resulted in those costs being wasted? It is not a matter of importance for this purpose whether the plaintiff be a poor man who can ill afford to bear the costs, or whether he be a substantial corporation, and the same applies to the defendant. I think that parties, whether they be rich or poor, are entitled to expect that their solicitors will act with all proper diligence to protect their interests. I entirely accept the view that, if there be a small or accidental error, it would not be right to penalise the solicitors. It would be right to look on the extra costs as one of the misfortunes which may arise in the course of litigation and parties must be prepared to meet them themselves.

In my judgment, it ought to have been apparent to anybody that the present case was not a proper one for the short non-jury list. It strikes me as at least a four days case. Between that and four hours is not a small margin of error, and moreover, as I have said, it is not the type of case that normally goes into the short non-jury list. One can understand a running-down case finding its

way into the short non-jury list and those concerned in it being taken by surprise by some feature of it which gives it an extra length, but the present is not that sort of case at all.

There is really no difficulty about solicitors making the necessary arrangements provided they are alive to their duty in the matter. Their proper course, in any case which is doubtful, is to take the opinion of counsel, and obtain from him what is his estimate of the length of the case. The time has come when one must enforce these rules strictly and see that the costs fall where the blame lies. Therefore, I think that I should make an order that the parties on both sides should not have to pay the costs thrown away as the result of the adjournment and transference of this case, but that they should be borne by the solicitors personally.

I next have to consider in what proportions those costs should be borne, or whether I should allow them to lie as they fall. It is suggested that the main blame ought to be put on the solicitors for the plaintiff because it was they who gave the original estimate of four hours and the plaintiff is sometimes said to be the person in charge of the case. I do not think that that ought to weigh with me. I think it ought to have been apparent to the defendant's solicitors at a very early stage that four hours was a quite inadequate estimate. The argument that counsel for the defendants addressed to me—that they were entitled to assume that the plaintiff's case would fall within a very short compass—was plausible rather than sound. I do not think any solicitor, if he had seen the pleadings, would have made any such assumption. He would have thought that the plaintiff's solicitors had not given any proper thought to the matter; that is the assumption which ought to have been made.

The rule puts the matter fairly and clearly on both parties. That, I think, is what is intended. It is the duty of solicitors in these matters to co-operate and work together so that the convenience of the court and public business may be attended to properly. I cannot distinguish between them. It might well have been that in the circumstances the defendants' solicitors would have discharged their duty by calling the attention of the plaintiff's solicitors to the situation which had arisen. I express no opinion on the matter. It might be said that the defendants' solicitors ought to have taken the initiative in the action. I do not know. The blunt truth is that both sides allowed matters to drift and did not give any thought to the length of the case as the rule requires. Both sides are to blame. I shall make no apportionment as to costs. There will be no order as to costs as between party and party, but I shall order in each case that the costs of each party thrown away as the result of this adjournment be discharged personally by the solicitors.

Order accordingly.

Solicitors: *Arnold Carter & Co.* (for the plaintiffs); *L. Bingham & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NOTE.

LANE v. LANE.

COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), December 10, 11, 12, 20, 1951.]

Justices—Desertion—Evidence—Notes of proceedings on earlier summons.

APPEAL by the husband from a decision of the Divisional Court dated Apr. 18, 1951, affirming an order of Bradford (Yorkshire) justices dated Nov. 6, 1950, whereby they found that the husband had deserted his wife and ordered him to pay maintenance of £2 a week.

The parties were married on Dec. 21, 1946. On Apr. 28, 1950, the wife left her husband, and the justices found that, in view of his conduct, he had been guilty of constructive desertion and made a maintenance order against him. On Oct. 8, 1950, at the instance of the wife, the parties resumed cohabitation, but there were differences between them, and eight days later the wife again left the husband and took out a summons alleging desertion. On the hearing of this summons the justices made the order which was the subject of the present appeal. The justices on this occasion were not the same as those adjudicating on the first appeal, and there was no cross-examination as to what took place when the first order was made. Before the Divisional Court the notes of the first hearing were considered by the court as forming part of the history of the case. On appeal four points were taken: (i) Did the husband's conduct amount to constructive desertion? (ii) Was the Divisional Court entitled to look at the notes of the previous proceedings between the parties although they were not in evidence before the justices? (iii) Was the doctrine of condonation and revival applicable to desertion so that conduct falling short of what would be required to prove desertion originally might be sufficient to revive condoned desertion? (iv) Was the amount payable under the order too high?

The Court of Appeal (JENKINS, L.J., *dissentiente*) held on the facts that the justices were entitled to find that the husband's conduct amounted to constructive desertion and that they had not erred in principle in the amount of maintenance ordered.

Cases referred to:

- (1) *Beard v. Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 2nd Digest Supp.
- (2) *Blandford v. Blandford*, (1883), 8 P.D. 19; 52 L.J.P. 17; 48 L.T. 238; 27 Digest 338, 3175.
- (3) *Paine v. Paine*, [1903] P. 263; 73 L.J.P. 1; 89 L.T. 588; 27 Digest 347, 3285.
- (4) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 2nd Digest Supp.
- (5) *Pew v. Pew*, (unreported), Jan. 30, 1951.
- (6) *Mummery v. Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 111 L.J.P. 58; 166 L.T. 343; 2nd Digest Supp.
- (7) *Cobb v. Cobb*, [1900] P. 145, 294; 69 L.J.P. 52; 82 L.T. 626; 64 J.P. 200; 27 Digest 563, 6201.
- (8) *Stibbe v. Stibbe*, [1931] P. 105; 100 L.J.P. 82; 144 L.T. 742; Digest Supp.
- (9) *Sherwood v. Sherwood*, [1928] P. 215; *affd.* C.A., [1929] P. 120; 98 L.J.P. 66; 140 L.T. 230; Digest Supp.

Simon, K.C., and *B. Garland* for the husband.

Wyndale, K.C., and *Hazel* for the wife.

Cur. adv. vult.

Dec. 20. SOMERVELL, L.J., dealing with the notes of the first hearing said that in a case like the present when there had been a resumption of cohabitation and a second separation of the parties, the reasons which led to the previous desertion might be of vital importance. If, for example, a wife had been driven out on

the first occasion by repetition over a period of time of a course of conduct, whether physical or verbal, a resumption of cohabitation, if the offending spouse was genuine, must clearly be on the basis that he or she would abstain from renewing that course of conduct. With that history, any real indication, though over a very short period of time, that the offending spouse was going to behave as before might result in his being guilty of constructive desertion, although his present conduct alone, without evidence of the past history of the case would be insufficient to establish such desertion. It was not that proof of a lesser matrimonial offence was sufficient in the sense in which it was said in *Beard v. Beard* (1) that matrimonial misconduct short of a matrimonial offence could revive a condoned offence, but that the significance of the present acts was affected by what had gone before. The matter should, therefore, be considered on the basis that the notes of the first hearing were available material. Like all such notes, they must be treated with caution. They were not transcripts, nor was it right to assume that any particular fact deposed to in favour of the successful party was necessarily accepted by the justices.

HODSON, L.J., said that, although desertion as a complete offence under the law as it existed before 1937 was capable of condonation and revival—compare *Blandford v. Blandford* (2), where adultery and desertion for two years were condoned and held to be revived by subsequent adultery, and *Paine v. Paine* (3), where the same decision was reached in a case of desertion created by failure to comply with a decree of restitution of conjugal rights—yet a current period of desertion was on a different footing since it could be determined at any time by the return of the offending spouse and the deserted spouse had, at least in the case of simple desertion, no alternative but to receive the deserter. The question in such a case was not primarily one of condonation, but whether the desertion had been terminated, either by a resumption of cohabitation involving a bilateral act, or by the deserted spouse refusing to receive his or her partner, thereby turning himself or herself into the deserter. Conduct could always be looked at in the light of past history which threw light on it, and acts of minor significance in themselves, in the light of past history, might be of serious import. In the present case, the conduct of the husband during and after a resumption of cohabitation could be looked at in the light of his previous desertion to enable the court to form a judgment whether such conduct amounted to constructive desertion. It was only in this way that he (HIS LORDSHIP) would draw any distinction between acts of greater and those of less significance in connection with the origination of a fresh period of desertion.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co.*, agents for *A. V. Hammond & Co.*, Bradford (for the husband); *Young, Jones & Co.*, agents for *James A. Lee & Priestley*, Bradford (for the wife).

J.D.P.

NOTE.UNITED MILLS AGENCIES, LTD. v. R. E. HARVEY,
BRAY & CO.

Q.B. DIVISION (McNair, J.), December 13, 14, 17, 18, 19, 21, 1951.]

Insurance—Broker's duty—Delay in forwarding cover note to insured—No cover obtained against loss sustained before cover note received.

ACTION for damages for negligence.

The insured, the plaintiffs in the action, on Mar. 30, 1951, instructed the defendants, who were insurance brokers, to effect an open marine insurance of the insured's goods, obtaining immediate cover. On Apr. 2 the brokers reported rates quoted to the insured and on their acceptance by the insured informed him that the cover was placed. On Apr. 4 the brokers dispatched the cover note to the insured. It did not contain any clause relating to attachment of the goods while goods were at packers, such clause not being a usual one, though also an unusual one, in an open cover. On the night of Apr. 4-5 goods of the insured of the value of £8,000 were destroyed by a fire at a warehouse at Gomersal, Leeds, of the packers, LEP Transport, who were holding them on behalf of the insured. The insured alleged that the brokers were negligent in failing to effect an insurance of the goods while at packers when so instructed, or, alternatively, in failing to advise the insured that the insurance did not cover goods in the hands of packers at insured's risk after having had clear notice that the insured had goods in that situation. They also submitted that the brokers were negligent in that they delayed in sending them a copy of the cover note for some days after the insurance had been placed, thereby depriving the insured of the opportunity of examining it and seeing whether it complied with his requirements. The insurers said that, if the cover note had been sent in due time, they would have had the opportunity of ascertaining that it did not cover the goods in the circumstances which existed. The insurance brokers denied negligence.

Mocatta, K.C., and Megaw for the plaintiffs.

Cott Cairns, K.C., and E. W. Roskill for the defendants.

Cur. adv. vult.

Dec. 21. **McNAIR, J.**, found that the insurance brokers had no knowledge that the goods in the hands of packers were uninsured and that they were negligent in not insuring them in the hands of packers or in not informing the insured that they had not so insured them. The insured contended that it was the duty of the brokers to cause the insured to be notified promptly of all the facts as soon as they had arranged the insurance and that there had been a failure on the part of the brokers to do so. Evidence had been called from an independent broker—and substantially agreed to by the defendant brokers' witness—that it was the practice of, at any rate, those two offices of insurance brokers (and he (HIS LORDSHIP) had no doubt the practice of brokers as a whole) that when cover had been placed the clients were notified as soon as possible. That seemed to be good business and prudent office management, but the evidence he (HIS LORDSHIP) was completely unable to hold that it was a failure of the duty owed by the broker to the client so to notify him, in the sense that a failure to do so would involve him in legal liability. No case was cited in which any broker had ever been held liable or had ever paid any client money in respect of such a failure. It seemed to him (HIS LORDSHIP) to put an intolerable and unreasonable burden on a broker to say that as a matter of law, apart from the usual practice, he was bound to forward the cover note as soon as possible.

It was, no doubt, prudent to do so, both to allay the client's anxiety and possibly to enable the client to check the terms of insurance, but that was very different from saying it was part of the broker's duty. He (HIS LORDSHIP) doubted whether, even if the cover had been in the insured's hands on Apr. 3, action appropriate to the circumstances would have been taken, but he did not found his judgment on that point because he was left in very considerable doubt on it. The insured failed on whichever of the three alternative ways they put their case, and there must be judgment for the brokers with costs.

Solicitors: *Coward, Chance & Co.* (for the insured); *Ince, Roscoe, Wilson & Griggs* (for the brokers).

F.A.A.

ABBOTT v. SULLIVAN AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Denning and Morris, L.JJ.), November 12, 13, 14, 15, December 20, 1951.]

Domestic Tribunal—Excess of jurisdiction—Absence of malice—Liability for damage caused by ultra vires acts.

The plaintiff, a corn porter employed in the London docks, was a member of a committee formed to protect the interests of corn porters. By custom the committee had disciplinary powers to enforce the observance of its working rules, and no man could act as a corn porter in the Port of London unless he was on a register controlled and kept by the committee. The plaintiff, who was a ganger in charge of twelve corn porters, was summoned to attend a meeting of the committee convened by one, P., a divisional officer of the trade union to which the corn porters belonged, following a complaint against the plaintiff by certain members of his gang. At the meeting, at which P. was present in an advisory capacity, the plaintiff was fined. Immediately after the meeting the plaintiff struck P. who, thereupon, convened an emergency meeting of the committee. At this meeting the committee resolved that the plaintiff's name should be removed from the register of corn porters. In an action by the plaintiff against, *inter alia*, two members of the committee for damages for wrongfully removing him from the register and against P. for procuring that removal, it was held that the resolution was *ultra vires* the committee and was invalid, but that the defendants had not been actuated by malice or wrong motive. On the question of damages,

HELD (DENNING, L.J., *dissentiente*): in the absence of malice, the fact that the defendants acted beyond their powers did not provide the foundation for any action in tort, nor could any contract be implied between the plaintiff and the committee that they would do no acts which were *ultra vires*, and, therefore, the plaintiff was not entitled to damages either from these members or from P.

Weinberger v. Inglis (No. 2) ([1919] A.C. 606) and *McMillan v. Free Church of Scotland* (1861) (23 Dunl. (Ct. of Sess.) 1314), distinguished.

AS TO CONCLUSIVENESS OF DECISIONS OF DOMESTIC TRIBUNALS, see HALSBURY, Hailsham Edn., Vol. 13, p. 451, para. 510; and FOR CASES, see DIGEST, Vol. 21, pp. 238, 239, Nos. 676-683.

es referred to:

- 1) *Maclean v. Workers' Union*, [1929] 1 Ch. 602; 43 Digest 101, 1046.
- 2) *Weinberger v. Inglis* (No. 2), [1918] 1 Ch. 517; 87 L.J.Ch. 345; 118 L.T. 769; *affd.* H.L. [1919] A.C. 606; 42 Digest 790, 14.
- 3) *McMillan v. Free Church of Scotland*, (1861), 23 Dunl. (Ct. of Sess.), 1314.
- 4) *Bagg's Case*, (1615), 11 Co. Rep. 93b; 77 E.R. 1271; 33 Digest 92, 624.
- 5) *Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland*, [1903] 2 K.B. 600; 72 L.J.K.B. 907; 89 L.T. 386; 43 Digest 118, 1226.
- 6) *Mogul S.S. Co. v. McGregor, Gow & Co.*, (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 42 Digest 968, 6.
- 7) *Terry v. Huntington*, (1668), Hard. 480; 145 E.R. 557; 38 Digest 84, 613.
- 8) *Marshalsea Case*, (1612), 10 Co. Rep. 68b; 77 E.R. 1027; *sub nom.* *Hall v. Stanley*, 2 Brownl. 125; 123 E.R. 852; 38 Digest 68, 448.
- 9) *Gwinne v. Poole*, (1692), 2 Lut. 935, App. 1560; 125 E.R. 522, 858; 38 Digest 69, 450.
- 10) *Calder v. Halket*, (1839-40), 3 Moo. P.C.C. 28; 2 Moo. Ind. App. 293; 4 State Tr. N.S. 481; 13 E.R. 12; 38 Digest 84, 615.
- 11) *Houlden v. Smith*, (1850), 14 Q.B. 841; 19 L.J.Q.B. 170; 15 L.T.O.S. 64; 14 J.P. 687; 117 E.R. 323; 38 Digest 84, 616.
- 12) *Bonham's Case*, (1610), 8 Co. Rep. 114a; 77 E.R. 646; 38 Digest 80, 578.
- 13) *Nichols v. Walker & Carter*, (1635), Cro. Car. 394; 79 E.R. 944; 18 Digest 399, 1403.
- 14) *Philips v. Bury*, (1696), Carth. 180 (90 E.R. 709); Comb. 265, 314 (90 E.R. 468, 499); Holt K.B. 715 (90 E.R. 1294); 1 Ld. Raym. 5 (91 E.R. 900); Skin. 447 (90 E.R. 212); 2 Term Rep. 346 (100 E.R. 186); 4 Mod. Rep. 106 (87 E.R. 289); 1 Show. K.B. 360 (89 E.R. 624); 21 Digest 238, 676.
- 15) *Baird v. Wells*, (1890), 44 Ch.D. 661; 59 L.J.Ch. 673; 63 L.T. 312; 8 Digest 512, 39.
- 16) *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523; 89 L.J.K.B. 563; 123 L.T. 191; 8 Digest 509, 25.
- 17) *Forbes v. Eden*, (1867), L.R. 1 Sc. & Div. 568; 8 Digest 506, 9.
- 18) *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 2nd Digest Supp.
- 19) *Boots v. Grundy*, (1900), 82 L.T. 769; 43 Digest 117, 1217.
- 20) *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239; 74 L.J.K.B. 525; 92 L.T. 710; 43 Digest 114, 1186.
- 21) *Brimelow v. Casson*, [1924] 1 Ch. 302; 93 L.J.Ch. 256; 130 L.T. 725; 43 Digest 115, 1194.
- 22) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- 23) *Rigby v. Connol*, (1880), 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 8 Digest 512, 38.
- 24) *Amalgamated Society of Railway Servants v. Osborne*, [1910] A.C. 87; 79 L.J.Ch. 87; 101 L.T. 787; *affg.* S.C. *sub nom.* *Osborne v. Amalgamated Society of Railway Servants*, [1909] 1 Ch. 163; *subsequent proceedings*, [1911] 1 Ch. 540; 43 Digest 93, 963.
- 25) *Leeson v. General Council of Medical Education & Registration*, (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 34 Digest 544, 30.
- 26) *Dawkins v. Antrobus*, (1881), 17 Ch.D. 615; 44 L.T. 557; 8 Digest 507, 18.

APPEAL by the plaintiff and CROSS-APPEAL by the defendants from an order of the COURT OF APPEAL, made on Mar. 9, 1951.

The plaintiff, a corn porter and ganger in the London docks, claimed against the first defendant, one Sullivan, and the second defendant, one Isett, two

members of the Overside Corn Porters' Committee, a committee formed to safeguard the interests of porters unloading grain from ships at the docks; the third defendant, the Transport and General Workers' Union; the fourth defendant, one Platt, a divisional officer of that union; and the fifth defendant, the Port of London Authority; *inter alia*, (i) that a resolution passed by the committee on Sept. 24, 1947, was invalid, (ii) damages for the wrongful removal of the plaintiff's name from the register of corn porters, and (iii) an injunction restraining the first four defendants from continuing to act on the resolution of Sept. 24 and a further resolution of July 12, 1948. The committee, of which the plaintiff was a member, consisted of nine members with whom rested the decision whether or not a man should be accepted and placed on the register of corn porters. No man could act as a corn porter in the Port of London unless he was accepted by the committee, and, on acceptance, he agreed to submit to the jurisdiction of the committee and to observe the Corn Porters' Working Rules. Failure to observe the rules involved liability to a fine. The committee was connected with the Transport and General Workers' Union, to which all corn porters belonged, and a divisional officer of the union convened the meetings of the committee and advised them in their deliberations, but the committee was not a committee of that union. On Sept. 15, 1947, following a complaint against the plaintiff by six members of his gang, the fourth defendant convened a meeting of the committee to consider the complaint. Notice was given to the plaintiff charging him with failing to man up to strength and going to work short-handed. On Sept. 18, 1947, the plaintiff attended before the committee, who sat with the fourth defendant to advise them. In the result the committee fined the plaintiff. After the meeting, the plaintiff followed the fourth defendant into the street and struck him. The fourth defendant then convened an emergency meeting of the committee. The plaintiff, as a member of the committee, received a copy of the notice of the meeting, and he wrote to the fourth defendant apologising for the incident on Sept. 18 and protesting against the committee's assumption of jurisdiction in a matter unconnected with his work as a corn porter. On Sept. 24 the meeting, which the plaintiff did not attend, took place. The committee unanimously resolved that the plaintiff was guilty of an unwarranted and unprovoked assault on the fourth defendant, who was present, and that he (the plaintiff) should be removed from the register of corn porters. The fourth defendant reported the decision of the committee to the Port of London Authority who instructed the departments concerned that the plaintiff was no longer to be employed as a corn porter. The plaintiff paid the fine imposed on him and applied to the committee for reinstatement, but the application was refused. The plaintiff appealed to the area committee of the union who recommended that he should be reinstated on the register. On July 12, 1948, the committee resolved that the decision of the area committee should be accepted provided that the plaintiff undertook to abide by the rules and constitution of the committee. At an early stage the action against the Port of London Authority was abandoned.

CROOM-JOHNSON, J., made a number of declarations, including a declaration that the resolutions of Sept. 24, 1947, and July 12, 1948, were *ultra vires*. He found that all the defendants had acted *bona fide* and without improper motive, and dismissed the claim for damages. The plaintiff appealed against the order as to damages, and, by their cross-appeal, the first four defendants claimed that the declarations made by the learned judge should be set aside. After the decision of CROOM-JOHNSON, J., the committee applied to the Port of London Authority for the plaintiff's name to be restored to the register, and it was restored.

Turner-Samuels, K.C., and Rodgers for the plaintiff.

Gardiner, K.C., and M. R. Nicholas for the defendants.

cc. 20. The following judgments were read.

SIR RAYMOND EVERSLED, M.R.: I have had the advantage of reading the judgments about to be delivered in this case by my brethren. On some of the many matters that were debated before us they are agreed, but on the difficult question whether the first two defendants may be held liable in damages (in effect) as for breach of contract and the consequential question whether the fourth defendant may be held liable also for the tort of procuring a breach of contract by the first two defendants, the views of DENNING, L.J., and MORRIS, L.J., differ. I have reached the same conclusion on all these matters as MORRIS, L.J., but, having regard to the curious nature of the appeal and to the difficulties of certain of the matters involved, I have thought it right to express briefly my own opinion.

On the main question, namely, whether the learned judge was right in his conclusion as to the invalidity of the resolution of Sept. 24, 1947, we are all agreed. It has been made plain that the corn porters' committee, though of a long standing and composed entirely of persons who are members of the union which is the third defendant, is not a committee of the union in the sense of being part of its organisation recognised and constituted by the union rules. It has, however, throughout the period of its life entertained a jurisdiction particularly in regard to working rules over those members of the union who are entitled to call themselves overside corn porters and who, as such, enjoy a somewhat privileged position. In the circumstances it is, in my judgment, plain that its jurisdiction must be founded on a contract express or implied mutually entered into and binding on all those who enjoy the privileges being accepted into the ranks of the corn porters. But its rules and organisation are nowhere found in any written constitution. Its jurisdiction being, then, challenged in the present case, the onus lay on those defendants who asserted the validity of its transactions, and, particularly, on the first two defendants, who, for some reason best known to the plaintiff, were selected out of the total number of the corn porters' committee other than himself, and on the fourth defendant, Platt, to prove the contract which would support the necessary jurisdiction. I agree with the learned judge that the relevant defendants failed to do so in the present case. It may well be that the obscurity of the pleadings concealed what was the vital issue which had to be proved, and that on some other occasion, or in some other case, more extensive evidence would be forthcoming. The matter was, however, clearly fought and tried out in the court below, and in the circumstances the learned judge arrived at the conclusion, as I think, rightly, that the necessary contractual foundation for what had been done had not been established. Indeed, the only evidence directly bearing on the point, namely, that of the plaintiff, was to the effect that the committee did not have, and had never assumed to have, jurisdiction to take disciplinary action as a result of an allegation of a common assault in the street on a trade union official. The result is fatal to the substance of the cross-appeal.

I prefer myself to express no concluded opinion on the alternative ground on which the learned judge based his conclusion of the invalidity of the resolution, namely, that the committee, while purporting to exercise a judicial or quasi-judicial function, had disregarded one of the so-called principles of natural justice in that they failed to give to the plaintiff any proper notice of the case in which he was being called on to meet. It is not open to doubt that the letter by which alone the plaintiff was informed of the summoning of the meeting of Sept. 24, 1947, contained no information of the nature of the charge that was being made against him, or, indeed, that any charge was being so made. On the other hand, it is clearly shown that the plaintiff was, in fact, well aware of the nature of the charge and of the fact that the meeting was being summoned for the purpose of considering what, if any, disciplinary measures should be taken against him, for the plaintiff thereupon challenged the committee's

jurisdiction and abstained from attendance. The principles of natural justice are easy to proclaim, but their precise extent is far less easy to define. They came under the consideration of MAUGHAM, J., in *Maclean v. Workers' Union* (1), and a useful note on them is to be found in the final report of the COMMITTEE ON MINISTERS' POWERS known as the DONOUGHMORE COMMITTEE of 1932 (Cmd. 4060) at pp. 75-80. Where some person or body of persons exercising judicial or quasi-judicial functions disregards any of the principles of natural justice which our courts recognise, the court will interfere to protect the party aggrieved. It is, however, equally clear that in giving effect to these principles no particular procedure has to be followed. Though I do not, therefore, dissent in the present case from the conclusion arrived at by CROOM-JOHNSON, J., I prefer on this aspect of the matter to express no concluded view of my own.

I turn, accordingly, to the appeal, and first, as regards the injunction claimed, it is plain that the question here involved is academic. I agree with my brethren that there is no case made out for the grant of any injunction now. There remains the most difficult matter of all, the question whether the plaintiff, who has, undoubtedly, suffered considerably in consequence of the resolution of Sept. 24, 1947, can make good a claim for an order for assessing damages against the first two defendants for breach of contract and, if so, whether he can further proceed to justify an order for an inquiry as to damages against the fourth defendant, Platt, for the tort of procuring the breach of contract by the first two defendants.

The first essential for the plaintiff is plainly for him to make good if he can his claim against the first two defendants, for, unless that claim is made good, the claim against the fourth defendant necessarily falls to the ground, and, in my view, the first answer to the essential claim is, that it is nowhere pleaded. From what I have already said it is plain that the claim, if claim there be, must rest on a contract, either express or implied, made (as I assume) by every corn porter with each member, severally, of the committee, which was broken by the passing by the committee and the carrying into effect by Platt of the resolution of Sept. 24, 1947. At no point in the long and much amended statement of claim can I find the slightest hint of any such claim. The contractual term alleged to be broken would require careful formulation. Is it suggested to be to the effect that a man once received into the company of corn porters should not thereafter be excluded by the committee from the company save for breach by him of some specified rules? Is it, more generally, that the committee would not, having knowledge, or the means of knowledge, of all material facts, purport to act beyond their proper (that is, contractual) jurisdiction? Nor can I agree that there is such a pleading of the essential facts that, coupled with a general claim to damages, should enable or entitle the court to deal with the point now raised. The only suggested claim for damages for breach of contract, as I understand the pleadings, is based on a wholly different matter, namely, an alleged promise made by the union to the effect that, if the plaintiff paid the sums awarded against him on Sept. 18, 1947, they would procure his unqualified reinstatement in his former position. In my judgment, this is not a case in which it would be right for the court at this stage to entertain an entirely new point of this character. If the statement of claim had intimated an allegation of the character which I have attempted to define and, more particularly, had coupled with it an allegation against the fourth defendant, Platt, that he had wrongfully procured a breach of such a contract, it is by no means clear to me that the trial would not in material respects have taken a different course. For example, I think it might well have been that a much greater body of evidence would have been given as regards what exactly did occur at the meeting of Sept. 24, 1947. As it is, though the learned judge has intimated a view that the members of the committee on that occasion were acting in some degree under the influence of the fourth defendant, he has wholly absolved the fourth defendant from any suggestion that he acted at any stage under the influence of malice or other improper

It is, unfortunately, the not uncommon experience of human affairs that the greatest disasters and troubles flow from the actions of men acting on the best possible motives. But I am far from satisfied that in any circumstances there is any evidence which would justify this court in holding that the defendant, in any ordinary acceptance of that phrase, "procured" the resolution by the members of the corn porters' committee on the occasion in question by such express or implied contract as I have attempted to define. It is, of course, a sufficient answer to the case. But the court is naturally and properly somewhat reluctant to decline on the grounds of a defective pleading to ascertain what might appear to be a legitimate claim on the part of someone who has suffered real injury. No authority was cited to us in the course of the argument that in the case of a body such as the corn porters' committee there should be imported a contractual term of the character and to the effect that I have stated. I am not, for my part, satisfied that any such contractual term, as I have indicated, binding on each member of the committee of corn porters, could be inferred from the facts proved in the present case. On the more legal aspect of the matter I should wish to hear full argument. I am not satisfied that in the case of a body such as that under discussion any relevant or legal analogy can be found by reference to tribunals established by statute and having a limited jurisdiction conferred on them by statute, or by reference to voluntary or dietary clubs. In the former class of case it appears logically to follow that the limits of jurisdiction set by Parliament negative any wider powers, so that, when a tribunal (subject to certain qualifications) acts beyond the powers conferred, its members will be liable for the consequences under the ordinary law, normally in an action for the independent tort committed. In the case of voluntary or dietary clubs, it may well be easy and proper to infer that a man, once admitted to membership, shall not be excluded by the owner save under or in accordance with the rules of the club. To my mind, *Weinberger v. Inglis* (No. 2) cited by DENNING, L.J.) is so far removed, on its essential facts and as regards the question to be decided, from the present case that the observations made by DENNING, L.J., from the judgment do not form a sufficiently reliable or authoritative guide on the present matter, and I think the same observations apply to the Scottish case of *McMillan v. Free Church of Scotland* (3). In my judgment, therefore, the plaintiff has failed to allege or establish by the evidence in the case that he has any cause of action for damages against the first two defendants for participating in the resolution which was, in truth, beyond their powers to pass. It follows that his claim for damages against the fourth defendant for procuring an alleged breach of contract necessarily fails also. The result of the whole matter, in my judgment, is that both the appeal and the cross-appeal fail save to the limited extent that on the cross-appeal the first two defendants are, in my judgment, entitled to have incorporated in the order of dismissal of the action against them in so far as it extended to claims for libel, libel, conspiracy, and procuring the wrongful dismissal of the plaintiff.

DENNING, L.J., stated the facts, held that the resolution of Sept. 24 *ultra vires* the committee (citing *Bagg's Case* (4) in support of his decision), continued: I now come to the question: Is the plaintiff entitled to damages for the *ultra vires* action of the committee? The judge thought not. He said he could not see any legal peg on which to hang an award of damages. I should like to try to think that, if a wrong has been done, the plaintiff is to go without a remedy simply because no one can find a peg to hang it on. That would be a regression to the days when a man's rights depended on whether he could fit his case into a prescribed form of action, whereas in these days the principle is applied that where there is a right there should be a remedy. It has been said by high authority that it is an actionable wrong for any man intentionally to injure another without just cause or excuse: *Giblan v. National Amalgamated*

Labourers' Union of Great Britain & Ireland (5) ([1903] 2 K.B. 620), *per* ROMER, L.J.; *Mogul S.S. Co. v. McGregor, Gow & Co.* (6) (23 Q.B.D. 613), *per* BOWEN, L.J. If this is correct, there can be no doubt that the conduct of the corn porters' committee and Mr. Platt was an actionable wrong, for they intended to deprive the plaintiff of his livelihood, they succeeded in doing so, and they had no just cause or excuse for their action, because they should have known it was *ultra vires*. But I do not think that this wide proposition has yet been accepted into our law. There is, however, a narrower proposition which does seem to me to fit the case. It is this, that if the members of a tribunal take it on themselves to punish a man for real or supposed wrongdoing when they know or have the means of knowing that they have no jurisdiction in that behalf, then they are liable to him for any damage so caused even though they were not actuated by malice. But if it is a case where, on the facts as known to them, they did have jurisdiction, then they are not liable for the erroneous exercise of that jurisdiction, at any rate not unless they were actuated by malice. The form of remedy varies. In the case of statutory tribunals which depend for their jurisdiction on a statute, it is an actionable wrong for them to usurp more than the statute gives them. In the case of domestic tribunals which depend for their jurisdiction on a contract, express or implied, it is an actionable breach of contract for them to usurp more than the contract gives them. The reason in each case is the same, namely, an express grant of jurisdiction carries with it an implied prohibition of other jurisdiction. SIR MATTHEW HALE, C.B., put it very succinctly in *Terry v. Huntington* (7), a case of a statutory tribunal. The commissioners of excise had adjudged some low wines to be strong wines. In so doing they went outside their jurisdiction and were held liable in damages. SIR MATTHEW HALE said (Hard. 483):

" . . . the matter here is not within their jurisdiction, which is a stinted, limited jurisdiction; and that implies a negative, *viz.*, that they shall not proceed at all in other cases. But if they should commit a mistake in a thing that were within their power, that would not be examinable here."

Let me first make good the principle in the case of statutory tribunals. If they fine or imprison a man without any jurisdiction to do so, their conduct is an actionable wrong. No matter that they act in good faith, nevertheless if, on the facts as known to them, they have no jurisdiction in law to deal with the case at all—as distinct from acting erroneously within their jurisdiction—they are liable in damages: see *Marshalsea Case* (8); *Gwinne v. Poole* (9); *Calder v. Halket* (10); BULLEN & LEAKE'S PLEADING AND PRACTICE, 3rd edn., p. 345. A mistake of law does not excuse them: *Houlden v. Smith* (11). The remedy in such cases is, as a rule, one of the recognised actions of tort. If an inferior tribunal imprisons a man without any jurisdiction in that behalf, the members of the tribunal are liable in trespass for false imprisonment: *Bonham's Case* (12), where the College of Physicians had imprisoned Dr. Bonham. If they levy a fine on his goods without any jurisdiction they are liable in trespass to goods or trover: *Terry v. Huntington* (7) (commissioners of excise levying a fine); *Nichols v. Walker & Carter* (13) (justices distraining for rates). But it sometimes is not an action of tort, but an action for restitution. If a man who is unlawfully fined should pay the fine under threat of distress without waiting for his goods to be taken, he could recover the amount in an action for money had and received. These cases all show that an invalid usurpation of jurisdiction which causes damage is itself a wrong. The form of action depends on the nature of the damage. But suppose the damage takes a different form from the old forms of fine or imprisonment. Suppose it takes the form of depriving a man of his livelihood, as by disqualifying him from driving a motor car, does that mean he has no remedy? It would be strange if the law could not adapt its remedies to such

situation where the wrong is the same but only the damage is different. SIR RAYMOND SALMOND thought it could, and he is no mean authority. He said in SALMOND ON THE LAW OF TORTS, 10th ed., p. 616 :

"A judge of an inferior court is civilly liable for an act done by him in excess of his jurisdiction and in the nature of a trespass against the person or property of the plaintiff or otherwise a cause of damage to him."

Let me next make good the principle in the case of domestic tribunals. The case is the celebrated case where the Visitor of Exeter College, Oxford, dismissed the rector of the college from his post as rector for being contumacious: *Wips v. Bury* (14). The Court of King's Bench presided over by HOLT, C.J., applied the self-same principles as in the case of statutory tribunals. There was a difference of opinion as to the application of the principles to that case, but there is no difference as to the principles themselves. They were well stated by WELLS, B., in his elaborate judgment in *Gwinne v. Poole* (9) (2 Lut. 1566):

"Where the founder of an eleemosynary foundation appoints a visitor and limits his jurisdiction by rules and regulations, then if the visitor in any sentence exceeds those rules, an action lies against him, as was agreed not only by all the justices but also by the Chief Justice himself [HOLT, C.J.] in the case of Exeter College; but it would be otherwise if he made a mistake in a thing within his power . . ."

The cases on proprietary clubs have proceeded on the same principle. The rules of those clubs often contain express provisions giving the committee jurisdiction to expel a member in certain circumstances. The courts have held that there is an implied contract between the proprietor and each member that the committee will not act outside its jurisdiction. Accordingly, if the committee act without jurisdiction or without giving proper notice (which means no jurisdiction), the proprietor is liable in damages. Even if the member has suffered no damage in fact, he is at least entitled to nominal damages for the breach: see *Ord v. Wells* (15); *Young v. Ladies' Imperial Club* (16).

There is no reason why the same principle should not apply to voluntary associations. If the committee of a voluntary association only gain jurisdiction by reason of a contract, express or implied, to give it to them, there surely must be an implied a contract that they will not take away a member's property or deprive him of his livelihood when they know, or have the means of knowing, that they have no jurisdiction in that behalf. The only English case in which we have found the matter discussed is *Weinberger v. Inglis* (No. 2) (2), where the committee of the Stock Exchange—a voluntary association—refused to re-elect a member because he was of German birth. The rules and regulations of the Stock Exchange contained a provision for members to be re-elected each year. Both LORD BIRKENHEAD, L.C., and BANKES, L.J., were prepared to hold that it carried with it, not only a positive implication that his re-election was to be properly considered, but also the negative implication that he was not to be elected without proper notice of the charge. LORD BIRKENHEAD, L.C., said [1919] A.C. 616):

" . . . if I took the view that the appellant was condemned upon grounds never brought to his notice, I should not assent to the legality of this course, unless compelled by authority."

I agree with SIR RAYMOND EVERSHED, M.R., that that case does not take us very far, but there are two Scottish cases which, so I think, support the view we have presented. The first is *McMillan v. Free Church of Scotland* (3). There a minister of the Free Church—which is a voluntary association exercising a consensual jurisdiction over its members—was suspended because he was said on one occasion to have drunk a little too much and, in his consequent excitement, seduced a married woman. He challenged the decision in the courts. Thereupon, without any notice to him, the assembly deprived him of his office as a minister.

He alleged that this action of the members of the assembly was *ultra vires* and brought a claim for damages. The members demurred to the claim on the ground that it disclosed no cause of action, but the Court of Session held that the claim was competent on the ground that an *ultra vires* usurpation of jurisdiction was a breach of contract. They did not decide whether there was a breach, because that depended on the scope of the agreement and would have to be decided at the trial, but they were clearly of opinion that, unless the contract conferred on the assembly jurisdiction to do what they did, they were liable in damages. The Lord President (LORD M'NEILL) said (23 Dunl. (Ct. of Sess.) 1330):

" . . . he [the Minister] says that, by a violation of the contract, and not by the exercise of the powers which he committed to these parties, they have disqualified and disabled him from fulfilling certain duties, and that they have inflicted serious wrong upon him by injuring his character, and destroying his usefulness and his ability in future to do good for himself. Well, I cannot doubt that damages may be claimed, if that is the result of a departure from the agreement between the parties, and a violation of the conditions of the contract which existed between them."

LORD DEAS said (*ibid.*, 1348):

" The parties who did the wrong—if a wrong was done—were all the individual members of the assembly, present at the meetings, who voted for, or tacitly adopted the resolutions or sentences complained of. Every one of these members became individually liable to make good the consequences incurred, if consequences were incurred at all, to the extent of his means and fortune."

That important decision was approved by LORD CHELMSFORD, L.C., in the House of Lords in *Forbes v. Eden* (17), and he accepted as correct (L.R. 1 Sc. & Div. 576) a principle stated by the Lord Justice-Clerk (LORD INGLIS) in that case wide enough to embrace all cases where a person is deprived of his livelihood by an *ultra vires* usurpation of jurisdiction. It is this:

" The possession of a particular status, meaning by that term the capacity to perform certain functions, or to hold certain offices, is a thing which the law will recognise as a patrimonial interest; and no one can be deprived of its possession by the unauthorised or illegal act of another without having a legal remedy."

In my opinion, that principle is as much the law of England as of Scotland. The right of a man to work is just as important to him as, if not more important than, his rights of property. We see in our day many powerful associations which exercise great powers over the rights of their members to work. They have a monopoly in important fields of human activity. A wrongful dismissal by them of a member from his livelihood is just as damaging, indeed more damaging, than a wrongful dismissal by an employer of his servant, and I see no reason why it should not give rise to a cause of action. If there is no contract between the parties, the action must be laid in conspiracy, in which case a wrongful intention must be proved, though it need not be a malevolent intent. A spirit of revenge for previous real or fancied injury will do: see *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (18) ([1942] 1 All E.R. 173) in which LORD PORTER cited a *dictum* of PHILLIMORE, J., in *Boots v. Grundy* (19) (82 L.T. 773). But if, as here, there is a contract between the parties, there is no need to embark on the difficult question of wrongful intent. The only question is what is the contract, and whether there has been a breach of it. It would, I think, be going too far to say that the members of a domestic tribunal promise absolutely that they will not exceed their jurisdiction, but I do think that they promise impliedly that they will not exceed it when they know, or have the means of knowing, that they have no jurisdiction in that behalf. I see no reason why the members of a domestic tribunal should have any greater protection than the members of

statutory tribunal, and if the implication which I have suggested is adopted, it will have the same protection, no more and no less.

Applying these principles, it seems quite clear that the committee in the present case had the means of knowing that they had no jurisdiction. They had the same means of knowing that the plaintiff had. They knew the facts on which their jurisdiction was based as well as he did. Their mistake was a mistake of fact in thinking that they could remove a man from the register without any practical or customary jurisdiction in that behalf. In making this mistake, they relied on Mr. Platt's advice, but that does not excuse them from their responsibility to the plaintiff. A mistake of law does not excuse a statutory tribunal: *Houlden v. Smith* (11), and it should not excuse a domestic tribunal. There remains, however, the question whether this way of putting the claim is sufficiently pleaded. No contract is alleged between the committee and the plaintiff. I confess that I feel much difficulty on this score, which is increased by the fact that SIR RAYMOND EVERSHED, M.R., and MORRIS, L.J., think the claim is not sufficiently pleaded. If this had been an ordinary case of contract, I could be prepared to regard the omission as fatal. But this is not an ordinary contract case. It is a claim in an uncharted area on the borderland of contract and tort. I can quite understand a pleader being perplexed as to the right way of putting the claim, and, in the special circumstances, I think it is one of the cases where he would be fully justified in stating the material facts without attempting to commit himself to the precise legal category in which they fall. It is all that the modern rules of pleading require: see R.S.C., Ord. 19, r. 4. I think that here the material facts are sufficiently stated. The details are given in the statement of claim states that "The corn porters' committee was authorised to pass any of the said resolutions," and in the prayer damages claimed "for the wrongful removal of the plaintiff's name from the register of corn porters." Those two sentences give the gist of the case. I think they are sufficient. We all agree that the facts are sufficiently stated to enable us to make a declaration which is founded on contract, and I think we should entertain the claim for damages on that footing also, despite the lack of formulation in the statement of claim. I think, therefore, that damages should be assessed against the members of the committee for their *ultra vires* action in removing the plaintiff's name from the register. Only two of them were named as defendants, but the claim was said to be made against them on their own behalf and on behalf of the other members of the committee. Without a representation order, however, the action would not be good against the others.

What is the position of Mr. Platt? He was not a member of the committee and is not liable for the breach of contract as such. But he, undoubtedly, induced the committee to commit the breach. He knew that the plaintiff was challenging the jurisdiction of the committee, but, nevertheless, he advised them to proceed with the matter whereas, as the judge found, he ought to have advised them that the committee had no jurisdiction and, if it had not been his own case, he would have done so. The judge clearly thought that, if Mr. Platt had done so, the committee would not have proceeded with the case. The judge said of them:

"All I can say, having seen them, is that I would be surprised to learn that this was their own unaided independent decision and course of conduct."

The judge acquitted Mr. Platt of doing anything from a wrong motive, but he found it quite clear that he did it from a mistaken motive. On those facts I think that Mr. Platt is liable in damages, equally with the members of the committee. The law is that a person who knowingly induces another to commit a breach of contract is liable in damages, even though he is not actuated by any wrongful motive: *South Wales Miners' Federation v. Glamorgan Coal Co.* (20); unless he can show a just cause: *Brimelow v. Casson* (21). On the judge's findings Mr. Platt had no just cause and is, therefore, liable. Here, again, the statement of claim does

not frame the claim in its correct legal form, but the material facts are stated and that is sufficient.

Apart from the remedy in damages, has the plaintiff any other remedy? He is, no doubt, entitled to a declaration that the resolution of Sept. 24, 1947, was invalid, but is he entitled to an injunction? In cases of this kind the remedy of an injunction is used very sparingly, the reason being that the court does not use it to enforce personal relations. It will not force men to work with another man if they do not wish to do so. It will not force club members to associate with one whom they have tried to expel. It will, as a rule, only interfere by injunction in these cases to protect a right of property, as, for instance, the interest of a club member in club property. But the corn porters' committee have no property and no injunction will lie against them on that ground. An injunction might, perhaps, have gone if they had insisted that the plaintiff was not on the corn porters' register, but it appears that, since the judgment of the court below, he has, in fact, been restored to the register without conditions, so there is no need for an injunction on that score.

The plaintiff complains that he has not been restored to his position as a ganger, but this court cannot help him there. No ganger is appointed except with the approval of the branch of the trade union. The branch have refused to approve the reinstatement of the plaintiff as a ganger and this court cannot compel them to do so. I agree with the judge that no cause of action was shown against the trade union. Indeed, in the result, I agree with the judge in nearly everything. The only substantial variation I would make in his order would be to hold that the members of the committee and Mr. Platt are liable in damages. It was Mr. Platt's mistaken action which caused the plaintiff to be removed from the corn porters' register. Mr. Platt is the person chiefly responsible, and he should take the consequences. The union is not responsible for his action because it cannot be made liable in tort. It should also be made clear that the corn porters' committee is not a committee of the union nor subject to the area committee. I would, therefore, be in favour of allowing the appeal and dismissing the cross-appeal.

MORRIS, L.J.: The plaintiff by his notice of appeal claims that the judgment of the learned judge should be varied in two respects: (i) so that the plaintiff should recover damages against the first four defendants in the action and against the Committee of Registered Overside Corn Porters, and (ii) so that an injunction should be granted against the first four defendants and against the above-named committee restraining them from continuing to act on certain resolutions declared to be in whole or in part *ultra vires*. By their cross-appeal the first four defendants claim that the declarations made by the learned judge should be set aside. They further ask that in the respects in which various causes of action against them were dismissed at the trial there should be a formal recording of this in the judgment.

[HIS LORDSHIP held, on the evidence, that the resolution of Sept. 24, 1947, was *ultra vires*, and continued:] The notice of appeal invites the granting of an injunction against the first four defendants and against the corn porters' committee. The injunction sought is one to restrain the four defendants and the committee from continuing to act on the resolution of Sept. 24, 1947, declared void by the learned judge and the part declared void of the resolution of July 12, 1948. It is not said that the learned judge has refused to make any injunction which he should have made. But apart from this consideration it is not shown that the defendants are continuing to act on any void resolution. There is no substance in the appeal in regard to this matter.

I now pass to consider what is, perhaps, the most difficult part of the appeal, that is, the claim to damages. Damages cannot be awarded against the committee. It is necessary to consider whether damages should have been awarded against (a) the union, (b) Mr. Platt, and (c) Mr. Sullivan and Mr. Isett. As

gards the union, it is manifest that the claims for damages for conspiracy, for libel and for procuring the wrongful dismissal of the plaintiff were destined to fail. A claim was formulated in the statement of claim for damages for breach of contract. It was said that there was an undertaking and promise made on behalf of the union that, if the plaintiff paid the sums which, on Sept. 18, 1947, had been ordered to pay he would then be reinstated in his former work. The evidence in support of any such claim was, however, wholly lacking. There was also a claim for damages for the wrongful removal of the plaintiff's name from the register. But it was not in any way shown that the union removed the name from the register. I am in agreement with the conclusions on this matter of the learned judge who said:

"the union has done nothing wrong. On the contrary, they seem to have gone out of their way to try and do the right thing. Moreover, the union is not directly responsible for the corn porters' list or anything to do with it."

Many claims were asserted against Mr. Platt. There were claims for damages for slander and libel. They soon disappeared from the case. Mr. Platt was one against whom damages for conspiracy to injure the plaintiff were claimed. The learned judge found that there was no such conspiracy. He regarded the claim as "quite hopeless." He negatived any assertion that there was malice in Mr. Platt. I see no reason to differ from any of these conclusions. Nor do I differ from the view that the claim for procuring the wrongful dismissal of the plaintiff was "quite hopeless." There remains the claim for damages for the wrongful removal of the plaintiff's name from the register. The learned judge said: "I cannot see how that is Mr. Platt's pigeon." I entirely agree. Mr. Platt was the convening officer of the corn porters' committee. He sat with them and advised them. He did not vote. Even if it were thought that he had influence with the committee it cannot be said that he had responsibility for their decision. Nor can it be said that the members were mere automata acting under his direction. Nor has this been found. Nor, in my judgment, could it have been found. The learned judge found that Mr. Platt gave wrong advice to the corn porters' committee on the subject of their jurisdiction and attributed this to the fact that, being personally concerned and being angry, he was not able to take a detached view. But beyond this the learned judge expressly exonerated Mr. Platt.

There remains for consideration the claim for damages against the first two defendants, who were two of the members of the corn porters' committee. If damages could be awarded, the matter would have to go back for assessment. Any questions would arise for consideration. It would have to be decided whether it was reasonable or unreasonable, in all the circumstances, for the plaintiff to have abstained from earning his living as a dockworker and so to have minimised his loss pending a determination of the merits of his complaints. It would also have to be decided whether some proceedings in the courts might have been earlier started or more expeditiously pursued. As to the first two defendants, there were claims for damages for conspiracy, for libel, and for procuring the wrongful dismissal of the plaintiff. All those claims either failed or were abandoned. In my judgment, they rightly failed. It was further concluded that there could and should be an award of damages "for the wrongful removal of the plaintiff's name from the register." It was pleaded that the members of the corn porters' committee acted maliciously and in bad faith. The attack on those lines failed completely. The learned judge expressed his views as follows:

"I am quite satisfied from all the evidence that in the circumstances those who were present at that meeting of the corn porters' committee embarked on this inquiry and carried it out honestly, desiring to protect the union official and desirous, I am sure, of doing justice."

Later, when considering costs, he said:

"I find great difficulty in ordering costs against two members of the corn porters' committee, who for some reason have been singled out, and whose *bona fides* I think are not in question."

The pleadings do not formulate the legal basis for asserting a claim for damages against the first two defendants apart from the allegation of conspiracy. In argument it was urged in general terms that these defendants had acted wrongly and should pay damages. Unless accepted principle or clear authority required the award of damages against these defendants, then the claim should fail. If in circumstances such as those now being considered members of a committee who act conscientiously and honestly, but who make mistakes, are to be liable in damages, new perils will be added to certain forms of public service. If this matter is approached on the basis that the categories of tort are not closed: see *per* LORD MACMILLAN in *M'Alister (or Donoghue) v. Stevenson* (22) ([1932] A.C. 619), and that established principles are of more consequence than names or labels, yet I cannot see, on the facts as found in the present case, any warrant for awarding damages against these two defendants on the basis that they committed some actionable civil wrong. Very different considerations would have arisen if they had acted maliciously or if the ingredients of an actionable conspiracy had been present.

Counsel for the defendants submitted to us that, just as in the first instance the corn porters' committee might for no reason or for a bad reason refuse to admit a person to the circle of corn porters, so they might for no reason or for a bad reason exclude someone from the circle. Neat and attractive as this argument is, I cannot believe it to be right. It might, of course, be shown in some particular case that arbitrary and dictatorial powers were expressly vested in a committee. That was not shown here. When a man is selected to become a corn porter he becomes a member of a privileged group whose numbers are limited. The group does not own property, but to be a member of the group involves being able to earn a living in a special way. Membership is much desired and is of definite benefit because it enables a man to qualify for particular rewards for labour. Admission to the group involves either by express statement or by implication that the rules and the practices of the corn porters will be observed. Because of all these circumstances the court will, in my judgment, intervene, either by granting an injunction or by making a declaration, if someone is being excluded from the group in defiance of the rules or of the principles often referred to as those of "natural justice" and discussed in *Maclean v. Workers' Union* (1). I do not find it necessary in the present case to consider fully the basis of the intervention by the court. In *Rigby v. Connol* (23) SIR GEORGE JESSEL, M.R., expressed the view that the jurisdiction of the court to interfere at the instance of a member of a society to prevent his being improperly expelled therefrom rested on the right of property vested in the member. FLETCHER MOULTON, L.J., in *Osborne v. Amalgamated Society of Railway Servants* (24), expressed the view ([1911] 1 Ch. 562) that where a member of a voluntary association was being improperly expelled the court would not limit its intervention to cases where the property of which the member was, as a result, being unjustly deprived consisted of a beneficial interest in land or chattels. He said that there were many rights which in such a sense could not be called rights of property which, nevertheless, the law would protect. As an instance he said that there would be protection of membership of an association of men subscribing for a benevolent purpose where the administration would be under the control of the association even though the members had no beneficial interest in the funds. On the basis discussed by FLETCHER MOULTON, L.J., the court is, in my judgment, on the facts of the present case entitled to intervene. No need arises to explore whether the jurisdiction of the court could alternatively be founded on some contractual

is. For a valuable examination of this topic, see article by Mr. DENNIS LLOYD THE MODERN LAW REVIEW, vol. 13, p. 281.

Before I pass to consider whether any claim for damages for breach of contract be established against any of the defendants, it may be helpful to consider whether any assistance is derived by examining the position of persons exercising judicial functions in a court who exceed their jurisdiction. In general it may be said that the law gives protection from civil liability to persons exercising judicial functions in a court in respect of anything done or said by them in their judicial capacity provided that the court is acting within its jurisdiction. In some cases an issue arises as to jurisdiction and the court may have to arrive at a conclusion in regard to certain facts in order to decide whether it has jurisdiction. In such cases, even if jurisdiction is wrongly exercised, there may still be protection from civil liability unless the court knew or had the means of knowing of certain facts which put the matter outside the court's jurisdiction. *Calder v. Halket* (10) PARKE, B., said (3 Moo. P.C.C. 77):

" . . . and it is well settled that a judge of a court of record in England, with limited jurisdiction, or a justice of the peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction."

It is to be noted, therefore, that, in given conditions, the law affords protection to persons exercising judicial functions. As this topic is only introduced in order to see whether assistance by analogy can be derived it is not necessary to do more than to state the matter in general terms. But the giving of protection is only necessary where there is something from which to protect. If a man's goods are seized or if a man is imprisoned or if defamatory words are spoken or written to him there may be protection from civil liability for the persons responsible for the seizure of goods or the imprisonment or the defamation provided that the conditions for the protection exist. In *Calder v. Halket* (10) the claim presented was in trespass claiming damages for arrest and false imprisonment. If an act is done which in ordinary circumstances would amount to a civil wrong it may be justified as having been done pursuant to some statutory authority. In *Terry v. Huntington* (7) the question was whether the Commissioners of Excise had acted within their jurisdiction as laid down by statute when they levied a warrant on goods. The claim brought was in an action for trover and conversion of goods. It was clear that, if the commissioners had no authority to do so, then they would be liable for what they did to the plaintiff's goods. Similarly, in *Nichols v. Walker & Carter* (13), the question was whether justices of the peace had acted within their jurisdiction in assessing a poor rate. As it was held that they had not, there was no protection for officers who executed a warrant to distrain, and the plaintiff succeeded in an action for trespass based on the entry to his house and the taking of his goods.

I do not consider that the actions of the members of the corn porters' committee can be judged on the footing that they were persons exercising judicial functions in a court. Had this been possible, then the question would arise whether they had knowledge or the means of knowledge of their absence of jurisdiction. In a difficult and, perhaps, border-line case they followed the advice of the man whose function it was to give advice. As, however, the members of the corn porters' committee cannot claim any protection on the basis of being persons exercising judicial functions in a court it is, in my judgment, plain that they have no protection if, because they acted beyond their powers, they did some actionable civil wrong. I cannot see that they did. They caused the plaintiff to be excluded from their group and his name to be removed from a list which was either real or notional. Conspiracy and defamation are negatived. I can find no conduct amounting in law to an actionable civil wrong.

I pass, therefore, to consider whether the members of the corn porters' committee are liable for any breach of contract. I will approach the matter as though it were a claim against all the members of the committee. One of the great difficulties in considering this aspect of the case is that there has been no formulation of the terms of any alleged contract. There is no suggestion that there was an express contract. It is hardly appropriate that an appellate court should be left to grope for implied terms when none have been specified, but it is only right to record that counsel for the plaintiff based his claim for damages mainly, if not entirely, in tort. When someone is admitted as a corn porter he becomes as regards other corn porters in a position comparable (though with certain important differences) to that of a member of an unincorporated members' club. No case was cited to us where it was sought to hold members of the committee of a members' club liable in damages because they had acted beyond their jurisdiction in deciding to expel a member. The position may be different if a member is wrongly expelled from a proprietary club. In such a case it may be that the proprietor may be made liable for damages for breach of contract: see *Baird v. Wells* (15) and *Young v. Ladies' Imperial Club* (16). In the Scottish case of *McMillan v. Free Church of Scotland* (3) the decision was that the lord ordinary had been right in refusing to dismiss the action and that investigation should proceed into whether there was a contract, and, if so, what were its terms. In the present case it is not suggested that there was any express contract between the members of the committee and the various corn porters. If, therefore, some implied contract is to be extracted, it is clear that its terms must not go beyond those which *must* have been of common acceptance. It is not a question of deciding what terms the court would deem desirable or appropriate. I cannot think that the corn porters who became members of the committee warranted that they would not do anything which was beyond their jurisdiction, nor that they undertook not to make mistakes. If members of the committee were asked about this matter I cannot conceive that any would assent to any view which involved that they had undertaken to do more than to apply their minds honestly and conscientiously to any problem that arose. On the facts of the present case, in my judgment, it was not shown that the first two defendants broke any contract with the plaintiff when they concurred in the decision reached on Sept. 24, 1947. As it was not shown that they committed any actionable wrong, the claim for damages against them, in my judgment, rightly failed.

Appeal and cross-appeal dismissed.

Solicitors: *Robinson & Bradley* (for the plaintiff); *Pattinson & Brewer* (for the defendants).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

REED v. GRAY.

CHANCERY DIVISION (Roxburgh, J.), December 18, 19, 20, 21, 1951.]

Issues—Taxation—Solicitor and client—Standard to be adopted—Solicitor-plaintiff consulting London agents—R.S.C., Ord. 65, r. 27 (29).

A solicitor brought an action for specific performance of a contract to sell to him certain land. By his defence the defendant alleged that the sale was not genuine, but was the outcome of an unlawful conspiracy to defraud and deprive him of the real value of the premises. The case came to trial, but the defence collapsed, and the court ordered that the costs of the plaintiff be referred to the taxing master to tax as between solicitor and client.

HELD: under the order for taxation it was the duty of the taxing master (as on a taxation as between party and party) to adopt as his norm or standard the directions in R.S.C., Ord. 65, r. 27 (29), but at the same time to make more generous allowances than he would in a taxation as between party and party; there was no basis for the view that, under the order made, the taxing master should tax the costs as between party and party, allowing on a more generous scale only the costs of certain letters and attendances; but the order could not be construed as an order for taxation as between solicitor and own client.

Dictum of LORD HANWORTH, M.R., in Frankenburg v. Famous Lasky Film Service, Ltd. ([1931] 1 Ch. 436), applied.

Giles v. Randall ([1915] 1 K.B. 290), applied and explained.

Goodwin v. Storrar ([1947] 1 All E.R. 203), distinguished.

The plaintiff, being a solicitor practising in the country, acted for himself in the proceedings, but employed London agents. In the course of the taxation the master excluded the amounts claimed for consulting and instructing the agents and for their attendance on the plaintiff.

HELD: although a solicitor could not claim for consulting, instructing and attendance on himself, he could incur costs for such work performed by his London agents, and, therefore, such costs were allowable.

Issues—Witness fee—Married woman not gainfully employed.

The plaintiff's wife, who did not follow a gainful occupation but performed domestic duties, was a witness for the plaintiff and claimed a witness fee. The master allowed a nominal sum only.

HELD: having regard to her absence from her domestic duties, the witness was entitled to more than the amount of her disbursements and should receive a fee of more than a nominal sum.

AS TO AMOUNT AND ALLOWANCE OF COSTS AS BETWEEN SOLICITOR AND CLIENT, see HALSBURY, Hailsham Edn., Vol. 26, pp. 100-103, paras. 189-193; **FOR CASES,** see DIGEST, Practice, pp. 899, 900, Nos. 4397-4402.

AS REFERRED TO:

- (1) *Andrews v. Barnes*, (1888), 39 Ch.D. 133; 57 L.J.Ch. 694; 58 L.T. 748; 53 J.P. 4; Digest, Practice, 899, 4398.
- (2) *Giles v. Randall*, [1915] 1 K.B. 290; 84 L.J.K.B. 786; 112 L.T. 271; Digest, Practice, 936, 4756.
- (3) *Frankenburg v. Famous Lasky Film Service, Ltd.*, [1931] 1 Ch. 428; 100 L.J.K.B. 187; 144 L.T. 534; Digest, Practice, 948, 4878.
- (4) *Palmer v. Walesby*, (1868), 3 Ch. App. 732; 37 L.J.Ch. 612; 19 L.T. 1; 33 Digest 232, 1450.
- (5) *Goodwin v. Storrar*, [1947] 1 All E.R. 203; [1947] K.B. 457; [1947] L.J.R. 1013; 2nd Digest Supp.
- (6) *London Scottish Benefit Society v. Chorley*, (1884), 13 Q.B.D. 872; 53 L.J.Q.B. 551; 51 L.T. 100; 42 Digest 253, 2844.

COMMISSIONS to review the taxation of the costs of an action.

The relevant facts appear in the judgment and are summarised in the headnote. *Russell, K.C.*, and *A. F. M. Berkeley* for the plaintiff.
F. B. Alcock for the defendant.

ROXBURGH, J.: The plaintiff, a solicitor practising in the north of England, brought this action for specific performance of a contract dated Nov. 8, 1949, made between the defendant, of the one part, and himself, of the other part, for the sale by the defendant to the plaintiff of No. 18 Norfolk Street, Sunderland, at the price of £1,600. The defence as pleaded was

"that the purported contract of sale of the said premises was not a genuine or real sale by auction resulting in a contract binding upon the defendant, but the outcome of an unlawful conspiracy or arrangement between the plaintiff, one L. W. Evans, L. W. Evans (Contractors), Ltd., and one Young, the auctioneer, or some of them, and improper and fraudulent acts on the part of them or some of them to bring about the sale by the defendant of his said premises at a grossly insufficient price and much below their true value and thus to defraud and deprive the defendant of the real value of the premises and to gain some undue advantage for themselves or some or one of them. In the circumstances the said purported contract was and is not enforceable and was and is void and/or in the alternative is not one in respect of which this Honourable Court of Equity should in the exercise of its discretion grant an order for specific performance."

The case came to trial, was part heard, and then the defence collapsed. Having regard to all the circumstances, I thought that, in the exercise of the discretion which I considered myself to have on the authority of *Andrews v. Barnes* (1), I ought to award the plaintiff costs as between solicitor and client, and, accordingly, I made, on Nov. 16, 1950, an order that it be referred to the taxing master to tax as between solicitor and client the costs of the plaintiff of this action other than certain costs.

What is the true construction of that order? On this point *Giles v. Randall* (2) is the leading case and R.S.C., Ord. 65, r. 27 (29), is the relevant sub-rule. Order 65, r. 27 (29) provides:

"On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

In *Giles v. Randall* (2) the plaintiff brought an action against the defendant to recover damages for breach of promise of marriage. When the case was in the day's list for hearing terms were agreed and indorsed on counsel's briefs "that judgment should be entered for the plaintiff for £500 with costs as between solicitor and client to be taxed (if necessary)," and, accordingly, the judgment as drawn up stated that "it is adjudged that the plaintiff recover against the defendant £500 and her costs as between solicitor and client to be taxed (if necessary)." The plaintiff's bill of costs was taxed, and the taxing master disallowed or reduced in amount a large number of items therein, such as charges for instructions for briefs and counsel's fees. The plaintiff carried in objections to the disallowances before the taxing master, which, so far as material, were as follows:

"The plaintiff objects generally to the taxation and to the disallowance of the items hereinafter mentioned on the grounds: (1) Such taxation

was conducted upon the basis of a party and party taxation. (2) It ought to have been conducted upon the basis of a taxation as between solicitor and client where the costs are to be paid by the client, because the terms of settlement of the action were that the plaintiff was to receive £500 damages clear, and all the costs for which she was liable to her solicitor were to be paid by the defendant."

The taxing master in his answer thereto (so far as material) said:

"It is well settled that there are various forms of taxation as between solicitor and client. No. 1. Where the costs are payable by the client to his solicitor or where the costs are payable out of a fund belonging entirely to the party. No. 2. Where the costs are payable out of a general or common fund. No. 3. Where the costs are payable out of a fund which belongs to other parties and in which the party has no interest or where the costs are payable by one party to another. The taxation in the case of No. 3, which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed."

Those last words, which, it is to be observed, are derived from the taxing master's answers to objections and not from any judgment of any member of the court, are the linchpin of the case which I am now trying, and it is also to be observed that they purport, not to set out a norm or standard of taxation, but to state in summary form the result of a taxation on what the taxing master calls No. 3 basis. I desire to emphasise that. I cannot believe that the taxing master in that case was ignorant of r. 27 (29), or failed to realise that that was the sub-rule which supplied the norm or standard for taxations as between solicitor and client. I think he was merely stating what in his experience was the general effect of a taxation so conducted. It is noted that he used the words "in effect," and he does not say "gives no more than." He says "gives little more than." BUCKLEY, L.J., adopts the classification into three classes indicated by the taxing master. He then says ([1915] 1 K.B. 295):

"A practice has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale. In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor. That distinction is too firmly established for this court to interfere with it, though it may be a matter proper to be considered by the Rule Committee. I have no doubt that litigants who stipulate for and by agreement are to receive costs as between solicitor and client often intend to get an indemnity in respect of costs. The taxing master has taxed the costs upon the footing that the latter part of r. 27 (29) of Ord. 65 applies."

I desire to emphasise that. That reinforces my conclusion that the taxing master knew perfectly well that it was that sub-rule which supplied the norm or standard for taxation, and that the paragraph to which I have referred was not intended by him to be substituted for the norm or standard, but was intended to be a broad summary of the results as he had experienced them. BUCKLEY, J., proceeds to discuss the sub-rule and then he says (*ibid.*, 296):

"The latter part [of the sub-rule] says that, except in one particular case, certain costs which were formerly to be disallowed are still to be disallowed. The excepted case is that of taxation of costs as between a solicitor and his own client. This part of the sub-rule in effect provides that as between solicitor and own client those costs may be allowed, but that in all other cases they shall not. The other cases include taxation as between solicitor and client as distinguished from taxation as between solicitor and own

client. Accordingly upon such a taxation as this the costs described in the latter part of sub-r. 29 are not to be allowed. The taxing master in this case has proceeded upon that footing. He says that 'the taxation in the case of No. 3, which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed.' That is not very well expressed. 'Necessary letters to and attendances on the client' are allowed as between party and party; the letters and attendances there referred to must be letters and attendances beyond those that would be allowed as between party and party. The taxing master has taxed this bill of costs on the footing that the latter part of sub-r. 29 applies. For the reasons I have given I think that he was right. Except upon a taxation as between solicitor and own client such costs as there mentioned are not to be allowed. That is the only question of principle argued before us."

PICKFORD, L.J., agreed. He regretted that he felt bound to affirm the decision, and said that logically costs as between solicitor and client could mean only one thing, *viz.*, such costs as were properly chargeable between a solicitor and his client and were properly payable by the client to his solicitor, but he agreed that the sub-rule did apply to a solicitor and client taxation. He made no reference to the paragraph in the taxing master's answers to which I have referred.

That case, in my judgment, decided one thing quite clearly, *i.e.*, that the latter part of the sub-rule applies to a solicitor and client taxation with the inevitable corollary that a solicitor and client taxation cannot be assimilated to, or cannot be made identical with, a solicitor and own client taxation. In my judgment, it decided nothing else. Counsel for the defendant suggested that, as BUCKLEY, L.J., referred to the particular paragraph in the taxing master's answer and criticised it in one respect only, I ought to infer that he impliedly approved it in all other respects. First, I do not think that it was ever intended to be a pronouncement of a norm or standard. Secondly, I do not think that BUCKLEY, L.J., did approve it in all other respects, because it is not really consistent with what he himself has said. He said that in the former case, *i.e.*, the solicitor and client taxation, the taxation is substantially a party and party taxation on a more generous scale. That must be so, because the whole of sub-r. (29) applies equally to both a party and party taxation and to a solicitor and client taxation. Therefore, the characteristics of the items which can properly be allowed must be the same in both classes of taxation. The only scope for difference is that the allowances should be on a more generous scale in one class of taxation than in the other. There is, in my judgment, no possible ground for thinking that BUCKLEY, L.J., thought that the only things that could be treated more generously were certain letters and attendances to the exclusion, for example, of counsel's fees.

Take, for example, item No. 4 in the case now before me:

"Mar. 2, 1950. Part of counsel's fee to settle affidavit in support of application under Ord. 14A. Fee claimed £3 5s. 6d. Fee allowed £2 4s. 6d."

There is no doubt whatever that the fee claimed was within the permissible category whether the taxation was on a party and party basis or on a solicitor and client basis. If the principle of a solicitor and client taxation is that more generous allowances should be given than in the case of a party and party taxation, why should that principle not extend to this particular item? According to BUCKLEY, L.J., it does. Accordingly, if £2 4s. 6d. was what would have been allowed on a party and party basis—that is merely a hypothesis—it may well be that £3 5s. 6d. is what would be allowed on a solicitor and client basis. I wish to point out the difference. If BUCKLEY, L.J.'s, definition is accepted, that is the position, but, if the final words of the taxing master in the passage I have read in *Giles v. Randall* (2) is accepted, that is not the position, because

is not an attendance or a letter, and, therefore, according to that view, there would be substantially no difference, on this item between a party and party taxation and solicitor and client taxation. For my part, I do not think that BUCKLEY, L.J., by his reference to this particular passage and his criticism of it in one respect only, intended to imply that it was to be read as a limitation on the generality of his own phrase, which is

“that a solicitor and client taxation is substantially a party and party taxation on a more generous basis.”

Contrary to my view, BUCKLEY, L.J., did intend to make that implication, as was plainly *obiter dictum*. He himself says that the only point of principle decided in the case was whether or not the sub-rule applied to a solicitor and client taxation. This point had no relevance to the decision of that point of principle and PICKFORD, L.J., does not refer to the taxing master's words at all. Therefore, I am not prepared to accept the view that those words have been put forward by anybody, by the taxing master in that case or by the court, as a norm or standard for a solicitor and client taxation.

In my judgment, the duty of a taxing master is to approach both classes of taxation, both party and party and solicitor and client taxation, with his mind to the sub-rule, which is his proper norm or standard, but, at the same time, he is to make more generous allowances in taxing as between solicitor and client taxation, though the sub-rule prevents him from fully achieving the intention clearly expressed by the direction in the order *i.e.*, to allow all that a solicitor can properly claim against a client, it is his duty to carry out that intention so far as permissible.

In his reply, counsel for the plaintiff referred me to a passage in *Frankenburg Famous Lasky Film Service, Ltd.* (3), in the Court of Appeal, which appears to me to embody the same principle. LORD HANWORTH, M.R., said ([1931] Ch. 436):

“... the difference between party and party and solicitor and client costs is undoubtedly this, that the solicitor and client costs are intended to embrace a more generous allowance for the actual costs which have been incurred by the plaintiff.”

Counsel asks me to go further and to hold that in the present case the order should be construed as though it had directed a solicitor and own client taxation, or, in other words, an indemnity. He says that because *Andrews v. Barnes* (1) was the case on which I relied as giving me jurisdiction to make the order which I made. It is undeniably true that FRY, L.J., delivering the judgment of the court in *Andrews v. Barnes* (1), refers to indemnity. He says (39 Ch.D. 140):

“... various circumstances have been stated as influencing the discretion of the court—in some cases to vindicate the honour and justice of the court, and in *Palmer v. Walesby* (4) on the ground of the right of the applicant to indemnity, the reason assigned by KAY, J., for awarding them in the present case.”

I cannot accept that submission. In my judgment, this order is not to be construed differently from any other order for solicitor and client costs merely because I thought I found my jurisdiction to make it in *Andrews v. Barnes* (1).

Counsel for the plaintiff further says that *Goodwin v. Storrar* (5) is an authority for the proposition that an order for solicitor and client costs ought now to be construed as though it were an order for solicitor and own client costs. There is no doubt that *Goodwin v. Storrar* (5) has not previously been taken into account in carrying out taxations as between solicitor and client in the Chancery Division. It is a decision of DENNING, J. The plaintiffs were personal representatives of a man and his wife who were killed as a result of an explosion at a munition works, and they brought an action against the defendant claiming damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and a sum under the Fatal Accidents Act for the benefit of the two children of the deceased. The

action was settled on the terms that £250 was to be paid in respect of each of the deceased under the Law Reform (Miscellaneous Provisions) Act, 1934, and £1,750 under the Fatal Accidents Act. The settlement was embodied in a consent order approved by the court, which contained the following provision as to costs:

"The defendant pays to the plaintiffs' solicitors the costs of this action as between solicitor and client to be taxed such costs to include the costs properly incurred before the issue of the writ and in relation to the subject-matter of the action."

On taxation, the taxing master taxed the costs on the basis that under Ord. 22, r. 14 (11), the plaintiffs' solicitors were entitled to be paid such costs as they would be properly entitled to receive from their own clients. The defendant applied for a review. DENNING, J., said ([1947] 1 All E.R. 204):

"The words 'taxation as between solicitor and client' have two meanings. One meaning, which I will refer to as meaning (A), is an inquiry as to the costs which a client ought properly to pay to his own solicitor, as distinct from 'taxation as between party and party,' which is an inquiry as to the costs which he should recover from the opposite side. The distinction is based on common sense . . . The other meaning of 'taxation as between solicitor and client,' which I will refer to as meaning (B), is an inquiry as to the costs to be paid to the solicitor out of a common fund in which the client and others are interested, and is substantially a taxation as between party and party, but on a more generous scale. When meaning (B) is used a different form of words is needed to describe an inquiry as to the costs which a client ought properly to pay his own solicitor, and that is then described as a 'taxation as between solicitor and own client.' . . . In my opinion, in R.S.C., Ord. 22, r. 14 (11), the words are used in meaning (A). . . . If I am right in thinking that in the sub-rule the words are used in meaning (A), it shows that it is a valid meaning to be attached to them in any legal document, and this enables me to distinguish *Giles v. Randall* (2). The court in that case recognised that meaning (A) was the ordinary meaning, but felt compelled to give the words the meaning (B) because that was the technical meaning, and where words in a legal document have a technical meaning, it is the technical meaning that should be received. Now that a rule of the Supreme Court has been made, in which are used the words in meaning (A), it follows that meaning (A) at the present day is, not only the ordinary meaning, but also a valid technical meaning, and that there is no reason why, in construing a legal document, that meaning should not ordinarily be given. In the order as to costs in this case, therefore, there is no reason why I should not adopt meaning (A) when that appears to be the meaning intended by the parties, as I think it is. In view of this development, it may be that *Giles v. Randall* (2) would be differently decided at the present day."

Order 22, r. 14, has no application to the action with which I am concerned, but Ord. 65, r. 27 (29), has and still stands. *Giles v. Randall* (2) decided that that sub-rule applies to my order, for, indeed, there is no ground of distinction known to me, other than that with which I have already dealt, between the order in *Giles v. Randall* (2) and the present order. Accordingly, my order cannot be construed as directing a solicitor and own client taxation because so to construe it would be to hold that the sub-rule did not apply to it. But I find in DENNING, J.'s, decision support for what I have myself already said about the duty of a taxing master in a solicitor and client taxation.

One other point of general principle emerges in the present case. The plaintiff, being a solicitor, acted for himself in these proceedings, but, as he practises in Sunderland, and the action was tried in London, he employed London agents to conduct the action.

In *London Scottish Benefit Society v. Chorley* (6) the court had to consider the right of a solicitor who acts for himself in litigation to recover costs against an adverse party. There was no question of agency in that case. SIR WILLIAM BRETT, M.R., said (13 Q.B.D. 876):

"The unsuccessful adversary of a solicitor appearing in person cannot be charged for what does not exist, he cannot be charged for the solicitor consulting himself, or instructing himself, or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing in person, subject to this restriction, that no costs which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances."

He read those words "costs of instructions and attendances" as referring to the previous sentence, "costs of instructing himself or attending upon himself". I am sure that in making those observations the court was not considering what might be the position between a solicitor and a London agent. In the present case the taxing master, in construing that passage, says:

"It is the settled law and practice that a solicitor litigant acting for himself is entitled to all costs of conducting the litigation to which he is a party, as if he had employed another solicitor to act for him except that he is not entitled to such items as 'instructions from' and 'attendances upon' himself, or perusal of his own documents. In this case I find as a fact that the plaintiff instructed Ward, Bowie & Co. as his London agents and they as London agents are in the same position for the purpose of this objection as the plaintiff himself, neither more nor less."

Counsel for the defendant conceded that that deduction was not permissible, and rightly so. The reason why SIR WILLIAM BRETT, M.R., said that a solicitor could not charge for consulting himself, or instructing himself, or attending on himself, was because such things did not exist, but that reason has no application in a case where a solicitor consults or instructs a London agent or there is an attendance on him by a London agent. I agree with counsel's admission that there is no impossibility in law in a solicitor being allowed costs in respect of those matters.

I now come to the facts of the present case. The plaintiff's London agents lodged a bill of costs claiming £471 8s. 6d. and from that bill the taxing master allowed £293 4s. 8d., leaving the sum allowed as £178 3s. 10d. To that fifty per cent. was added making £267 5s. 9d., and to that the disbursements, amounting to £542 7s., were added, making £809 12s. 9d., and with the taxing fee of £20 5s. the total was £829 17s. 9d. The plaintiff carried in sixteen specific objections against particular disallowances and gave reasons for his objection. He concluded with a general objection divided into four heads, which I must read:

"General objection. Because the disallowances fail to reflect (a) the principle that party and party costs are intended as a full indemnity for all costs reasonably incurred in an action; (b) the principle that solicitor and client costs are intended to embrace a more generous allowance for the actual costs which have been incurred by the party; (c) the fact that ROXBURGH, J., made the special order for solicitor and client taxation expressly on the ground that the case was 'a very exceptional and rare case' that contained a wholly 'unjustified allegation of fraudulent conduct against two professional men and one business man,' and that he considered that it [the defence] should never have been put forward, let alone persisted in; (d) the fact that it was vital to the plaintiff not merely to obtain an order for specific performance but in the course of it to ensure that grave charges should be shown to be wholly unjustified."

Ars est celare artem. The real gravamen of the objections is in head (b), and I have no doubt that the taxing master realised that because, though his answer is not specifically directed to any one of the four sub-headings, it does fit in very neatly as an answer to head (b). He says:

"This is a solicitor and client taxation where costs are payable by one party to another and is substantially little more than a party and party taxation except that any necessary letters to and attendances upon the client are allowed: *Giles v. Randall* (2)."

I have already given my reasons for thinking that *Giles v. Randall* (2) does not support that proposition, derived as it was from the taxing master's answers in that case, as a norm or standard for the taxation of costs as between solicitor and client. On the contrary, head (b), to which it appears to be an answer, does, as it seems to me, embody the true principle which I have endeavoured earlier to state. The plaintiff said that the allowances were not sufficiently generous, and, in support of that contention, inserted head (b). The taxing master's answer must, therefore, be regarded by him as pointing to a less generous scale. That conclusion seems to me irresistible. It seems to me plain from what the taxing master has himself said that he did adopt a norm or standard of taxation less generous than that indicated under head (b), and, if so, then, in my judgment, that must vitiate all his decisions on all items affected by the general principle. Counsel for the defendant said that the master's detailed decisions are all questions of *quantum*. I do not agree. The question is not the *quantum*, but from what point of view does one approach the ascertainment of the *quantum*? If one approaches it from a wrong point of view, the *quantum* must necessarily be vitiated. Not only is it, in my judgment, inherent in the taxing master's own answer to that general objection that he has approached the taxation with a wrong standard in mind, but when I come to some of the material items I see it reflected at once. No. 3 of Feb. 14, 1950, is "part of counsel's fees to settle writ." The sum claimed was £2 4s. 6d. and the amount allowed £1 3s. 6d. This is an item which would be allowed whether the taxation is party and party or solicitor and client. I imagine that it is impossible for a taxing master to allow less than £1 3s. 6d. because that is at present counsel's minimum fee. Accordingly, if he is to allow anything, he cannot allow less than £1 3s. 6d. and, therefore, I must assume that that is the application of the party and party system of taxation to that item. If the taxing master's proposition is accepted, the item would be the same on a solicitor and client taxation because it is neither a letter nor an attendance, and, therefore, presumably, he would say as regards that item: "It must be the same whether the taxation is party and party or solicitor and client." That is not so if the proposition which was advanced under head (b) by the objectors, and which has found favour with me, is correct. The taxing master would not be bound to allow £2 4s. 6d. on a solicitor and client taxation, but he plainly could do so. Hence at once appears the difference in result between the two principles.

[HIS LORDSHIP then gave detailed consideration to other items, applied the principles which he had enunciated, and continued:] I now come to items 15 and 16 which are in a different category again. The plaintiff's wife attended to give evidence and, I believe, gave evidence. Both items 15 and 16 relate to Mrs. Reed's witness fee. Item 15 relates to one day only, Oct. 2, 1950. That was an occasion when I was unable to try the case on the day on which it should have been tried. Accordingly, she had to return. In respect of that, £3 3s. was claimed and eventually 5s. was allowed. Item 16 relates to Nov. 15, 16, 17, when the case was heard, and the sum claimed then was £9 9s. which was eventually reduced to 15s. The objector said about these two items:

"Because Mrs. Reed is entitled to a witness fee having regard to the absence from her domestic duties which giving evidence at the trial involved

and there is no justification for disallowing this fee merely because she did not carry on a gainful occupation separate from her husband. Because even the old table of allowances to witnesses provide for fees for 'Gentlemen' and 'Females according to their station in life'."

taxing master answered:

"The witness in question follows no gainful occupation and there has been no evidence before me that she has lost anything financially except her expenses which I have already allowed under another item. I am of opinion, therefore, that she is not entitled to anything more than a nominal sum as witness fee which I assess at £1 altogether. To this extent I allow this objection. The old scale of witness fees referred to is completely outdated and not in practice acted upon at the present time."

It seems to me that the taxing master's answer is inconsistent with itself. A witness who is not following a gainful occupation is entitled to anything without proof of actual loss, he ought to have disallowed this item altogether. On the other hand, such a witness is entitled to something, he ought not to have made a nominal award, but ought to have made what he considered was a proper award. Accordingly, it seems to me that his answer must be wrong in every way. The point is rather difficult, but it seems to me that a witness who is taken away from her domestic duties is entitled to something more than actual disbursements, though it may not be much more, and that there is no reason for thinking that, though the old scale is certainly obsolete in these days, females are not allowed witness fees according to their station in life. I see no reason for thinking that a wife who is engaged in domestic duties and the bringing up of her children is entitled to absolutely nothing because she cannot prove that she did in fact get in a charwoman or hire the services of a nursemaid on the relevant day. I think that the objector's objection is well founded. I think that Reed was entitled to a proper witness fee, *i.e.*, something more than a nominal fee, though not necessarily a substantial fee, for her absence from her domestic duties, and there is no justification for disallowing any fee, or anything more than a nominal fee, merely because she did not carry on a gainful occupation separate from her husband.

Order accordingly.

Solicitors: *Ward, Bowie & Co.*, agents for *Richard Reed*, Sunderland (for the plaintiff); *Maples, Teesdale & Co.*, agents for *W. A. Ellis*, Sunderland (for the defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

JOHNSON v. JOHNSON.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.JJ.), December 4, 20, 1951.]

Divorce—Petition—Petition within three years of marriage—Leave to present—Jurisdiction of commissioner to grant—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 70 (5)—Matrimonial Causes Act, 1950 (c. 25), s. 2 (1).

An application under the proviso to s. 2 (1) of the Matrimonial Causes Act, 1950, that the applicant be allowed to present a petition for divorce before three years have passed since the date of the marriage is a matter "connected with" a matrimonial cause within s. 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925, and, therefore, a special divorce commissioner has power to hear and determine it.

Ambler v. Ambler ([1951] 1 All E.R. 980), overruled.

Quaere, whether the application was itself a "matrimonial cause" within s. 225 of the Act of 1925.

FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 70 (5), see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 363.

Cases referred to:

(1) *Ambler v. Ambler*, [1951] 1 All E.R. 980.

(2) *Re Nanaimo Community Hotel, Ltd.*, [1944] 4 D.L.R. 638; *affd.*, C.A., [1945] 3 D.L.R. 225; 2 W.W.R. 145; 2nd Digest Supp.

APPEAL by the husband from an order of His Honour JUDGE WETHERED made on June 20, 1951, whereby he held that he had no jurisdiction to hear a petition for divorce presented within three years of the marriage.

The parties were married on June 24, 1950. On Apr. 7, 1951, His Honour JUDGE PATON, sitting as a special commissioner, made an order granting the husband leave to present a petition within three years on the ground of exceptional hardship. On the presentation of the petition JUDGE WETHERED felt himself bound by *Ambler v. Ambler* (1) and refused to proceed.

H. S. Russell for the husband.

Colin Duncan for the King's Proctor.

SOMERVELL, L.J.: This is an appeal from a decision of His Honour JUDGE WETHERED, who decided that he had no jurisdiction to entertain certain divorce proceedings. By s. 2 (1) of the Matrimonial Causes Act, 1950, which reproduces s. 1 (1) of the Matrimonial Causes Act, 1937, it is provided:

"No petition for divorce shall be presented to the [High] Court unless at the date of the presentation of the petition three years have passed since the date of the marriage: Provided that a judge of the [High] Court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship . . ."

The parties were married on June 24, 1950. On Apr. 7, 1951, the husband, wishing to seek a divorce within the three years, made an application under s. 2 (1) of the Act of 1950, to His Honour JUDGE PATON, sitting as a commissioner, who granted leave to present the petition.

Under s. 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided:

"A commissioner acting under a commission of assize or any other commission issued under this section, shall, subject to rules of court, have power to try and determine matrimonial causes of any prescribed class and any matters arising out of or connected with any such causes, and shall for that purpose have all such powers and duties as are vested in the Probate Division

under the enactments (including this Act) relating to matrimonial causes and matters."

Under art. 1 (1) of the Matrimonial Causes (Special Commission) (No. 2) Order, 1946 (S.R. & O., 1946, No. 2112), made by virtue of s. 70 (5), it is provided:

"All classes of matrimonial causes may, subject to rules of court, be tried and determined by a special commissioner, acting under a special commission."

The question that arises in the present case is whether, having regard to the words of s. 70 (5) and the order of 1946, a commissioner can exercise the power given to a judge of the High Court under the proviso to s. 2 (1) of the Act of 1950. This question came before WALLINGTON, J., in *Ambler v. Ambler* (1). The judgment states:

"A special divorce commissioner has no jurisdiction to make an order under the Matrimonial Causes Act, 1937, s. 1 (1), giving leave to present a petition for divorce before the expiration of three years from the date of the marriage, since at the time when the application for the order is made no matrimonial cause is in existence, and, consequently, the application cannot be a matter 'arising out of or connected with' any such cause within s. 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925."

In his judgment WALLINGTON, J., after setting out various statutory provisions, said: ([1951] 1 All E.R. 981):

"It is plain that this matter does not 'arise out' of a matrimonial cause, because there was no such cause in existence when the order was made. Furthermore, it seems to me that the words 'connected with any such cause' in s. 70 (5) are inserted to indicate that once there is a matrimonial cause in the hands of a special commissioner he has authority to determine any matter arising out of it or connected with it. I do not understand how anything can arise out of or be connected with a non-existent thing."

It is easy to appreciate the force of the learned judge's view that for a matter to be "connected with" a cause it would seem, at first sight, that there must be a cause for it to be connected with, but, regarded as an ordinary English expression, I think, though it would not necessarily decide the construction of the words in this sub-section, that the words "connected with" can naturally be used to describe a relation with a contemplated event which is still *in futuro*. I need not elaborate that in my own words because we have been referred to what was said by certain Canadian judges in a case where a very similar statutory phrase fell to be construed. In *Re Nanaimo Community Hotel, Ltd.* (2), which came before the British Columbia Supreme Court in chambers, s. 66 of the local Income War Tax Act, 1927, which fell to be construed, provided:

"... the Exchequer Court shall have exclusive jurisdiction to hear and determine all questions that may arise in connection with any assessment made under this Act."

It was argued that that could not confer any jurisdiction on the court until there had been an assessment, but McFARLANE, J., held that it covered matters relating up to an assessment or intended to do so. He puts it in this way ([1944] 1 L.R. 639):

"Mr. Cunliffe argues that that section pre-supposes that an assessment has been made and that, as I understand him, the words 'in connection with' mean 'consequent upon'. I do not think that that is the correct construction to be put upon these words. One of the very generally accepted meanings of 'connection' is 'relation between things one of which is bound up with or involved with another'; or again 'having to do with.' The words include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to the principal thing. The phrase 'having to do

with ' perhaps gives as good a suggestion of the meaning as could be had. I think s. 66 is sufficient to oust the jurisdiction of this court [*i.e.*, the Supreme Court] to deal with a decision on which an assessment is subsequently made. It is not necessary, therefore, for me to deal with the other phrases of the very interesting and instructive argument presented on behalf of the motion."

That case went to the Court of Appeal, and ROBERTSON, J.A., said ([1945] 3 D.L.R. 250):

"To my mind the language 'in connection with any assessment' clearly covers all the preceding steps leading up to the assessment being made."

SIDNEY SMITH, J.A., said (*ibid.*, 261):

"I agree with MCFARLANE, J., that the words of s. 66 'include matters occurring prior to as well as subsequent to or consequent upon so long as they are related to' the assessment."

It may be in that case that it was plain that there was going to be an assessment, whereas when an application is made under s. 2 (1) of the Act of 1950 it is not plain that there is going to be a cause because the court may refuse to grant leave under the proviso, but I have found what was stated by MCFARLANE, J., and approved by the Court of Appeal, very helpful in deciding the present case, and I have come to the conclusion that the words "matters . . . connected with" a matrimonial cause include the application which has to be made under s. 2 (1) of the Act of 1950 in respect of a petition which is sought to be filed within the three years. That seems to me to be a natural meaning. I think one would say that such an application was connected with a matrimonial cause, and, therefore, I think this appeal must be allowed.

Counsel for the King's Proctor also argued that, having regard to the definitions to be found in s. 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, an application under s. 2 (1) of the Act of 1950 could be entertained by anyone who had power to try and determine matrimonial causes, even if the words about "arising out of or connected with" were not there. He sought to rely on certain words that can be found in the definition of "matrimonial cause" which is defined as

"any action for divorce, nullity of marriage, judicial separation, jactitation of marriage or restitution of conjugal rights."

He submitted that there should be read into that definition the definitions of "cause" and of "action" in the section, and that those words themselves must be read having regard to the definition of the word "plaintiff". There is some difficulty, in view of the form of the definition of "matrimonial cause", in bringing in some of the matters which counsel sought to bring in, but, without relying on any of the special words in the definition on which he sought to rely, I would have thought there was a good deal to be said for the contention that a power to try and determine matrimonial causes by itself conferred a power to deal with applications under s. 2 (1) of the Act of 1950. It is unnecessary for us to decide it because the question can be decided on the wider words "in connection with." For those reasons, I think this appeal must be allowed.

JENKINS, L.J.: I agree. This case is in effect an appeal from the decision of WALLINGTON, J., in *Ambler v. Ambler* (1). That was a case under the Matrimonial Causes Act, 1937, s. 1 (1), whereas the relevant section in the present case is s. 2 (1) of the Matrimonial Causes Act, 1950, but there is no material distinction between the two sections for the purposes of the point at issue.

It is not in dispute that the Matrimonial Causes (Special Commission) (No. 2) Order, 1946, delegated to the commissioners all powers capable of being delegated to them under the provisions of s. 70 (5) of the Supreme Court of Judicature

olidation) Act, 1925. The question is whether, on its true construction, (5) authorises the delegation to commissioners of power to deal with an application for leave to present a petition before the expiration of the minimum of three years from the marriage. WALLINGTON, J., decided against the view that commissioners had jurisdiction in relation to these applications for leave on the short ground that the application for leave is made at a stage when the proposed petition has not been presented, and, therefore, at a stage when it may be said that the actual cause which is intended to be brought is not yet arising. He took the view that such an application for leave could not be said to arise out of or be connected with any cause because no cause was in existence. In respect to him, I regard that as too narrow a view of s. 70 (5), both regarding the matter from the point of view of strict construction and giving each word its proper and no less than which seems to be its normal meaning and also regarding the matter from the rather wider standpoint of the apparent intention of the sub-section as a whole. There may be difficulty in speaking of a matter as "arising out of" a cause not yet on foot, but I see no reason why an application such as this should not be "connected with" the proposed matrimonial cause. I think it is a perfectly proper and natural use of the expression, and I agree with WALLINGTON, J., that this view is strongly supported by *Re Nanaimo Community Hotel*, [1925] 1 D.L.R. 122 (2).

Regarding s. 70 (5) as a whole, one finds it is in two branches. First, it provides

"a commissioner acting under a commission . . . shall . . . have power to try and determine matrimonial causes of any prescribed class and any matters arising out of or connected with any such causes"

Secondly, it provides that a commissioner

"shall for that purpose [*i.e.*, for the purpose of trying and determining matrimonial causes of any prescribed class and any matters arising thereout connected therewith] have all such powers and duties as are vested in the Probate Division under the enactments (including this Act) relating to matrimonial causes and matters."

The sub-section, being framed in that way, does, to my mind, strongly suggest, if it is looked at as a whole, that the intention of the legislature was to enable the commissioners to be invested with all the powers of the Probate Division for the purpose of trying matrimonial causes of any prescribed class so as to enable them to deal with business of that kind and with all matters incidental to the dispatch of such business as if they were sitting as judges of the appropriate division of the High Court. Viewed from that point of view, it seems to me that the sub-section does on its natural construction authorise the delegation to commissioners of the fullest powers in relation to the trial and determination of matrimonial causes, including the disposal of all such incidental matters as an application for leave in circumstances such as those of the present case, these being all comprehensively described as "matters arising out of or connected with any such causes" and covered by the second branch of the sub-section which invests commissioners with all the powers and duties of the Probate Division for that purpose, *i.e.*, for the purpose of trying and determining matrimonial causes of any prescribed class and any matters arising thereout or connected therewith.

I prefer to base my decision on the meaning of the words "connected with" in this context rather than on the view that an application for leave should be regarded as in itself a matrimonial cause within the meaning of the definition in s. 225 of the Act of 1925. I agree, however, that the definition of "matrimonial cause", read in conjunction with that of "cause", is a very comprehensive one, and I think it might conceivably be possible, if the true view is that such an application was not a matter "connected with" a matrimonial

cause, to reach the conclusion that in such case it should be classified as constituting in itself a particular species of matrimonial cause. Accordingly, I agree with my Lord that this appeal should be allowed. I may, perhaps, add that it seems to me that our decision, at all events, has the merit of convenience. Administrative difficulties should not, as a general rule, be taken into consideration in construing a statute, but it does appear that the result we have reached is, from a practical point of view, the more reasonable and convenient one.

HODSON, L.J.: I agree. The learned commissioner was bound by the decision of WALLINGTON, J., in *Ambler v. Ambler* (1) where WALLINGTON, J., felt himself constrained to hold, on the construction of s. 70 (5) of the Act of 1925, that the words "arising out of or connected with any" matrimonial cause were not wide enough to cover an originating summons taken out before the cause had come into existence. After hearing the argument of counsel for the husband and for the King's Proctor, I have come to the conclusion that that view was too narrow a one. It is conceded by the husband that this originating summons could not be said to arise out of the cause, but he argued (I think convincingly) that it was "connected with" the cause. The matters which are ancillary to the petition and come into existence after the petition may all, I think, be said to arise out of the petition, and, if that is so, it is difficult to give any force to the words "connected with" unless those words cover such an application as the present. I agree with the reasons given by my Lords for allowing this appeal on the ground that the words "connected with" are wide enough to cover the application in question, but I would also like to leave open for favourable consideration the argument, which may affect the construction of some of the rules to which we have been referred, that this appeal could be allowed on the ground that the originating summons in question is itself a cause.

Appeal allowed.

Solicitors: *Gustavus Thompson & Sons*, agents for *Hillier, Naish & Co.*, Bath (for the husband); *Treasury Solicitor* (for the King's Proctor).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

Re RUDD'S WILL TRUSTS. WORT AND ANOTHER v. RUDD AND OTHERS.

[CHANCERY DIVISION (Upjohn, J.), November 21, 22, December 17, 1951.]

Settlement—Capital or income—Tenant for life and remainderman—Apportionment—Capital profits dividend—Profit on sale of company's assets—Notice by company of intention to declare dividend—Duty of trustees to sell cum dividend.

By his will, dated Jan. 3, 1939, the testator gave his residuary estate to trustees on trust for sale and conversion "(with full power to postpone such sale . . . and conversion . . . and to retain any of the investments in the same state of investment as at my decease for so long as my trustees shall in their absolute discretion think fit without being personally liable . . . for any loss occasioned by such postponement or retention) . . ." He directed that the proceeds of sale should be invested in authorised investments and he then settled the residue. He died on Aug. 21, 1939, and at the time of his death his investments included a sum of stock of Thomas Tilling, Ltd., which was then valued at 46s. per £1 stock. The trustees retained £9,950 of this stock as part of the residuary trust fund. On Nov. 8, 1948, the company issued a circular to shareholders in which it stated that, having sold its interests in road transport to the British Transport Commission in consideration of the allotment of a large holding of British Transport three per cent. stock, it proposed to recommend, at a meeting to be convened later, that on Apr. 1, 1949, "a capital distribution be made

out of the amount received to holders of [the company's] ordinary stock at the rate of £5 of British Transport . . . stock . . . in respect of each £1 stock held." On receiving the circular the trustees did not re-consider the question whether their holding of the company's stock, or any part of it, should be sold, and it did not occur to them that the sum received in payment of what was described as a "capital" bonus might be distributable as income. The company's stock was quoted on the London Stock Exchange, and on Feb. 15, 1949, its mean price was £6 4s. per £1 stock, while on Feb. 16, 1949, it was quoted ex the capital profits dividend, the mean price being then approximately £1 8s. per £1 stock. On Mar. 17, 1949, the company passed a resolution to pay a capital profits dividend on its ordinary stock by distributing the British Transport stock as proposed in the circular of Nov. 8, 1948, to shareholders on the register on Feb. 21, 1949 (the date of the notice of the meeting), and, as a result of the resolution, the trustees received the sum of £49,750 British Transport stock. The beneficiaries interested in capital contended that, although, under the decision in *Re Sechiari* ([1950] 1 All E.R. 417), this sum was to be treated as income of the testator's residuary trust fund, it should, nevertheless, be apportioned as between the capital and income of the fund, as the trustees had committed a breach of trust by failing, after receiving notice of the company's intention to declare the dividend to sell the whole or part of their holding of the company's stock before Feb. 16, 1949, when it went ex dividend.

Held: on the true construction of the will, both the power to postpone sale and the power to retain investments were ancillary to the trust for conversion; the trustees were not entitled to treat the company's stock as permanent authorised investments, but it was not their duty to realise it in order to make a large profit for capital at the expense of income; on the facts of the case, no breach of trust had been committed; and, therefore, no part of the British Transport stock received by the trustees was to be apportioned to the capital of the testator's residuary trust fund.

Re Kleinwort's Settlement Trusts ([1951] 2 All E.R. 328), applied.

AS TO APPORTIONMENT BETWEEN TENANT FOR LIFE AND REMAINDERMAN, HALSBURY, Hailsham Edn., Vol. 29, pp. 653-655, paras. 935-939; and CASES, see DIGEST, Vol. 40, pp. 677-680, Nos. 2132-2157.

es referred to:

- 1) *Re Sechiari*, [1950] 1 All E.R. 417; 2nd Digest Supp.
- 2) *Re Kleinwort's Settlement Trusts*, [1951] 2 All E.R. 328; [1951] Ch. 860.
- 3) *Re Maclaren's Settlement Trusts*, [1951] 2 All E.R. 414.
- 4) *Re Roth*, (1896), 74 L.T. 50; 43 Digest 871, 3156.
- 5) *Re Inman*, [1915] 1 Ch. 187; 84 L.J.Ch. 309; 112 L.T. 240; 44 Digest 209, 373.
- 6) *Re Chaytor*, [1905] 1 Ch. 233; 74 L.J.Ch. 106; 92 L.T. 290; 43 Digest 618, 586.
- 7) *Re Doughty*, [1947] 1 All E.R. 207; [1947] Ch. 263; 176 L.T. 173; 2nd Digest Supp.
- 8) *Re Harrison's Will Trusts*, [1949] Ch. 678; 2nd Digest Supp.

ADJOURNED SUMMONS to determine *inter alia* whether a sum of £49,750 British Transport stock, received by the trustees of the testator's will as a capital profits dividend on £9,950 ordinary stock of Thomas Tilling, Ltd., which formed part of the testator's residuary trust fund, should, in the events which had happened, be apportioned between the income and the capital of the fund. It was contended by the beneficiaries interested in capital that, by reason of the decision in *Re Sechiari* ([1950] 1 All E.R. 417), the sum of British Transport stock must be treated as income of the trust fund, but they contended that the court had no jurisdiction to apportion it as the trustees had committed a breach of trust in that they had failed to sell the whole or some part of their holding of the

company's stock after receiving notice of the company's intention to declare the dividend and before the stock went ex dividend.

Harold Lightman for the trustees.

Wilfrid Hunt for defendants interested in income.

S. Pascoe Hayward, K.C., and *Parbury* for defendants interested in capital.

Cur. adv. vult.

Dec. 17. **UPJOHN, J.**, read the following judgment. This summons raises the question, now becoming familiar in this court, whether a substantial sum of British Transport three per cent. guaranteed stock received by the trustees of the will of the late Edward Whitten Rudd (hereinafter called "the testator") as a capital bonus in respect of their holding of ordinary stock of Thomas Tilling, Ltd. (hereinafter called "the company"), ought to be treated as capital or income, or apportioned between the two.

By his will dated Jan. 3, 1939, the testator, after revoking all former wills, by cl. 2 appointed the plaintiffs to be executors and trustees. He then left a number of pecuniary and specific legacies and by cl. 9 dealt with the residue of his estate in these terms:

"As to all the rest residue and remainder of my real and personal estate whatsoever and wheresoever I give devise and bequeath the same unto my trustees upon trust to sell call in and convert into money the same or such part thereof as shall not already consist of money (with full power to postpone such sale calling in and conversion of any part of my residuary estate and to retain any of the investments in the same state of investment as at my decease for so long as my trustees shall in their absolute discretion think fit without being personally liable or responsible for any loss occasioned by such postponement or retention) and I direct that the income thereof shall as well during the first year as afterwards be applied as if the same were income arising from investments hereinafter directed to be made of the proceeds of sale thereof and out of my ready money and the proceeds of such sale calling in or conversion to pay my debts funeral and testamentary expenses and death duties and to invest the remainder of my ready money and of the said proceeds (hereinafter called 'my trust estate') in such investments as may be authorised by law for the investment of trust funds including freehold mortgages only Upon trust out of the annual income thereout to pay to my wife . . . during her lifetime the annual sum of £2,000 payable quarterly upon protective trusts for her benefit during her lifetime as provided by s. 33 of the Trustee Act 1925."

By cl. 10 the testator disposed of the remaining income of his estate during the lifetime of his widow, who died on May 16, 1947. By cl. 11 on the death of his wife he gave certain pecuniary legacies, mainly to charities, and then proceeded as follows:

"12. Subject to the payment of the said legacies I direct that my trustees shall hold the residue of my estate upon the trusts following: 13. I direct that my trustees shall hold the remainder thereof upon trust and shall pay and divide the income thereof (a) as to seventeen and one half shares thereof to my stepson Leslie Rudd and his wife Hilda Rudd [the first and second defendants] in equal shares and on the death of either of them then such seventeen and one half shares to the survivor during his or her lifetime; (b) as to seventeen and one half shares thereof to my nephew Leslie Frank Rudd [the eighth defendant]; (c) as to seventeen and one half shares thereof to my niece Kitty Luttrell [the third defendant]; (d) as to fifteen shares thereof to my niece Aline Luttrell [the fourth defendant]; (e) as to fifteen shares thereof to my nephew Eric Luttrell [the fifth defendant]; (f) as to ten shares thereof to my nephew Tally Luttrell [the sixth defendant]; (g) as to five shares thereof to my niece Anna Maguire [the seventh defendant];

as to two and one half shares thereof to my nephew Robert Luttrell [the fourth defendant] during their respective lives and I direct that at the decease of each and every one of the before-mentioned beneficiaries the capital of such shares so bequeathed to him or her shall be divided between his or her children in such shares as he or she may by will appoint and in default of such appointment if more than one in equal shares but if they should respectively leave no such child or children then the capital of such share and the income shall be held so that it shall go and accrue by way of addition to the share of the other beneficiaries mentioned in this clause in the same proportions and on the same trusts as their original shares as provided by the said clause."

14. The testator declared that the life interests were to be held on protective trusts. The first nine defendants are, therefore, interested in income of the residuary estate. The first four and the sixth defendants have never had issue and have argued in favour of income. The fifth, seventh eighth and ninth defendants, although interested in income, have children, who are the tenth to thirteenth defendants, and are interested, accordingly, in capital, and they have agreed to join with such children and have argued in favour of capital. The testator died on Aug. 21, 1939, and his will was proved by the plaintiffs, executors and trustees, in the Principal Probate Registry on Oct. 20, 1939. During his lifetime the testator had considerable interests in the transport industry and at his death he was the owner of, among other investments, £18,225 ordinary stock of the company. Of this stock £7,405 was sold for estate purposes and further £870 was appropriated by the trustees to satisfy legacies, leaving £10,020 stock which has been retained by the trustees as part of the residuary estate. The stock was valued at the date of the testator's death at 46s. per £1. The company was a large shareholder in a number of road transport undertaking undertakings and in addition owned and operated a commercial haulage and road haulage undertaking. After the coming into force of the Transport Act, 1947, the company reached an agreement with the British Transport Commission, set up by that Act, for the transfer to the commission of the road transport undertakings I have mentioned above, and the consideration for the transfer was the sum of £24,800,000 which was satisfied by an allotment to the company of British Transport three per cent. guaranteed stock 1968-73 at 101 per cent.

These matters were explained at length in a circular to shareholders by the chairman dated Nov. 8, 1948, and the circular then continued as follows:

"It is proposed to recommend at a meeting to be convened later that on Apr. 1, 1949, a capital distribution be made out of the amount received to holders of ordinary stock at the rate of £5 of British Transport three per cent. guaranteed stock 1968-73 in respect of each £1 stock held. Interest on such stock up to that date will be received by the company."

On Feb. 21, 1949, notice of an extraordinary general meeting of the company was given, dated Mar. 17, 1949, was given, stating that the following resolution would be passed as an ordinary resolution:

"That a special capital profits dividend on the ordinary stock of the company of £20,806,000 payable out of the profit realised by the company on the recent sale of part of its undertaking to the British Transport Commission be and the same is hereby declared and that such dividend be payable to the ordinary stockholders on the register on Feb. 21, 1949, in proportion to their holdings of ordinary stock and be paid and satisfied by distribution amongst them as at Apr. 1, 1949, of £20,600,000 British Transport three per cent. guaranteed stock 1968-73 (part of the consideration received by the company from the British Transport Commission for the undertaking above referred to) taken at its issued price of 101 per cent., being in the

proportion of £5 British Transport stock for every £1 ordinary stock of the company held by them."

The resolution was duly passed on Mar. 17, 1949, and in due course the trustees received the sum of £49,750 British Transport stock, being £5 of such stock for each £1 of ordinary stock in the company held by them.

The company is a very large one. Its issued ordinary stock amounts to £4,120,000. This stock is quoted on the London Stock Exchange and naturally the Stock Exchange was not unresponsive to the circular of Nov. 8, 1948. I do not know what was the price of the stock before the issue of that circular, but the evidence before me was to the effect that on Feb. 15, 1949, the mean price of the stock was £6 4s. per £1 stock. On Feb. 16, 1949, the stock went ex the capital profits dividend and the mean price was then approximately £1 8s. per £1 stock. It may be noted that the stock was quoted ex capital profits dividend before notice of the general meeting was given.

The sole question is whether the sum of British Transport stock received by the trustees as aforesaid ought to be treated as capital or income or apportioned between the two. The first question raised by the summons is:

"Whether on the true construction of the said will and in the events which have happened namely the receipt by the plaintiffs as the trustees of the trusts of the said will of £49,750 British Transport three per cent. guaranteed stock 1968-73 as a capital bonus in respect of their holding as such trustees of £9,950 of the ordinary stock of Thomas Tilling, Ltd., all or any and if so what part of the said capital bonus ought to be treated as income of the residuary trust fund of the testator or as an accretion to the capital of the said fund."

It is conceded by those interested in capital that, so far as this court is concerned, the answer to this question must necessarily be that the stock must be treated as income: see *Re Sechiari* (1). Therefore, I need not consider that question further.

The second question is:

"If the answer to question 1 be that the said capital bonus or any part thereof ought to be treated as income of the residuary trust fund whether the trustees are entitled to distribute such capital bonus or such part as aforesaid between the persons entitled to the income of the said trust fund without taking any steps in the execution of the trusts of the will of the deceased to apportion or secure the apportionment of the said bonus on equitable principles between income and capital in accordance with the declaration in *Re Sechiari* (1)."

On this question those interested in capital make two submissions. First, they say that, in the exceptional circumstances of this case, there is a general equity quite apart from any question of breach of trust by the trustees, with which I shall deal in a moment, which enables a court to direct an apportionment. The exceptional circumstances relied on were that on Feb. 15, 1949, the value of the stock held by the plaintiffs in the company was of a value of £61,690, whereas on the next day, Feb. 16, when it went ex dividend, the value of the stock amounted to a total of £13,930, so that a capital loss was suffered on the night of Feb. 15-16 of £47,760. However, that argument is reserved for another court, as counsel for the defendants interested in capital conceded that in this court, having regard to the decision of VAISEY, J., in *Re Kleinwort's Settlement Trusts* (2), and of HARMAN, J., in *Re Maclaren's Settlement Trusts* (3), any right to apportionment must be based on a breach of trust and not on any general principle of equity. Therefore, I do not consider this question further.

The second submission was based on the allegation that the trustees committed a breach of trust by not selling the whole or some part of their holding of the company's stock before it went ex dividend, and it was said that, if such a breach

ved, the court has a jurisdiction to make an apportionment of the capital and as between capital and income. In *Re Maclaren's Settlement Trusts* (3) AN, J., said ([1951] 2 All E.R. 420):

I understand that VAISEY, J., recently decided another case arising out of his Thomas Tilling transaction (*Re Kleinwort's Settlement Trusts* (2)) held that the circumstances there before him did not warrant an apportionment. It was admitted before him that there was a jurisdiction to apportion in a proper case, but he expressed the view in a tentative way that its exercise was really confined to cases of breach of trust. This, I think, may well be the answer. It seems to me clear that the court would never allow the beneficial rights to be altered by a breach of trust, and if the circumstances were such that a purchase by trustees (of the Thomas Tilling shares, for instance, with a knowledge of the possible or probable faults) would have been a breach, the court might well apportion the undivided dividend or allocate it to capital even though in fact the trustees did not realise what they were doing when they did it."

I am content to accept that as a statement of the law.

I have, therefore, to consider whether the plaintiffs have committed a breach of trust by failing to sell the whole or some part of their holding of the company's shares before it went ex dividend on Feb. 16, 1949. It was conceded that for the purpose I must approach the matter on the footing that, if (contrary to the facts of this case) the trustees had paid away the transport stock to those entitled in income and it had been spent, they would, in principle, be personally liable to replace it, subject possibly to some claim for relief from the consequences of their breach of trust under s. 61 of the Trustee Act, 1925. These considerations do not, however, affect the matter of principle. To consider this question I must advert to some further matters of fact. On Mar. 20, 1951, the defendants entitled in capital filed an affidavit, sworn by Mr. Christlieb, guardian *ad litem* of some of the infant defendants, in which he said, in para. 3:

It would appear from the plaintiff's affidavit that the first intimation given to the plaintiffs, as the trustees of the will of the testator, had of the proposal to recommend a capital profits dividend was contained in the circular letter dated Nov. 8, 1948 . . . It is respectfully submitted that the plaintiffs, as the trustees of the said will of the testator, on receiving information of the proposal to declare a capital profits dividend should have considered the effect thereof on the position between the tenants for life of the company's shares of residue and the remaindermen and should have sold some part, at any rate, of the said stock in order to preserve an even balance between capital and income. The plaintiffs had ample time between the receipt of the circular letter of Nov. 8, 1948, and Feb. 16, 1949, in which they considered the position and to decide upon their course of action and time at which to sell the said stock or an appropriate part thereof before dealings in the capital profits dividends commenced. Had a sale been made it is respectfully submitted that the proceeds thereof would have been treated as capital. In these circumstances it is respectfully submitted that, since the plaintiffs failed to take any action to preserve capital for the remaindermen, an apportionment of the capital profits dividend should be made on equitable principles between capital and income."

At the last moment the defendants interested in capital asked the trustees to agree with this in an affidavit, and the trustees did so in an affidavit filed by Mr. Christlieb, one of the trustees, on Nov. 14, 1951. Paragraph 2 was in these terms:

With regard to para. 3 of the . . . affidavit [sworn by Mr. Christlieb] I say that at no time after receipt of the circular letter dated Nov. 8, 1948 did I or my co-plaintiff re-consider the question whether the stock in the company or any part thereof should be sold. I am informed by my co-plaintiff

and verily believe that it did not occur to him, as it did not occur to me, that the payment of what was described as a capital bonus might be distributable as income and thereby affect the position as between the tenants for life of the various shares of residue and the remaindermen."

The defendants interested in capital now contend on those facts that the trustees have been guilty of a breach of trust and that they ought to have sold, it was suggested, half of their holding of the company's stock cum dividend. A Counsel for those defendants asked me to draw the following inferences of fact from Mr. Wort's affidavit: (i) the trustees did not consider a sale after receiving the circular because they thought that the distribution would be corpus; (ii) if they had thought at that time that the capital dividend distribution would go wholly to income, they would have considered a sale; and (iii) if they had considered a sale, they would have sold some or all of the company's stock cum dividend. B In my judgment, the first inference is justified. With regard to the second, I should, if asked, guess that the plaintiffs would have considered a sale. But a guess does not enable me to draw an inference, and, if it was an essential part of their case to establish this inference, I am at a loss to understand why no application to cross-examine Mr. Wort on his affidavit was made. C The third inference of fact which I am asked to draw seems to me wholly speculative, and I decline to draw it.

Counsel for the defendants interested in capital submits that it was the duty of the plaintiffs to consider from time to time whether trust assets, the sale of which had been postponed under the discretion contained in cl. 9 of the will, ought to be sold, and he referred to *Re Roth* (4). He further submits that, when an event happened, such as the issue of the circular of Nov. 8, 1948, which might affect the trust estate, it was the duty of the trustees to meet and decide whether to continue to exercise the power to postpone sale, which they failed to do, and they thereby committed a breach of trust. Counsel for the defendants interested in income, on the other hand, says that the trustees had power under cl. 9, not merely to postpone sale of the investments, but to retain them, and he asks me to infer that the trustees must long ago have decided to retain the company's stock permanently as authorised investments and were under no duty to consider a sale on receipt of the circular. Now, it is a question of construction whether the power to retain is to be construed as a power to retain permanently or for the better realisation of the estate: see *Re Inman* (5). E

In my judgment, on the true construction of cl. 9, having regard to its general framework, both the power to postpone and the power to retain were ancillary F to the trust for conversion: see *Re Chaytor* (6); although the actual decision in that case has no application to the present. In my judgment, the trustees were not entitled to treat the company's stock as permanent authorised investments. That, however, in my judgment, does not mean that the trustees ought necessarily to have taken the opportunity of realising the stock in order to make a large profit for capital at the expense of income, as they must always act G impartially between the two. In my judgment, it is not sufficient to show that the trustees ought to have met and considered a sale or that they misunderstood the legal effect of the circular. It is further necessary to show that, being properly advised on the law, they ought to have sold the whole or some part of the company's stock cum dividend. Except for the large sums involved, no reason was advanced to me why the trustees should have sold the stock cum H dividend, nor why, accepting the expression that the distribution was a windfall, it was wrong to allow the law to take its course with the result that the windfall belongs to income.

A further point should be mentioned. Except that the net personal estate of the testator was sworn for probate purposes at £84,000 odd and that he was at the date of his death possessed of considerable interests in the transport industry, represented by investments in various other transport companies

were retained until British Transport stock was received for the same, and no idea of the value of the residuary estate now or at the date of death. But going into these matters in some detail so as to be informed of the actual value at the date of death and the value now, and of the income that those entitled to income have been receiving in the past, and, indeed, what they are to receive in the future, it is, in my judgment, impossible to hold the trustees guilty of breach of trust or to form any view as to what part of their holding of the company's stock ought to be sold cum dividend. No explanation is offered why it was suggested that one half of the stock ought to have been sold except that that was the proportion suggested in *Re Kleinwort's Settlement Trusts* (2). On the materials before me, I am quite unable to hold that any breach of trust has been committed, and, therefore, the claim by the defendants interested in the capital fails.

I have dealt with the matter as one of general principle apart from authority, and I accept the submission of counsel for the defendants interested in income that this case is, on the materials before me, covered by the decision of VAISEY, J., in *Kleinwort's Settlement Trusts* (2). It is true that in that case the company's stock held by the trustees was an authorised investment, but, if it was the duty of the trustees in this case to cease to exercise their power to continue the investment, so in that case it appears to me that they ought to have exercised their power to change investments. Counsel for the defendants interested in income made the point that the circular was not, apparently, drawn to the attention of VAISEY, J., and he sought to distinguish *Re Kleinwort's Settlement Trusts* (2) on that ground, but it is plain that that case proceeded on the footing that the trustees were informed of the proposal to make the distribution before the vital date of Feb. 16, 1949, when the stock went ex dividend, and it was argued that it was their duty to apply to the court for directions whether the company's stock or one part thereof ought to be sold cum dividend for the benefit of capital. On their failure to do so, the court ought to make the apportionment which, as I have said, would have been directed had the trustees applied to the court. In dealing with those arguments, VAISEY, J., said ([1951] 2 All E.R. 330):

"I am unable to accede to those suggestions in the present case. While it may well be that the suggested jurisdiction exists and while I do not doubt the power of the court to exercise it in suitable special circumstances. Although, as I have said, it may be that interference by the court could only be justified where the trustees could be said to have committed some breach of trust consisting either of some action or inaction on their part—none, in my judgment, there are no special circumstances, and I cannot think that there is anything in the nature of a general rule that profits distributed, in whatever shape, as dividends, and belonging under well-established principles to the tenant for life, must be subject to an apportionment for the benefit of capital. The cases which seem to me to govern the general principle applicable to this kind of income rights are *Re Doughty* (7) and *Harrison's Will Trusts* (8). These accretions to the normal income of the trust fund are sometimes metaphorically described as 'windfalls,' and when they have left the parent tree I can see no principle for notionally attaching them on the boughs from which they have fallen."

For these reasons, I propose to answer the second question in the summons by declaring that no part of the capital distribution ought to be apportioned for the benefit of capital. The costs of all parties must be taxed as between solicitor and client and be paid out of the residuary estate.

Order accordingly.

Solicitors: *Sturton & Sturton* (for the trustees and the defendants interested in income); *Tippets* (for the defendants interested in income).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

**Re BIRKENHEAD CORPORATION'S RESOLUTIONS.
QUIGLEY v. BIRKENHEAD CORPORATION.**

[CHANCERY DIVISION (Romer, L.J.), November 14, 15, 16, December 21, 1951.]

Master and Servant—Trade dispute—Jurisdiction of National Arbitration Tribunal—Dispute between workman and employers arising out of interpretation of workman's contract of service—Conditions of Employment and National Arbitration Order, 1940 (S.R. & O., 1940, No. 1305), art. 7. A

By a resolution, dated Sept. 26, 1939, the defendant corporation decided to augment the war service pay of their employees who were called up for service with the forces during the recent war to their full pay, "full pay" being defined, by a resolution of Jan. 23, 1940, as meaning the ordinary salary to which the employee would have become entitled had he continued in his civil duties, including any annual increment under the corporation's scale of salaries applicable to the grade in which that employee was serving when called up for war service, but excluding *inter alia* any increase of rates of pay granted by the corporation. The plaintiff, a school teacher employed by the corporation, served with the forces from Sept. 8, 1941, until November, 1945, and on Dec. 12, 1945, he resumed his employment as a school teacher with the corporation. By the Remuneration of Teachers Order, 1945, the Minister of Education directed local authorities to pay to teachers, as from Apr. 1, 1945, the scales of pay contained in the report of the Burnham Committee whereby the scale of salary for teachers in the category within which the plaintiff came was increased. The corporation did not make up the plaintiff's war service pay to the new scale as from Apr. 1, 1945. On Jan. 27, 1949, the corporation, purporting to act under the Conditions of Employment and National Arbitration Order, 1940, reported to the Minister of Labour and National Service a trade dispute existing between them and the plaintiff arising out of his claim that from Apr. 1, 1945, to November, 1945, the rate of pay applicable to him for the purposes of the augmentation of his war service pay was that laid down by the order of 1945. The report was referred by the Minister to the National Arbitration Tribunal, and, by an award dated Aug. 23, 1949, the tribunal found against the plaintiff's claim. On the hearing of an originating summons taken out by the plaintiff to determine whether, under his contract of service with the corporation, he was entitled, as from Apr. 1, 1945, to November, 1945, to have his pay made up to the scale laid down in the order of 1945, it was contended on his behalf that the tribunal had no jurisdiction in the matter as a question of contractual rights was not a "trade dispute" within the meaning of the order of 1940. B C D E F

HELD: the tribunal were competent to deal with the rights of employers and employed under private, as distinct from national, agreements of service; the dispute between the plaintiff and the corporation was a "trade dispute" within the order of 1940; and the tribunal had jurisdiction to hear it. G

FOR THE CONDITIONS OF EMPLOYMENT AND NATIONAL ARBITRATION ORDER, 1940, see HALSBURY'S STATUTES, Vol. 33, p. 734.

EDITORIAL NOTE. The Conditions of Employment and National Arbitration Orders, 1940 to 1950, were revoked by the Industrial Disputes Order, 1951 (S.I., 1951, No. 1376), art. 13 (1). By art. 7 of the order of 1951 the Industrial Disputes Tribunal is constituted to settle disputes between employers and workers which are reported to the Minister of Labour and National Service in accordance with the order and referred by him to the tribunal. Article 10 contains a provision similar to the second provision in art. 2 (5) of the order of 1940, whereby the award of the tribunal is to become an implied term of the H

contract between the parties. By art. 12 (1) of the order of 1951, which corresponds with art. 7 of the order of 1940, "dispute" is defined as meaning "any dispute between an employer and workmen in the employment of that employer connected with the terms of the employment . . .", except a dispute as to the employment or non-employment of any person or as to whether any person should or should not be a member of any trade union. In *R. v. National Arbitration Tribunal. Ex p. South Shields Corporation* ([1951] 2 All E.R. 828) it was held that art. 12 (1) of the order of 1950 contemplated only the reference of a dispute between a number of workmen and their employer and not that of a dispute between an employer and a single workman.

Cases referred to:

- (1) *National Association of Local Government Officers v. Bolton Corpn.*, [1942] 2 All E.R. 425; [1943] A.C. 166; 111 L.J.K.B. 674; 167 L.T. 312; 106 J.P. 255; 2nd Digest Supp.
- (2) *R. v. National Arbitration Tribunal. Ex p. South Shields Corpn.*, [1951] 2 All E.R. 828; 115 J.P. 594.
- (3) *R. v. National Arbitration Tribunal. Ex p. Horatio Crowther & Co., Ltd.*, [1947] 2 All E.R. 693; [1948] 1 K.B. 424; [1948] L.J.R. 682; 2nd Digest Supp.
- (4) *R. v. National Arbitration Tribunal. Ex p. Imperial Tobacco Co., Ltd.*, *R. v. National Arbitration Tribunal. Ex p. British American Tobacco Co., Ltd.*, *R. v. National Arbitration Tribunal. Ex p. Godfrey Phillips, Ltd.*, *R. v. National Arbitration Tribunal. Ex p. Ardath Tobacco Co., Ltd.*, [1943] 2 All E.R. 162; 2nd Digest Supp.
- (5) *R. v. National Arbitration Tribunal. Ex p. Midgley Harmer, Ltd.*, [1947] 1 All E.R. 196; [1947] L.J.R. 645; 2nd Digest Supp.

ADJOURNED SUMMONS.

The plaintiff, a school teacher employed by the defendant corporation, served in His Majesty's Forces from Sept. 8, 1941, until November, 1945, when he was demobilised, and on Dec. 12, 1945, he resumed his employment as a school teacher with the corporation. By a resolution, dated Sept. 26, 1939, the corporation resolved that "pursuant to the provisions of the Local Government Staffs (War Service) Act, 1939, all permanent officers and servants who are contributors to the appropriate superannuation fund, and who . . . may be called up for war service . . . in connection with the present emergency, shall be paid, during the pleasure of the council, full pay, less government pay and allowances . . ." By a resolution of the corporation, dated Jan. 23, 1940, for the purpose of the war service allowances "full pay" was defined as meaning "the ordinary weekly or monthly wage or salary to which the officer or servant is or would normally have become entitled had he continued in his civil duties, and shall include any annual increment under the [corporation's] scale of salaries applicable to the grade in which he was serving when called up for war service, but shall exclude . . . any increase of rates of pay or bonus granted by the [corporation] during the . . . war." By the Remuneration of Teachers Order, 1945 (S.R. & O., 1945, No. 1317), the Minister of Education directed local education authorities to pay to teachers, as from Apr. 1, 1945, the scales of pay contained in the report of the Burnham Committee for 1945, whereby the scales of salary for certain categories of teachers was increased. The plaintiff, as well as a number of other teachers employed by the corporation, came within the categories affected by the order. As from Apr. 1, 1945, the corporation did not make up the war service pay of teachers to the new scales, and on Feb. 5, 1947, the Birkenhead Branch of the National Association of Schoolmasters, purporting to act under the Conditions of Employment and National Arbitration Order, 1940, submitted a report to the Minister of Labour and National Service in respect of a trade dispute existing or apprehended between twelve members of the association and the defendant corporation arising out of claims by the members for adequate

augmentation of their war service pay, and applied to the Minister to declare a trade dispute between the association and the corporation in respect of those claims and to refer the matter to the National Arbitration Tribunal for adjudication.

On the matter being referred to the tribunal by the Minister, the employees claimed that, as from Apr. 1, 1945, the new Burnham scale should be recognised as "full pay" for the purpose of the supplemental allowances made by the corporation to teachers on war service. By an award, dated Apr. 22, 1947 (Award No. 949), the tribunal found that the employees' claim had not been established.

The plaintiff, although a member of the National Association of Schoolmasters and employed by the corporation on similar terms and conditions as were applicable to the employees named in the report of Feb. 5, 1947, was not a party to the proceedings which ensued as a result of the report, and on Oct. 14, 1947, he took out an originating summons under R.S.C., Ord. 54A, for the determination of the question whether, on the true construction of the resolutions of Sept. 26, 1939, and Jan. 23, 1940, he was entitled to be paid the supplementation grant in respect of his period of war service from Apr. 1, 1945, to the date of his demobilisation at the rate of pay applicable to him under the Remuneration of Teachers Order, 1945. On May 7, 1948, the summons came before ROMER, J., and was adjourned so that the National Arbitration Tribunal, on a reference to them by the Minister of Labour on the application of the corporation, might determine (i) whether, as a matter of interpretation of Award No. 949, the plaintiff was a "party" to the award and, accordingly, bound thereby, and (ii), if not, whether he was a worker "to whom the . . . award relates" so as to be bound thereby under the Conditions of Employment and National Arbitration Order, 1940, art. 2 (5). On Jan. 14, 1949, the tribunal issued a determination that the plaintiff was a party to the trade dispute, but was not a worker to whom the award related so as to be bound thereby.

As a result of that determination, on Jan. 27, 1949, the corporation reported to the Minister a trade dispute existing between them and the plaintiff, describing the dispute in terms similar to the description of the earlier dispute contained in the report of Feb. 5, 1947, and stating that a like dispute was apprehended between them and the other school teachers employed by them who were not parties to or bound by Award No. 949. By an award, dated Aug. 23, 1949 (Award No. 1313), the tribunal found against the plaintiff's claim.

On July 25, 1951, the originating summons was restored for further hearing, and counsel for the plaintiff submitted (i) that the questions raised by the summons were not the same as the "dispute" which the tribunal had decided by Award No. 1313, and (ii) that, if it were decided that they were, the tribunal had no jurisdiction to entertain the matter and had acted *ultra vires* in purporting to do so. As the learned judge considered that the second point raised a question of principle of such importance that it should not be decided without giving the tribunal and the Minister of Labour the opportunity of being represented, the summons was stood over again. On Oct. 24, 1951, by leave of the learned judge, the plaintiff amended his originating summons by adding in his claim to relief the words "notwithstanding Award No. 1313 dated Aug. 23, 1949, of the National Arbitration Tribunal which was *ultra vires*." On Nov. 14, when the amended summons came up for argument, the Minister of Labour was represented by counsel appearing as *amicus curiae*, but the National Arbitration Tribunal did not appear.

Salmon, K.C., and N. N. McKinnon for the plaintiff.

Salt, K.C., and Miss B. A. Bicknell for the defendant corporation.

S. B. R. Cooke as *amicus curiae*.

Cur. adv. vult.

Dec. 21. ROMER, L.J., read a judgment in which he set out the facts, and continued: Counsel for the plaintiff enunciated the following questions for

consideration: (i) whether under his contract of service with the defendant corporation the plaintiff was entitled to have his pay made up to the new Burnham scale between Apr. 1 and November, 1945; (ii) as to the true construction of the resolutions of the corporation passed respectively on Sept. 26, 1938 and Jan. 23, 1940, and, in particular, as to the proper interpretation of the words "full pay" as used therein; (iii) whether question (i) in conjunction with question (ii) was the "dispute" which was the subject of Award No. 1313; (iv) if so, whether the National Arbitration Tribunal had jurisdiction to entertain it. Of these questions I propose to consider numbers (iii) and (iv) first, for, if they are both decided adversely to the plaintiff, then, as counsel on his behalf rightly conceded, the matter is *res judicata* and the plaintiff cannot proceed on his summons. Were, then, the rights which the plaintiff seeks to have established by declaration on this originating summons the same as his claims which were negated by Award No. 1313? [His LORDSHIP referred to *National Association of Local Government Officers v. Bolton Corporation* (1); stated that the plaintiff and his fellow employees had acquired contractual rights by virtue of the resolutions of Sept. 26, 1938, and Jan. 23, 1940; examined the statements of the employers' and employees' cases in the arbitration proceedings and the terms of the awards; and continued:] I have no doubt that in the first and in the second arbitration proceedings the employees' contractual rights under the two resolutions were in issue, and I must, accordingly, decide this question adversely to the plaintiff.

The next question for consideration is whether the National Arbitration Tribunal had jurisdiction to decide the rights of the plaintiff under his contract of service with the corporation. The answer to this question depends on the construction and effect of the Conditions of Employment and National Arbitration Order, 1940, hereinafter referred to as "the order of 1940"—but it would first be convenient to consider the Defence (General) Regulations, 1939, R. & O., 1939, No. 927, as amended by S.R. & O., 1940, No. 1217, reg. 58AA, by virtue of which the order of 1940 was made. Paragraph (1) of reg. 58AA provides:

"With a view to preventing work being interrupted by trade disputes, the Minister of Labour and National Service may by order make provision—(a) for establishing a tribunal for the settlement of trade disputes, and for regulating the procedure of the tribunal; (b) for prohibiting, subject to the provisions of the order, a strike or lock-out in connection with any trade dispute; (c) for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the order to be, or to be not less favourable than, the recognised terms and conditions; (d) for recording departures from any rule, practice or custom in respect of the employment, non-employment, conditions of employment, hours of work or working conditions of any persons; (e) for any incidental and supplementary matters for which the Minister thinks it expedient for the purpose of the order to provide."

para. (4):

"In this regulation the expression 'trade dispute' has the same meaning as in the Industrial Courts Act, 1919."

The order of 1940 (as amended) is as follows. The recital is:

"The Minister of Labour and National Service (hereinafter referred to as 'the Minister') with a view to preventing work being interrupted by trade disputes and by virtue of the powers conferred on him by reg. 58AA of the Defence (General) Regulations, 1939, hereby makes the following order."

art. 1:

"For the purpose of settling trade disputes which cannot otherwise be determined there shall be constituted by the Minister a tribunal to be

called 'the National Arbitration Tribunal' and the provisions of the schedule to this order shall have effect with respect to the constitution and proceedings of the tribunal."

By art. 2:

"(1) If any trade dispute exists or is apprehended that dispute, if not otherwise determined, may be reported to the Minister by or on behalf of either party to the dispute and the decision of the Minister as to whether a dispute has been so reported to him or not and as to the time at which a dispute has been so reported shall be conclusive for all purposes. (2) The Minister shall consider any dispute so reported to him as aforesaid and if in his opinion suitable means for settling the dispute already exist by virtue of the provisions of any agreement to which the parties are organisations representative of employers and workers respectively, he shall refer the matter for settlement in accordance with those provisions: so, however, that where a matter has been referred for settlement in accordance with the provisions of this paragraph and there is a failure to reach a settlement or, in the opinion of the Minister, a settlement is unduly delayed, the Minister may cancel the reference and substitute therefor a reference to the National Arbitration Tribunal. (3) Where, in his opinion, no such suitable means of settlement exist as are mentioned in the last preceding paragraph of this article, the Minister shall take any steps which seem to him expedient to promote a settlement of the dispute and may, if he thinks fit, refer the matter for settlement to the National Arbitration Tribunal. (4) Where steps to promote a settlement of the dispute have been taken by the Minister under the provisions of para. (2) or para. (3) of this article (otherwise than by means of a reference to the National Arbitration Tribunal) and those steps have not resulted in a prompt settlement of the dispute, the Minister shall refer the dispute for settlement to the National Arbitration Tribunal and shall do so within twenty-one days from the date on which the dispute was so reported to him as aforesaid, unless, in his opinion, the special circumstances of the case make it necessary or desirable to postpone such a reference. (5) Any agreement, decision or award made by virtue of the foregoing provisions of this article shall be binding on the employers and workers to whom the agreement, decision or award relates and, as from the date of such agreement, decision or award or as from such date as may be specified therein, not being earlier than the date on which the dispute to which the agreement, decision or award relates first arose, it shall be an implied term of the contract between the employers and workers to whom the agreement, decision or award relates that the rate of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with such agreement, decision or award until varied by a subsequent agreement, decision or award."

By art. 3 and art. 4:

"3. The Minister may refer to the National Arbitration Tribunal for advice any matter relating to or arising out of a trade dispute or trade disputes in general or trade disputes of any class or any other matter which, in his opinion, ought to be so referred. 4. An employer shall not declare or take part in a lock-out and a worker shall not take part in a strike in connection with any trade dispute unless the dispute has been reported to the Minister in accordance with the provisions of art. 2 of this order and twenty-one days have elapsed since the date of the report and the dispute has not during that time been referred by the Minister for settlement in accordance with the provisions of that article."

By art. 5 (as amended by S.R. & O., 1942, No. 1973, and S.R. & O., 1944, No. 1437):

"(1) Where in any trade or industry in any district terms and conditions of employment are established which have been settled by machinery of

ation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of employers and workers engaged in that trade or industry in that district (hereinafter referred to as 'recognised terms and conditions') all employers in that trade or industry in that district shall observe the recognised terms and conditions or such terms and conditions of employment as are not less favourable than the recognised terms and conditions. If any question arises as to the nature, scope or effect of the recognised terms and conditions in any trade or industry in any district or as to whether an employer is or was observing the recognised terms and conditions or was observing terms and conditions which are or were not less favourable than the recognised terms and conditions, that question may be referred to the Minister . . . by any organisation of employers or any trade union which in the opinion of the Minister is an organisation or trade union that habitually takes part in the settlement of wages and working conditions in the trade or industry concerned and if so reported the question thereupon be dealt with in the same manner as if it were a trade dispute reported to the Minister under the provisions of art. 2 of this order and the provisions of that article shall apply accordingly: so, however, that in making an award on any question referred by the Minister by virtue of the powers conferred by this paragraph the National Arbitration Tribunal shall have regard not only to the provisions of para. (2) of this article, but also to any collective agreements concerning the terms and conditions of employment of workers in comparable trades or industries . . . (4A) Where an award has been made by the National Arbitration Tribunal in consequence of a dispute made under the foregoing provisions of this article, then as from the date of the award, it shall be and, in the case of a retrospective award, shall be deemed to have been an implied term of the contract between the employer and workers to whom the award applies that the wages to be paid and the conditions of employment to be observed under the contract shall, until varied by a subsequent agreement, decision or award such as is mentioned in the foregoing provisions of this article, be in accordance with the award. (5) Any reference in the foregoing provisions of this article to an agreement, decision or award shall be construed as a reference to that agreement, decision or award as modified by any subsequent agreement, decision or award."

The Minister defines a trade dispute as follows:

"The expression 'trade dispute' means any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person."

Counsel for the plaintiff did not contend that on this definition a dispute between one employee and his employers is not included within it—and, indeed, he contended that this point has been affirmatively decided by a Divisional Court (see *R. v. National Arbitration Tribunal. Ex p. South Shields Corpn.* (2)).* More than this, counsel for the plaintiff conceded that, if the terms of the definition be given their literal meaning, they are wide enough to include the dispute which has arisen between the plaintiff and the corporation. He argued, however, that some of the other provisions of the order of 1940 compel a narrower interpretation of the definition than that which its language *prima facie* demands, and in particular, that the literal interpretation of the definition should be cut down so as to exclude a dispute between a workman and his employers arising out of the interpretation of the workman's contract of service. The way he advanced was this. He argued first that the settlement of contractual disputes

* As to position under the Industrial Disputes Order, 1951, see *ibid.*

was outside the purview of the Defence (General) Regulations, 1939, reg. 58AA, which envisaged claims of employees, not in enforcement of their contractual rights, but for extra wages or improved conditions which were outside and beyond those to which their agreements already entitled them—claims for the settlement of which no tribunal already existed and which, unless speedily dealt with, might lead to disastrous strikes in a time of national emergency. The order of 1940 was brought into being to avert such dangers as these and not to facilitate the settlement of private contractual disputes for the determination of which tribunals, namely, His Majesty's courts, already existed. Counsel for the plaintiff then pointed to art. 2 (5) as supporting this general approach to the order. This paragraph has a dual effect. It provides (i) that any award made under art. 2 shall be binding on the employers and employees concerned; and (ii) that, as from the date of the award (or other date as therein specified) its terms shall (in effect) be incorporated by implication in the contracts already existing between such employers and employees respectively. How, asked counsel for the plaintiff, could an award interpreting a provision of a subsisting contract be implied as a term of that contract? What the second part of art. 2 (5) is aiming at, he says, is the incorporation in the contract of something that is not already in it, for example, some change in wages or working conditions. Counsel for the plaintiff then contrasted art. 2 of the order with art. 5. That article, while empowering the reference of certain agreements to the tribunal, is confined to national agreements, and, although the tribunal can consider and decide the effect of such agreements, there is no provision (as there is in art. 2) that its award shall be binding on the parties concerned. It is merely provided that it shall thenceforth be an implied term of the national agreement to which it relates. From the above considerations counsel for the plaintiff proceeds to the conclusion that, notwithstanding the width of the definition of "trade dispute," differences arising out of the interpretation of private, as distinct from national, agreements of service are outside it. And, by way of illustration, he said that it would be monstrous if an employee, having a long-term service agreement, who was summarily dismissed for fraud, could be taken, at the instance of his employers, to the tribunal and be thus deprived of his rights as a citizen to have his case heard and determined by a judge and jury.

The contrary arguments (apart from the citation of authority, which I will consider later) of counsel for the defendant corporation may be summarised as follows. The language of the definition of "trade dispute" in art. 7 of the order so plainly covers differences such as that which has arisen between the plaintiff and the corporation that the court cannot be justified in excluding them in the absence of compelling indications in other parts of the order, and no indications sufficiently compelling are to be found. My attention was drawn to the fact that the definition is not the hurried work of some hard-pressed draftsman in time of war, but was fashioned in its present shape so long ago as 1906. The definition is to be found in substantially the same terms in s. 5 (3) of the Trades Disputes Act, 1906. This statute was not concerned with industrial conciliation, but the definition, in precisely its present form, appears again in s. 8 of the Industrial Courts Act, 1919. And, as appears from the Defence (General) Regulations, 1939, reg. 58AA, that regulation specifically provides that the term is to have the same meaning as that in the Act of 1919. It is, accordingly, argued, with some force, that a strong case must be made out for whittling down the plain meaning and effect of words which, presumably, have received legislative consideration over so long a period of years and which no legislative authority has ever thought proper to alter. It was then submitted that in practically every case where a dispute arises by reason of employees demanding, and employers refusing, an increase in wages or improved conditions the first thing the tribunal has to do is to inquire what are the subsisting wages and conditions to which the men, by virtue of their contracts, are already entitled, and that in many cases such an inquiry necessarily involves the interpretation

contracts by the tribunal. From this it is argued that the consideration of private agreements as well, must have been within the contemplation of the authors of the order of 1940. The plaintiff's argument founded on the second provision of art. 2 (5), it is submitted to me that the fact that it could have no application to a case of the present is irrelevant and is quite insufficient to warrant the cutting of the definition of trade dispute in the way that the plaintiff invites me to do. The first provision of art. 2 (5) is applicable to all decisions or awards of the tribunal, including the one now under consideration, made on references to art. 2. The second provision is applicable to the general run of such cases made on claims for wages or conditions beyond those already conferred by contract. The fact that this particular provision is inapplicable to certain cases cannot justify the view that, notwithstanding the plain meaning of "dispute" in art. 7, the definition article, the scope of the order is confined to cases which admit of the application of that provision.

In my judgment, and apart altogether from such authority as exists on the point, the arguments of counsel for the corporation are sound. The obvious purpose of the order of 1940 was to establish a tribunal which could deal, and deal speedily (for speed was clearly one of the main objects of the order), with disputes between employers and workmen which, unless so dealt with, might lead to strikes and lock-outs at a time when this country could least afford industrial unrest. Such unrest can well arise from a grievance, real or imaginary, under a private contract of service, and it appears to me to be inherently probable that the intention of the order was to exclude disputes resulting from breaches of such contracts from its scope. Approaching the order, then, from this point of view, I am not surprised to find that disputes of this character are unquestionably within its scope if one looks to the definition article alone, and, in my opinion, it would require a great deal more than the matters relied on by counsel for the plaintiff to justify the alteration of the definition and, by so doing, to arrive, not at an expected, but at an unexpected, result. I am not impressed by the force of the hypothetical case, suggested by counsel for the plaintiff, of the long-term employee summarily dismissed for dishonesty. It is true that the difference arising therefrom could, in fact, be regarded as a "dispute," the jurisdiction of the tribunal would only be concurrent with, and not exclusive of, that of the courts. And if the employee immediately issued proceedings for damages, as he most probably would, I have no doubt but that the tribunal could and would (unless anticipating immediate industrial unrest) take prompt action on any report submitted to him by the employers or the Minister in the trial in the courts. If, on the other hand, he had reason to suppose that his dismissal would occasion immediate and widespread sympathetic action by fellow employees or others, I see no reason why he should not avail himself of the speedy machinery of the tribunal rather than wait until the question of his action had been decided by the courts and, possibly, by the ultimate appeal to the tribunal.

I now turn to the authorities to which I was referred. In *R. v. National Industrial Tribunal. Ex p. Horatio Crowther & Co., Ltd.* (3) the headnote is:

"On November, 1946, workmen employed by the applicants, a company, through their union had pressed for changes in wages and conditions of service. On Mar. 28, 1947, the company gave the workmen on the retarding side of their business, including those in the union, notice terminating their employment as from Apr. 4. On Apr. 14, the matter was referred to the Minister of Labour and National Service, who referred it to the National Arbitration Tribunal. The claim of the workmen included that: ' (1) The reinstatement from the date of dismissal of the workers dismissed.' The award of the tribunal stated: ' They find in favour of the

claim set out in item (1) . . . and award accordingly.' On an application for an order of *certiorari* to quash the award: HELD: (i) although at the date of the report to the Minister of Labour the contract of service between the company and the workmen had been terminated, there was nevertheless a 'trade dispute,' within the meaning of art. 7 of the order of 1940, which had been properly referred under art. 2 (1). (ii) a direction to reinstate the workmen would be *ultra vires* the tribunal, and, as (CROOM-JOHNSON, J., *dissentiente*) the finding on item (1) of the claim was equivalent to such a direction, the award in so far as it related to that finding must be quashed."

LORD GODDARD, C.J., after referring to the notice determining the men's employment, said ([1947] 2 All E.R. 694) that no question arose as to that being in any way a notice otherwise than in accordance with the contracts of service. Then, in the course of considering and rejecting the argument submitted on behalf of the employers that there could not be a trade dispute between them and employees whose employment had already been determined, he said (*ibid.*, 695):

"Supposing a dispute arose whether the workers in a particular industry or branch of an industry could be, as the employers contended, dismissed at an hour's notice or whether they were entitled, as the workers contended, to a week's notice. There you would have a dispute connected with the terms of employment. It appears to me clear that an employer could not avoid a reference by the Minister if the matter was reported to him by discharging his workmen and saying: 'They are no longer in my service, whether I rightly or wrongly dismissed them.' If an employer discharges his workmen without proper notice, although the workmen would have an action for wrongful dismissal, they are not from the moment of discharge in the employer's service, but if the contention advanced by the employers in this case be right the question of what notice workers in this industry or this factory should be given could not be settled by the tribunal."

In *R. v. National Arbitration Tribunal. Ex p. Imperial Tobacco Co., Ltd.* (4) the headnote is:

"A war emergency committee was set up in the tobacco industry in 1941, and the workers' side of the committee asked for increases of rates of wages, which the employers' side refused. As they were unable to come to an agreement the Ministry of Labour and National Service, in answer to an application by the workers' side, made an order under the Conditions of Employment and National Arbitration Order, 1940, referring the dispute to the National Arbitration Tribunal, a body set up by the same order. The employers applied for orders of prohibition on the ground that the tribunal had no jurisdiction to hear the dispute. They maintained that the Conditions of Employment and National Arbitration Order, 1940, art. 1, which provided that the tribunal should be constituted for 'the purpose of settling trade disputes which cannot otherwise be determined' must be construed as 'for the purpose of settling trade disputes for the determination of which no machinery exists,' and that, as the workers' claims were in effect claims for minimum rates, the machinery of the trade board existed for the settlement of the disputes: HELD: the workers' claims were not for minimum rates of wages. The disputes arose out of claims for rises on actual rates of wages paid, and, consequently, the trade board had no jurisdiction to hear the present disputes. The Conditions of Employment and National Arbitration Order, 1940, has to be read as a whole and art. 1 does not limit the jurisdiction of the tribunal."

For present purposes that case is mainly useful for the observations of the members of the court on the scope of the order of 1940 notwithstanding the

apparently limiting or qualifying words which are to be found in art. 1. On this subject VISCOUNT CALDECOTE, C.J., said ([1943] 2 All E.R. 166):

"When the words of . . . art. 2 [of the order of 1940] are looked at, it will be seen that the article deals with trade disputes, that is, trade disputes within the meaning of the definition . . . I . . . think that these are trade disputes which cannot otherwise be determined either by the trade boards or by agreement. I further think that upon a proper review of this order, the jurisdiction of the National Arbitration Tribunal is not to be found in the introductory words of art. 1, but is to be ascertained from the order as a whole. If a trade dispute gets before the National Arbitration Tribunal regularly, it seems to me that jurisdiction to entertain the dispute in question follows as a matter of course. Let me look at art. 2 to see how the matter stands. Article 2 (1) of the order provides in the widest terms, quite unqualified terms, that: 'If any trade dispute exists or is apprehended, that dispute, if not otherwise determined, may be reported to the Minister . . .'. Article 2 (2) provides that the Minister shall—he must—refer the matter for settlement in accordance with any suitable means, suitable that is, in his opinion, for settling the dispute, which are the result of agreement, but it is still true to say that that applies to any trade dispute. Article 2 (3) says that failing suitable means, the Minister may refer the matter for settlement to the National Arbitration Tribunal, and art. 2 (4), under which I think the Minister was acting in this case, provides that when ' . . . steps have not resulted in a prompt settlement of the dispute, the Minister shall refer the dispute for settlement to the National Arbitration Tribunal . . .'. Those provisions seem to me quite plainly to give jurisdiction to the National Arbitration Tribunal to entertain a trade dispute which has been properly referred to it; otherwise it seems to me nonsense would be made of the articles to which I have referred, and I see no reason why any limitation of the right of the National Arbitration Tribunal should be supposed to exist, subject to this, that it must be a trade dispute, and it must be a trade dispute which has come before the Arbitration Tribunal in accordance with the provisions to which I have referred. I think it is a much safer way of construing these provisions which create the tribunal and create the jurisdiction of the tribunal to refer to the operative words of the article as a whole, than to pay attention solely to the introductory words of art. 1, where the purpose of the establishment of the National Arbitration Tribunal is stated."

OMPHEYS, J., after referring to the words, "For the purposes of settling trade disputes which cannot otherwise be determined", in art. 1 of the order, said (*ibid.*, 169):

"All I desire to say about that is that I am quite clearly of opinion, with my Lord, that whatever may be the effect of the introduction of these words, they cannot and do not limit the jurisdiction of the Minister or of the National Arbitration Tribunal . . . It is not the law of England that any tribunal set up by Parliament or by a statutory order can be prohibited from functioning, so long as it keeps within the terms of the statute or the order merely because there may be a different way, which that body cannot take, of arriving at the same result."

QUITH, J., dealt with the matter as follows (*ibid.*, 171):

"I agree with the judgments delivered by my Lords, and I would add only a few sentences on a single point, that is on the construction of the words 'which cannot otherwise be determined' in art. 1. It has been contended that those words mean 'for the determination of which no other machinery, whether statutory or otherwise, exists.' If they did mean

that, in my view, that would not curtail the jurisdiction of the tribunal. But can they mean that? The order must be read as a whole. Article 2 (2) provides that where suitable means of settling the dispute exist by virtue of an agreement, the Minister has to resort to those means, and do so unsuccessfully, before he can refer the dispute to the tribunal. The words in art. 1 are, in my view, no more than an anticipation, in language perhaps unnecessarily wide, of this later provision. Indeed, I am not sure that the language is even unnecessarily wide, for while the words 'which cannot otherwise be determined' are capable of meaning 'which cannot be determined by any other means,' they are equally capable of meaning 'which cannot be determined by certain specific other means,' namely, the means specified below in art. 2 (2), and this is, in my view, their true meaning."

In *R. v. National Arbitration Tribunal. Ex p. Midgley Harmer, Ltd.* (5), the facts were as follows. On May 23, 1945, the Minister referred to the tribunal a dispute arising out of a claim by some of the employees of Midgley Harmer, Ltd., for an increase of pay under the terms of an agreement, dated Aug. 9, 1944, between the Engineering and Allied Employers' National Federation and certain trade unions. Midgley Harmer, Ltd., who were not a party to that agreement, were paying their employees at a higher rate than that mentioned in the agreement, and they contended that the agreement did not, therefore, apply to them, that art. 5 of the order of 1940 did not make it apply, and that the tribunal had no jurisdiction to entertain the dispute. In his judgment, LORD GREENE, M.R., said ([1947] 1 All E.R. 197):

"The particulars of the dispute [referred to the tribunal by the Minister] were as follows: 'The dispute arises out of a claim made by the workmen mentioned in sched. 1 for increases in rates of pay under the terms of the agreement dated Aug. 9, 1944, between the Engineering and Allied Employers' National Federation and certain trade unions'."

After referring to the Defence (General) Regulations, 1939, reg. 58AA (1), and art. 1 and other provisions of the order of 1940, LORD GREENE, M.R., said (*ibid.*, 198):

"The only limit on the jurisdiction of the tribunal which appears there is that the matters that can be referred to it are confined to trade disputes. The definition of 'trade dispute' is to be found in art. 7 of the order."

He then read the definition and proceeded (*ibid.*):

"It appears to me to be really incapable of argument that, on the true construction of that definition, the present dispute is not a trade dispute within the meaning of the order. The employers, on the one hand, and the work-people, on the other, are in dispute or difference connected with the terms of employment, namely, the wages which the employees are to be paid. *Prima facie*, therefore, the matter is clearly a trade dispute in respect of which the National Arbitration Tribunal is the competent body to decide."

After a reference to art. 5 (1) of the order of 1940 and to the terms of the agreement of Aug. 9, 1944, LORD GREENE, M.R., said (*ibid.*, 199):

"The employers' case, as far as I understand it, is of this nature. They say that this agreement, which, for convenience, I shall call the national agreement, does not provide for increases to be given to female workers save in the case of those who are earning wages at rates mentioned in the agreement itself. It does not apply, they argue, and art. 5 does not make it applicable, to a case where the wages of the female workers are already above the scales mentioned in the agreement. Therefore, it is said, the National Arbitration Tribunal has no jurisdiction to take this controversy into consideration, in other words, it is not competent to the employees to say that this agreement applies to them and gives them the right, pursuant to art.

of the order of 1940, to the increase which they are demanding. The employees say that the effect of the agreement, on its true construction, as set into force against the employers under art. 5 of the order, gives to the male employees of Midgley Harmer, Ltd., the right to the increases mentioned, irrespective of what they were earning before. Why that does not constitute a trade dispute, I am afraid I am incapable of understanding." ROMER, L.J., said (*ibid.*, 200):

"I agree. In the present case there is a dispute as to the meaning and effect of the agreement of Aug. 9, 1944. In my judgment, that is plainly a trade dispute within the definition contained in the Conditions of Employment and National Arbitration Order, 1940. The argument of counsel for the employers really amounts to this: 'The construction which my clients seek to place on the agreement of Aug. 9, 1944, is clearly right. If the National Arbitration Tribunal decides against my clients, it will be deciding wrongly. On Feb. 28, 1945, in a similar case, the National Arbitration Tribunal did decide wrongly, and I am apprehensive that they will do the same again.' That is not an objection to jurisdiction. It is merely a suggestion that the tribunal has misconstrued the agreement once and will misconstrue it again. It is not for this court to form any view about the meaning of the agreement. That is entirely a matter for the tribunal, and I, of course, have formed no view one way or the other."

Counsel for the plaintiff says that the statement which I have cited from the judgment of LORD GODDARD, C.J., in *Ex p. Crowther* (3) was *obiter*. So it was, but it is a clear guide to what the views of LORD GODDARD, C.J., were on the point I am considering, and I accord to it the weight to which all his opinions, specially expressed, are entitled. Then, as to the *Imperial Tobacco Co.* case, counsel for the plaintiff, while admitting that the observations of LORD MACCOTE, C.J., and HUMPHREYS, J., are against him so far as they went, admits that they did not go far enough. Moreover, he placed some reliance (which I am afraid I do not myself appreciate) on the judgment of ASQUITH, J., in regard to *Ex p. Midgley Harmer, Ltd.* (5), counsel for the plaintiff said that the agreement which was there under discussion was a national agreement, and so, apparently, it was. It was pointed out, however, by counsel for the defendant corporation that LORD GREENE, M.R., said that the reference by the Master was, not under art. 5 of the order of 1940, but under art. 2, and there was to be no sufficient ground for supposing that this was not the case.

On the whole it seems to me that, although none of the cases to which I have referred is direct authority in support of the proposition that the National Arbitration Tribunal had jurisdiction to deal with the rights of employers and employees under private—as distinct from national—agreements of service, judicial utterances which I have cited tend to suggest that my own view that the tribunal had such jurisdiction is correct, and no authority was cited to the contrary. I, accordingly, hold that, not only did the tribunal in fact hear the question which the plaintiff has sought to put in issue on the present originating summons, but it had full jurisdiction to do so. From this it follows, counsel for the plaintiff conceded, that the matter is, as between the plaintiff and the defendant corporation, *res judicata*. In these circumstances the question of construction of the resolutions of Oct. 4, 1939, and Jan. 23, 1940, does not arise. It only remains for me to dismiss, for the above reasons, the originating summons, and I, accordingly, do so, with costs.

Declaration accordingly.

Solicitors: *Craigen, Hicks & Co.* (for the plaintiff); *Robins, Hay & Waters*, Agents for *D. P. Heath*, town clerk, Birkenhead (for the corporation); *Solicitor, Ministry of Labour and National Service.*

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Re MELDRUM'S WILL TRUSTS. SWINSON AND ANOTHER v. MELDRUM AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), December 18, 19, 1951.]

Administration of Estates—Order of application of assets—Variation of statutory order—Indication in will of intention to vary—Bequest of “residue of my deposit account . . . after all . . . debts . . . have been liquidated”—Separate gift of residuary estate—Administration of Estates Act, 1925 (c. 23), sched. I, Part II, para. 8 (a).

By his will, dated May 21, 1948, the testator, who died on June 2, 1948, gave certain property to A., including the sum of £500 for her immediate expenses, all moneys standing to the credit of his current account, and “the residue of my deposit account at Lloyds Bank . . . after all legacies debts funeral and other expenses have been liquidated but excluding death duties and testamentary expenses.” The testator gave his residuary estate to trustees on trust to pay a part of the income thereof to his son, H., and a part to A. during the life of A., and after A.’s death to hold on trust for H. absolutely. The testator and a partner were interested in two companies which were family concerns, and it was their practice to borrow from the companies money which they repaid at their convenience. At the time of his death the testator owed £10,000 to one company and £9,000 to the other, his other liabilities being small. At the date of his will and at the date of his death there was about £12,000 in the deposit account.

HELD: there was clear indication in the will that the testator intended to vary the order of application of assets specified in sched. I, Part II, to the Administration of Estates Act, 1925, and, therefore, under s. 34 (3) of the Act and para. 8 (a) of sched. I, Part II, the provisions contained in the will applied in regard to the fund out of which the debts were to be paid and the sums of £10,000 and £9,000 were to be paid primarily out of the deposit account.

Re Littlewood ([1931] 1 Ch. 443), and *Re James* ([1947] 1 All E.R. 402), applied.

AS TO ORDER OF APPLICATION OF ASSETS, see HALSBURY, Hailsham Edn., Vol. 14, p. 375, para. 704; and FOR CASES, see DIGEST, Supplement, Vol. 24, Executors and Administrators, Nos. 5908a-5919a.

Cases referred to:

- (1) *Re James*, [1947] 1 All E.R. 402; [1947] Ch. 256; [1947] L.J.R. 735; 176 L.T. 370; 2nd Digest Supp.
- (2) *Re Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 107; 142 L.T. 111; Digest Supp.
- (3) *Re Gordon*, [1940] 3 All E.R. 205; [1940] Ch. 769; 109 L.J.Ch. 289; 163 L.T. 308; 2nd Digest Supp.
- (4) *Re Smith*, [1913] 2 Ch. 216; 83 L.J.Ch. 13; 108 L.T. 952; 23 Digest 497, 5640.
- (5) *Re Littlewood*, [1931] 1 Ch. 443; 100 L.J.Ch. 243; 144 L.T. 718; Digest Supp.
- (6) *Re Atkinson*, [1930] 1 Ch. 47; 99 L.J.Ch. 35; 142 L.T. 129; Digest Supp.

ADJOURNED SUMMONS to determine, on the true construction of the will of Harrison Meldrum, (a) whether the word “debts,” in a direction to pay debts out of a deposit account which was specifically bequeathed to the second defendant, included sums owing by the testator to companies which were family concerns, and (b) whether the will showed an intention to vary the order of application of assets mentioned in the Administration of Estates Act, 1925, sched. I, Part II.

R. J. T. Gibson for the plaintiffs (the trustees).

Harold Christie, K.C., and *H. H. Monroe* for the first defendant, the residuary legatee.

Montgomery White, K.C., and *J. A. Brightman* for the second defendant, specific legatee.

UPJOHN, J.: This summons raises some interesting and difficult points in relation to the incidence of debts and legacies as between two different funds arising under the will of the testator, Harrison Meldrum. The testator made his will on 21, 1948, and on May 25, 1948, he made a codicil disposing of certain shares of a company known as J. James & Co., Ltd. He died on June 2, 1948, and the will was duly proved in the Principal Probate Registry on Aug. 21, 1948, by the executors named in the will, *viz.*, the plaintiffs, Reginald Barnes Swinson and Ronald Sydney Dawe, and the first defendant, Harold Meldrum, the testator's son.

By cl. 1 of his will the testator appointed the first defendant and the plaintiffs as executors and trustees. Clause 4 begins with the words: "I bequeath the residue of my real and personal estate . . . legacies free of duty," and the testator then sets out a number of specific legacies in sub-clauses (a) to (p) inclusive. In cl. 4 (q) he says:

"To Annie Leeman Meldrum [the second defendant] the sum of £500 for her immediate expenses and all articles of domestic or personal use and ornament including furniture pictures wines spirits linen that may belong to me as well as any share of mine in the motor car and all moneys standing to the credit of my current account with Lloyds Bank at Dartmouth and of my deposit account with the Post Office Savings Bank and also all my shares and national savings certificates and the residue of my deposit account with Lloyds Bank Dartmouth after all legacies debts funeral and other expenses have been liquidated but excluding death duties and testamentary expenses."

By cl. 5 the testator gave an annuity of £500 to the second defendant for her life and made provision for a fund to be set aside to secure the payment of that annuity. By cl. 9 he devised and bequeathed

"all the residue of my property including property over which I may have power of appointment and the *corpus* of the fund set aside to answer the annuity of [the second defendant] unto my trustees upon trust to pay the same as to three fourths to [the first defendant] and as to one fourth to the second defendant] during the life of [the second defendant] and after the death of [the second defendant] to hold my residuary estate upon trust for [the first defendant] absolutely."

The contest here is of a twofold nature, the questions being (i) what liabilities of the testator were included in the expression "debts" in cl. 4 (q) of his will?, and (ii) whether, on the true construction of the will and having regard to the provisions of the Administration of Estates Act, 1925, the primary fund for payment of legacies, debts, and funeral and other expenses is the residue of the deposit account at Lloyds Bank or whether it is the residuary estate of the testator which he dealt with by cl. 9 of his will. Before I can answer those questions, I must briefly advert to one or two other relevant facts. The Meldrum and the Swinson families were jointly interested in a number of shipping concerns in which they owned approximately in equal shares. They had a number of companies which were managed by the firm of Meldrum & Swinson or by the company of Meldrum & Swinson, Ltd., and there were two companies in particular to which I am concerned—one the Essex Transport & Trading Co., Ltd. (which I will call the transport company) and the other the Essex Steamship Co., Ltd. (which I will call the steamship company). At the date of his death, the testator was indebted to the steamship company in the sum of £10,000, and to the transport company in the sum of £9,000.

The first question which I have to determine is whether the testator included the two sums in the expression "debts" when he used the words in cl. 4 (q), "after all legacies debts funeral and other expenses have been liquidated." The LORDSHIP considered the evidence and cl. 4 (q) of the will, said that the

question depended solely on the special facts of the case and the wording of the will and that he could find nothing which enabled him to read the word "debts" as meaning "debts other than loans from family companies", and continued:] I now turn to the difficult and important question whether the matter is affected by the Administration of Estates Act, 1925. Section 34 (3) of that Act provides:

"Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of sched. I to this Act."

The heading to sched. I, Part II, is: "Order of application of assets where the estate is solvent." Paragraph 1 of the schedule is: "Property of the deceased undisposed of by will . . ." Paragraph 2 is:

"Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid."

Counsel for the second defendant contended that, as there is a residuary gift here, under para. 2 residue is the primary fund for payment of the debts and funeral and testamentary expenses. Paragraph 4 is:

"Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts."

It is admitted by counsel for the second defendant that cl. 4 (g) of the will does constitute a charge for the payment of debts, but he contends that, under the provisions of sched. I, Part II, the property referred to in para. 4 ranks behind that referred to in para. 2, so that residue remains the primary fund. Paragraph 8 is:

"The following provisions shall also apply—(a) The order of application may be varied by the will of the deceased . . ."

It is, therefore, clear from s. 34 (3) of the Act and sched. I, Part II, para. 8 (a), that the provisions in sched. I, Part II, are subject to the provisions contained in the will and the order of application may be varied by the will. In other words, it is a matter of construction of the will in each case whether the provisions of sched. I, Part II, apply or whether they have been varied by the terms of the will. I propose, therefore, to consider the construction of this will before turning to the authorities which have been cited to me. Reading cl. 4 (g) of the will, I can feel no doubt in my own mind what the testator was meaning to do, and I should have thought it was clear almost beyond argument that he was intending to direct that the legacies which he had given and his debts and funeral and other expenses, whatever they might be, were to be paid or liquidated out of the deposit account and that his death duties and testamentary expenses were to be discharged out of residue, which was the other fund for the discharge of those obligations. With respect, I agree with the words used by ROXBURGH, J., in *Re James* (1), when he said ([1947] 1 All E.R. 404):

" . . . I should hold that the direction to pay debts out of a particular fund necessarily involved an intention to exonerate some other fund which the testator disposed of in some other part of his will—in other words, necessarily involved an intention to exonerate the residue of his estate which he devised and bequeathed to his wife absolutely."

It is true that in that case the direction was to trustees to realise certain property and to meet certain obligations, but in the present case, speaking without reference to authority and merely construing the words of the will, I should have thought that the testator was plainly saying that the legacies, debts, and funeral

other expenses were to be paid out of the deposit account, and the estate and testamentary expenses were to be paid out of residue. In other words, paraphrase the words which the testator used, in my judgment, it is as though said in cl. 9 of his will: "I devise and bequeath all the residue of my property to my trustees upon trust, after discharging death duties and testamentary expenses thereout, to pay the income" in the way indicated. Had he said that, I hardly think there could have been any argument about it. That being my view of the true construction of the will, I turn to the authorities to see whether there is anything in them which prevents me from giving effect to it. I think, are the intentions of the testator, which, in my judgment, clearly require the order of application of assets laid down in the Administration of Estates Act, 1925, sched. I, Part II. Counsel for the second defendant relied on the decision of MAUGHAM, J., in *Re Kempthorne* (2), which was overruled by the House of Lords on appeal, but only on a point of construction of that particular will. According to para. 3 and para. 4 of sched. I, Part II, to the Act of 1925, MAUGHAM, J., said ([1930] 1 Ch. 278):

"Then come two further paragraphs, which I think are somewhat difficult to understand, in relation to the subject-matter."

On reading para. 3 and para. 4, MAUGHAM, J., continued (*ibid.*):

"Now in both of those cases it is to be noticed that the legislature is assuming that the testator by his will has specifically appropriated in one case, or devised or bequeathed in the other, property for the payment of debts; or that he has charged with payment of debts specific property, or some property, under a general description, or devised or bequeathed property subject to a charge for payment of debts, and I cannot help concluding that those two paragraphs mean that the fact that the testator has done one of those things is not *per se* to constitute, to use the words of s. 34 (1), a provision in the will which operates to alter the order of application which is specified in Part II of the schedule."

The statement of the law was acted on by BENNETT, J., in *Re Gordon* (3) and was treated by him as being binding notwithstanding that the decision of MAUGHAM, J., was reversed on the particular facts of that case. As I understand MAUGHAM, J., he is saying that, having regard to the presence of para. 1 and para. 2 in sched. I, Part II, an indication in the will that a particular piece of property is to be charged with payment of debts is not sufficient to enable one to assume that the testator is intending to alter the order of application of assets, because, if that were so, one could never give effect to these paragraphs where there was a partial intestacy, bringing in para. 1, or a gift of residue (as in this case), bringing in para. 2. I think that ROXBURGH, J., recognises that in *Re James* (1). Nevertheless, it seems to me to remain a question purely of construction of each will whether or not the testator has varied the order of application of assets or not.

Counsel for the second defendant contended that the intention behind sched. I, Part II, was that the rules in regard to personal property were to be assimilated to the rule before 1926 in regard to real property. That rule, which was stated by EVE, J. ([1913] 2 Ch. 221) in *Re Smith* (4), was that, where there was a charge of debts on real estate, one had to find a clear indication in the will that the testator intended, not only to charge the realty, but also to discharge personalty, whereas it was sufficient to find a charge to pay debts on personalty to exonerate residue. Counsel for the first defendant contended, on the other hand, that the intention of sched. I, Part II, to the Act of 1925 was to bring the law into line with the previously existing rule relating to personalty, and in support of his contention he cited an observation of LAWRENCE, L.J. ([1930] 1 Ch. 298) in *Re Kempthorne* (2). My own view of the matter remains that it is a question of construction of each will whether or not the testator has intended to vary the order of application of assets, and I think I am justified in coming

to that conclusion, not only on the words of the Act, but in view of the decision of MAUGHAM, J., in *Re Littlewood* (5), which was not entirely dissimilar to the present case as there was an express charge of debts and funeral and testamentary expenses on a specific bequest followed by an absolute gift of residue. The will being executed before the coming into force of the Administration of Estates Act, 1925, the learned judge construed it in the light of the existing law, and he came to the conclusion that the charge of debts on certain specific bequests did exonerate the residuary estate, and, therefore, that the testator had intended to alter the order of application of assets specified in sched. I, Part II, to the Act of 1926. MAUGHAM, J., said ([1931] 1 Ch. 446):

“ In *Re Kempthorne* (2) I endeavoured to explain the difficulty which I felt in giving effect to some of the provisions of that Part of that schedule, and I understand that the Court of Appeal, who differed from me on one point in that case, also felt some difficulty in explaining the precise effect of those provisions. I think, however, that I am justified in taking the view that, *prima facie*, the paragraphs of the schedule are to have effect subject to the provisions of the will of the deceased, in cases where there is a reasonably clear indication of the intention of the deceased: and *a fortiori*, I think, is that the case where the will was executed before the coming into force of the Administration of Estates Act, 1925. In the present case I have come to the conclusion that the testatrix has definitely expressed a desire that the debts and funeral and testamentary expenses and legacies shall be paid out of or charged upon the farm stock, implements, and tenant right of which she has disposed: and, following the principle adopted by the Court of Appeal in *Re Kempthorne* (2) and by CLAUSON, J., in *Re Atkinson* (6), I hold that the order of application of assets specified in Part II of sched. I to the Administration of Estates Act, 1925, has been varied by the provisions in the will of the testatrix . . . ”

I think I am also justified in coming to that conclusion having regard to the decision of ROXBURGH, J., in *Re James* (1). In that case the learned judge construed the will and found that the testator had indicated an intention to vary the order of application of assets. I am not unimpressed by the argument of counsel for the second defendant that it is difficult to reconcile the cases which I have just mentioned with the statement of the law by MAUGHAM, J., in *Re Kempthorne* (2), but, having come to the conclusion that it is, in each case, a matter of construction of the will, I can find nothing in the authorities which precludes me from giving effect to what I feel are the clear indications in cl. 4 (g) and cl. 9 of the will which is now before me as to what the testator intended.

In support of his contentions counsel for the second defendant referred to the general legacy of £500 given to the second defendant by cl. 4 (g) for her immediate expenses, and he pointed out that the testator must have intended that that sum should in any event be paid out of residue, because it would be absurd to suppose that he intended it to come out of the specific gift of the residue of the deposit account which she was given in that very same clause. It seems to me that the testator wanted that to be paid out immediately after his death, and I do not think he was considering whence it was ultimately to come. At all events, although this point gives rise to a difficulty, I cannot accept it as overriding what seems to me to be the clear words at the conclusion of that clause. Accordingly, for the reasons which I have stated, I propose to declare that the two sums of £10,000 and £9,000 are debts within the meaning of cl. 4 (g) of the will and on the true construction of the will they ought to be paid primarily out of the testator's deposit account at Lloyds Bank, Ltd.

Declaration accordingly.

Solicitors: *Lattey & Dawe* (for the plaintiffs and the first defendant); *Kinch & Richardson* (for the second defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

NEWTON ABBOT CO-OPERATIVE SOCIETY, LTD. v.
WILLIAMSON AND TREADGOLD, LTD.

NCERY DIVISION (Upjohn, J.), November 26, 27, December 17, 1951.]

of Land—Restrictive covenant—Covenant running with the land—Identification of dominant tenement — Enforcement by assignee — Covenant to protect covenantee's business—Benefit of land—Death of covenantee—No assent to vesting of benefit in beneficiary entitled—Power of beneficiary to assign benefit. inistration of Estates—Assent—Benefit of restrictive covenant—No express assent to vesting—Assignment by beneficiary.

In 1923 B.M. carried on business as an ironmonger on premises (hereinafter called "the plaintiffs' premises") which she owned in fee simple. Almost opposite to the plaintiffs' premises were other premises owned by B.M. (hereinafter called "the defendants' premises"). In 1923 B.M. sold the defendants' premises for an estate in fee simple to G. M. & Sons, who were then carrying on business as grocers on part of those premises, the purchasers covenanting with B.M. "that they the purchasers and the persons deriving title under them will not at any time hereafter carry on or cause to be carried on on any part of the hereditaments and premises hereinbefore expressed to be hereby conveyed any business of such a nature which will in any way affect or be in competition with the business of a furnishing ironmonger china dealer plumber sanitary or electrical engineer and that furnishing ironmongery shall mean that the purchasers and those deriving title under them shall not at any time hereafter sell or expose for sale any ironmongery or hardware brooms brushes baskets paints lamps and glasses of any description on any part of the hereditaments hereby conveyed." In 1947 the defendants acquired the defendants' premises in fee simple, the conveyance to them being made expressly subject to the said covenant. On Apr. 4, 1944, B.M. died, and by her will she appointed W., L., and V., to be her executors. She devised and bequeathed all her real and personal estate not otherwise disposed of to L. absolutely, and on Jan. 8, 1945, the executors assented in writing to the vesting of the plaintiffs' premises in L. There was no assent in writing regarding the benefit of the restrictive covenant contained in the conveyance of 1923. The business of ironmonger was carried on after the death of B.M. by L. until 1948. In June, 1948, L. sold the business of ironmonger to the B.T.C. Society and by deed assigned to them the goodwill of the business and the benefit of the restrictive covenant. By a separate deed of even date, L. granted the said society a lease of the plaintiffs' premises for twenty-one years. In 1949 the said society amalgamated with the plaintiffs. The defendants having exposed for sale articles of ironmongery, the plaintiffs claimed an injunction restraining such sale.

HELD: (i) the conveyance of 1923 failed to identify the land for the benefit of which the covenant was taken, and, therefore, the benefit of the covenant could not be said to have passed with the assignment of the plaintiffs' premises without express mention.

Renals v. Cowlishaw (1879) (11 Ch.D. 866), applied.

(ii) although the benefit of the covenant had not been assigned to L. by the executors of B.M., that benefit was held by the executors as bare trustees for L., who was, therefore, entitled in equity thereto and was entitled to assign it in equity on an assignment of the plaintiffs' premises.

Dictum of SARGANT, J., in Lord Northbourne v. Johnston & Son ([1922] 2 Ch. 317), applied.

(iii) it could not be said that in 1923 B.M. took the covenant for the benefit of her business only and not for the benefit of the land, for the covenant enhanced the value of the latter and there was nothing in the conveyance

of 1923 to lead to the conclusion that the object of the covenant was so limited.

(iv) it was not necessary that, for an assignee of the benefit of a covenant to maintain a suit based on the covenant, there should be something in the deed containing the covenant to define the land for the benefit of which the covenant was entered into, but the existence and situation of the land must be indicated in the deed or otherwise shown with reasonable certainty; bearing in mind the close juxtaposition of the plaintiffs' premises and the defendants' premises, the only reasonable inference to draw from the circumstances in 1923 was that B.M. took the covenant for the benefit of the plaintiffs' premises, which were, therefore, sufficiently identified.

Dictum of BENNETT, J., in Re Union of London & Smith's Bank, Ltd.,'s Conveyance ([1933] Ch. 625), dissented from.

AS TO RESTRICTIVE COVENANTS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 125-129, paras. 110, 111; and FOR CASES, see DIGEST, Vol. 40, pp. 310-328, Nos. 2648-2768.

Cases referred to:

- (1) *Renals v. Cowlishaw*, (1876), 9 Ch.D. 125; *affd.* C.A., (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 40 Digest 316, 2686.
- (2) *Re Union of London & Smith's Bank, Ltd.,'s Conveyance*, [1933] Ch. 611; 102 L.J.Ch. 241; 149 L.T. 82; Digest Supp.
- (3) *Ives v. Brown*, [1919] 2 Ch. 314; 88 L.J.Ch. 373; 122 L.T. 267; 40 Digest 322, 2728.
- (4) *Northbourne (Lord) v. Johnston & Son*, [1922] 2 Ch. 309; 92 L.J.Ch. 12; 128 L.T. 496; 40 Digest 321, 2722.
- (5) *Formby v. Barker*, [1903] 2 Ch. 539; 72 L.J.Ch. 716; 89 L.T. 249; 40 Digest 306, 2626.
- (6) *London County Council v. Allen*, [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 40 Digest 302, 2602.
- (7) *Reid v. Bickerstaff*, [1909] 2 Ch. 305; 78 L.J.Ch. 753; 100 L.T. 952; 40 Digest 312, 2665.
- (8) *Rogers v. Hosegood*, [1900] 2 Ch. 388; 69 L.J.Ch. 652; 83 L.T. 186; 40 Digest 312, 2664.
- (9) *Nicoll v. Fenning*, (1881), 19 Ch.D. 258; 51 L.J.Ch. 166; 45 L.T. 738; 40 Digest 324, 2737.

ACTION for an injunction restraining the defendants, Williamson & Treadgold, Ltd., from carrying on, on certain premises, the business of a furnishing ironmonger, china dealer, plumber, or sanitary or electrical engineer, in breach of a covenant contained in a conveyance dated May 9, 1923.

R. C. C. J. Binney for the plaintiffs.

Michael Bowles for the defendants.

Cur. adv. vult.

Dec. 17. **UPJOHN, J.**, read the following judgment. This is an action by the plaintiffs, Newton Abbot Co-operative Society, seeking to restrain the carrying on by the defendants, Williamson & Treadgold, Ltd., on premises known as 25 and 27, Fore Street and Swiss Cottage, Bovey Tracey, in the county of Devon, the business of a furnishing ironmonger, china dealer, plumber, or sanitary or electrical engineer, in breach of a covenant contained in a conveyance dated May 9, 1923. Neither the plaintiffs nor the defendants were parties to that conveyance, but the former claim to be entitled to the benefit of such covenant and allege that the latter are subject to a liability to observe the same. There is no dispute as to the facts, the defendants having sensibly made bold admissions in their defence and further admissions at the trial to enable the real point to be determined, and, in view of those admissions, it has not been necessary to adduce any oral evidence before me.

23 a Mrs. Bessie Mardon (whom I shall refer to as "Mrs. Mardon") had been for some years carrying on business as an ironmonger under the name of W. J. T. Mardon in premises known as Devonian, Fore Street, Bovey Tracey. She was the owner and occupier of those premises in fee simple. Almost entirely opposite to Devonian were premises known as 25 and 27, Fore Street; and those premises, but, as I understand it, forming part thereof, was a premises known as Swiss Cottage. I shall call these premises, 25 and 27, Fore Street and Swiss Cottage, "the defendants' premises." At this time Mrs. Mardon was the owner in fee simple of the defendants' premises, but parts thereof were in the occupation of tenants, as hereinafter appears. It appears that Mrs. Mardon was minded to sell the defendants' premises and by an agreement in writing dated Mar. 6, 1923, she contracted to sell the same to the firm of George Williamson & Sons, who were then carrying on business as grocers on part thereof, at 25, Fore Street. I need not refer to the contract, for the purchase was effected by a conveyance on sale dated May 9, 1923, which contained the recitals on which the plaintiffs rely in this action.

The conveyance (which I shall refer to as "the 1923 conveyance") was made by John French, of the first part (he was a mortgagee of the premises and did not enter the picture), Mrs. Mardon, described as of Devonian, Fore Street, Bovey Tracey, hereinafter called the vendor, of the second part, and George Mardon, John Charles Wynne Mardon, and Ralph Abbot Victor Mardon, described as of Bovey Tracey, being co-partners in the trade or business of grocers at Bovey Tracey carrying on business under the firm or style of George Mardon & Sons, hereinafter called the purchasers, of the third part. The conveyance contains a number of recitals which I need not read, and then proceeds as follows:

Now this indenture witnesseth that in pursuance of the said agreement in consideration of the sum of £600 now paid by the purchasers to the mortgagee at the request of the vendor out of the said purchase money of £1,100 the receipt whereof the mortgagee hereby acknowledges and also in consideration of the sum of £500 paid by the purchasers to the vendor in full payment and receipt of which said sums of £600 and £500 making together the said purchase money of £1,100 the vendor hereby acknowledges) the mortgagee as mortgagee hereby grants and conveys and the vendor as personal representative and as beneficial owner hereby grants conveys and confirms unto the purchasers all those dwelling-houses shop buildings and premises now known as numbers 25 and 27 Fore Street Bovey Tracey aforesaid now in the respective occupations of Messieurs Daniel George Upham and the said George Mardon and also the dwelling-house gardens and premises with the appurtenances at the rear of numbers 25 and 27 Fore Street Bovey Tracey aforesaid and known as Swiss Cottage and now in the occupation of Mr. I. Rumbleow and all other the hereditaments and premises conveyed to the said William James Thomas Mardon in the hereinbefore recited indenture of conveyance of June 26, 1900, including the dwelling-house and premises since erected by the said William James Thomas Mardon on part thereof to hold the same unto and to the use of the purchasers in fee simple as part of their partnership property freed and discharged from the hereinbefore recited indentures of mortgage second mortgage and transfers of mortgage and from all principal sums and interest and all other moneys thereby secured."

It now follows the restrictive covenant on which the plaintiffs rely:

"And the purchasers hereby covenant with the vendor that they the purchasers and the persons deriving title under them will not at any time hereafter carry on or cause to be carried on on any part of the hereditaments and premises hereinbefore expressed to be hereby conveyed any business of such a nature which will in any way affect or be in competition with the business of a furnishing ironmonger china dealer plumber sanitary or

electrical engineer and that furnishing ironmongery shall mean that the purchasers and those deriving title under them shall not at any time hereafter sell or expose for sale any ironmongery or hardware brooms brushes baskets paints lamps and glasses of any description on any part of the hereditaments hereby conveyed."

I shall call this covenant "the restrictive covenant."

The defendants acquired the defendants' premises in 1947 and are now the occupiers and owners in fee simple thereof, but I need not trace in detail the devolution of the title of the purchasers in the 1923 conveyance to the defendants, for it is admitted on the pleadings that the defendants took with notice of the restrictive covenant, and, indeed, the conveyance to them, which was dated Apr. 30, 1947, was made expressly subject to that covenant.

The plaintiffs are now in occupation and are the owners in fee simple of the premises, Devonian. The devolution of their title is as follows. Mrs. Mardon remained in occupation of the premises Devonian until her death on Apr. 4, 1944. By her will, dated Apr. 24, 1941, she appointed W. J. T. Mardon, a son of the original W. J. T. Mardon, Leonard Soper Mardon, and V. G. Mardon, her sons, to be executors. She then gave free of duty her furniture, chattels, and personal effects to a daughter, and proceeded as follows:

"Subject to the payment of my debts funeral and testamentary expenses I give devise and bequeath all my real and personal estate not hereby or by any codicil hereto otherwise specifically disposed of unto my said son Leonard Soper Mardon absolutely."

This will was duly proved by the executors in the Exeter District Probate Registry on July 3, 1944, and on Jan. 8, 1945, the executors assented in writing to the vesting of Devonian in Leonard Soper Mardon, the residuary legatee. There was no assent in writing of the benefit of the restrictive covenant in the 1923 conveyance. The business of ironmonger had been carried on by Mrs. Mardon, or by her son, Leonard Soper Mardon, on her behalf, until her death, and thereafter Leonard Soper Mardon continued to carry on the business until 1948.

On May 22, 1948, by an agreement in writing he agreed to sell to the Bovey Tracey Co-operative Society the business of ironmonger carried on by him and to grant to the society a lease of Devonian for twenty-one years. This transaction was completed by two deeds, *viz.*, an assignment dated June 14, 1948, between Leonard Soper Mardon and the society, whereby, in consideration of £1,825, Leonard Soper Mardon assigned the goodwill of the business to the society, and by cl. 2 he assigned the benefit of the covenant in the 1923 conveyance in these terms:

"For the consideration aforesaid and in pursuance of cl. 6 of the agreement the assignor (so far as he can legally assign the same) hereby assigns to the society the benefit of the covenant on the part of George Mardon Reginald Charles Wynne Mardon and Ralph Albert Victor Mardon contained in a conveyance dated May 9, 1923, and made between John French of the first part Bessie Mardon of the second part and the said George Mardon Reginald Charles Wynne Mardon and Ralph Albert Victor Mardon of the third part being a conveyance of numbers 25 and 27 Fore Street Bovey Tracey aforesaid and the dwelling-house gardens and appurtenances situate at the rear thereof and known as Swiss Cottage a copy of such covenant being set out in the schedule hereto."

I do not think I need refer in detail to the schedule which was, as stated, merely a copy of the covenant. The other document in this transaction was a lease of the same date and made between the same parties whereby Leonard Soper Mardon granted a lease of the premises Devonian to the society for twenty-one years from June 14, 1948, at the annual rental of £338. The society continued

to carry on the business of ironmongers on the premises Devonia until they were amalgamated with the plaintiffs, an amalgamation which became effective on Apr. 6, 1949. I need not say more about that for it is admitted that the plaintiffs, who have carried on the business there ever since, stand for all purposes in the shoes of the Bovey Tracey Co-operative Society.

Now, turning to the defendants, after the conveyance to them of the defendants' premises in 1947, they continued to carry on the business of grocers there under the style or title of Slade & Sons, but at some time thereafter (the exact date does not appear) they began to expose for sale on such premises articles of ironmongery and hardware, and, after some informal conversations in the matter, on Mar. 17, 1950, a formal complaint was made by the plaintiffs' solicitors. Correspondence followed which I need not read, for it merely sets out the respective contentions of the parties and ultimately the writ in this action was issued on Apr. 6, 1951. The statement of claim, after setting out the title of the plaintiffs, alleges that the right to enforce the covenant became vested in the plaintiffs. They allege that the defendants went into possession of the defendants' premises with notice of the restrictive covenant and that in breach of that covenant the defendants have carried on the business of an ironmonger, that the plaintiffs have thereby suffered damage, and that the defendants threaten and intend to carry on such business. The plaintiffs claim an injunction and damages for breach of covenant. The defendants by their defence admit that they have sold ironmongery, hardware and similar articles, that they intend to continue so to do unless restrained by injunction, and that such sale and exposure for sale is within the prohibition contained in the 1923 conveyance. They further admit that the restrictive covenant contained in the 1923 conveyance is binding between the parties thereto, but conclude their defence in these words:

"But the defendants will contend that the plaintiffs (whether or not the benefit of the said covenant is or purports to be vested in them as alleged in the statement of claim) are not and never have been entitled to enforce the covenant against the defendants."

Thus, the sole issue before me is whether the plaintiffs are entitled to the benefit of the restrictive covenant, and, if so, whether they are entitled to enforce it against the defendants. I will deal with the first point first. Counsel for the plaintiffs submitted, first, that the benefit of the restrictive covenant was annexed to Devonia so as to pass with the assignment of Devonia in equity without any express mention in such subsequent assignment—in other words, that the covenant runs with the land. Alternatively, he said that the plaintiffs are the express assigns of the benefit of the covenant, and as such are entitled to enforce it. In this difficult branch of the law one thing, in my judgment, is clear, *viz.*, that in order to annex the benefit of a restrictive covenant to land so that it runs with the land without express assignment on a subsequent assignment of the land, the land for the benefit of which it is taken must be clearly identified in the conveyance containing the covenant. That has been established in a number of cases of high authority, and I need only refer shortly to two. In *Renals v. Cowlishaw* (1) JAMES, L.J., said (11 Ch.D. 868):

"I am of opinion that the decision of HALL, V.-C., is correct. It is impossible, as it seems to me, to distinguish this case from the cases to which he has referred. To enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into. Supposing I were now framing the deed afresh, I should not have the remotest idea how the covenant ought to be framed, as I cannot tell what the property was which the parties intended to be protected, and within what limits."

The second case, *Re Union of London & Smith's Bank, Ltd.*, 's Conveyance (2), is also a decision of the Court of Appeal. ROMER, L.J., delivering the judgment of the court, said ([1933] Ch. 627):

"Now the defendants are not the original covenantees, and it therefore becomes necessary to ascertain what person other than the original covenantee is entitled to the benefit of a restrictive covenant affecting land. This question was put to himself by HALL, V.-C., in *Renals v. Cowlishaw* (1), and the answer was given in a judgment so well known that it is unnecessary to refer to it at length. It is a judgment that has received the approval both of this court and of the House of Lords, and has always been regarded as a correct statement of the law upon the subject. Stated shortly it laid down this: that, apart from what are usually referred to as building scheme cases (and this is not a case of that sort), a purchaser from the original covenantee of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant if the conveyance shows that the covenant was intended to enure for the benefit of that particular land."

Looking at the 1923 conveyance, I can find nothing whatever which identifies the land for the benefit of which the covenant is alleged to be taken. Counsel for the plaintiffs relies on the fact that Mrs. Mardon is described as of Devon, Fore Street, but that, in my judgment, is quite insufficient to annex the benefit of the covenant to those premises. There is no other mention whatever of Devon in the conveyance. In my judgment, therefore, the plaintiffs fail on this point.

I turn, then, to his second submission, *viz.*, that the plaintiffs are express assigns of the benefit of the restrictive covenant. Counsel for the defendants contends that, even if his submissions (with which I shall deal later) are wrong and the covenant was taken by Mrs. Mardon for the benefit of Devon to enable her to dispose of it to better advantage, yet there is here no complete chain of assignments vesting the benefit in the plaintiffs. He says that there was never any assignment of the benefit of the covenant by the executors of Mrs. Mardon to Leonard Soper Mardon, and, therefore, he was not in a position to assign the benefit of the covenant to the plaintiffs' predecessors in title. He relied on *Ives v. Brown* (3) and *Lord Northbourne v. Johnston & Son* (4). In my judgment, those authorities do not support his contention. The position as I see it was this. On the footing that the restrictive covenant was not annexed to the land so as to run with it, the benefit of the covenant is capable of passing by operation of law as well as by express assignment and formed part of Mrs. Mardon's personal estate on her death: see *Ives v. Brown* (3). It follows, therefore, that when her estate was duly wound up and administered—and this case has been argued before me on the footing that that happened many years ago—the benefit of the covenant was held by the executors as bare trustees for the residuary legatee, Leonard Soper Mardon, who was himself one of the executors. He, therefore, became entitled to the benefit of this restrictive covenant in equity, and, in my judgment, he was entitled to assign the benefit in equity on an assignment of Devon. No doubt, had the covenant been assigned to him by the executors, he could also have assigned it at law. That this is the position is, in my judgment, made clear by the passage in the judgment of SARGANT, J., in *Lord Northbourne v. Johnston & Son* (4) where the learned judge said ([1922] 2 Ch. 317):

"Mr. Grant for the defendants put the first of these defences thus: He admitted that if by the indenture of July 25, 1884, the trustees had conveyed to Lady Northbourne not only the unsold portions of the Shipcote Estate, but also the benefit of the restrictive covenants relating to the sold portions, she and those entitled under her would have been in a position to enforce these covenants so far as this defence is concerned. But he maintained that, when once the trustees had conveyed the land to Lady

Northbourne without the benefit of the covenants, there was a complete and final severance; that the covenants remained in the trustees as mere covenants in gross unconnected with the protection or benefit of land; that they were incapable of being enforced in equity as against an assign of the covenantor: *Formby v. Barker* (5) and *London County Council v. Allen* (6), and that this defect could not be cured either by Lady Northbourne or her devisees joining with the trustees in an action, or by any subsequent assignment of the covenants by them or their assigns to Lady Northbourne or her devisees. In my judgment, however, this argument is unduly technical, neglects the substance of the matter and is unsustainable. It is of course clear that these restrictive covenants were entered into for the benefit, not of the trustees, but of Lady Northbourne, and that they were as much trustees for her of the benefit of these covenants as of the beneficial interests in the unsold portions of the estate. If, before the execution of the conveyance of July 25, 1884, they had capriciously refused to enforce the covenants, she would have been entitled to compel them to allow her to use their names in an action for the purpose on proper terms. And she could, undoubtedly, had the question arisen, have insisted on the inclusion in the conveyance to her of an express assignment of the benefit of these covenants. The circumstance that by the conveyance Lady Northbourne became the legal owner of the unsold land could not destroy her existing equitable right to have the restrictive covenants enforced for the protection of that very land. And a subsequent assignment by the trustees or their successors in title to Lady Northbourne or her devisees would merely restore matters to the position in which Lady Northbourne was throughout entitled to have them placed, and reunite, as legal rights, those equitable rights that were subsisting together originally. The case differs widely from either of the two reported cases last referred to—*Formby v. Barker* (5) and *London County Council v. Allen* (6)—and appears to me to be completely covered by the reasoning in the judgment of HALL, V.-C., in *Renals v. Cowlishaw* (1) and in my own recent decision in *Ives v. Brown* (3), a case which has many points of similarity to the present one."

The second main point was the question whether the defendants are liable to have the covenant enforced against them. This was the defendants' main defence in this action and counsel says that the restrictive covenant was not taken for the benefit of Devonian. He puts his case in this way. First, he says that in any event this was not taken for the benefit of any land, but was a covenant with Mrs. Mardon personally, solely for the benefit of her business. Secondly, he says that in order that an express assign of the benefit may sue an assignee of the burden of a covenant there must be some reference in the conveyance creating such covenant to the land for the benefit of which it was taken. It will be convenient to deal with the first point first.

Counsel for the defendants strongly urged that the covenant was taken solely to protect the goodwill of the business carried on at Devonian, that it had no reference to the land itself, and that it was not taken for the benefit of such land—in brief, that it was a covenant in gross incapable of assignment. He urged that taking such a covenant would benefit the business in that an enhanced price could be obtained for the business, but no such enhanced price would be obtained for the land. He relied on the fact that the covenant did not mention the vendors' assigns and that it was a covenant against competition. Further, he pointed out that when Leonard Soper Mardon assigned to the Bovey Tracey Co-operative Society the benefit of the covenant was assigned in the deed which assigned the business and not in the lease of Devonian. If that be the right view, then he said there could be no right to enforce the covenant against the defendants because the mere fact that the defendants took with notice is not sufficient to bind their consciences in equity, and he relied on *Formby v. Barker* (5) and

London County Council v. Allen (6). Those cases show, he submitted, and I agree with him, that in order to enforce a covenant such as this against an assign of the covenantor, you must show that the covenant created something in the nature of an equitable easement. You must find something in the nature of a dominant tenement for the benefit of which the covenant was taken and a servient tenement which was to be subject to that covenant. Here he says there was no dominant tenement. The covenant was taken, not for the benefit of any land, but for the benefit of the business. I do not accept this view of the transaction in 1923. In that year Mrs. Mardon was carrying on the business of an ironmonger at Devonian. No doubt, the covenant was taken for the benefit of that business and to prevent competition therewith, but I see no reason to think, and there is nothing in the 1923 conveyance which leads me to believe, that that was the sole object of taking the covenant. Why should not Mrs. Mardon have sold her land and the business and the benefit of the covenant in such manner as to annex the benefit of the covenant to Devonian, for, by so doing, she would get an enhanced price for the totality of the assets she was selling? A purchaser would surely pay more for a property which would enable him to pass on the benefit of the covenant and to sue in equity assigns of the defendants' premises taking with notice, than for a property which would only enable him to sue the original covenantor, for that is the result of the view urged on me by counsel for the defendants. Further, Mrs. Mardon may well have had it in mind that her own business might be closed down or the goodwill thereof sold to someone who was going to carry it on on some other premises. She would then be left with Devonian, and Devonian could be sold at an enhanced price to someone intending to carry on the business of an ironmonger because, if as part of the sale transaction he obtained the benefit of the covenant, he could prevent competition from the defendants' premises opposite in that trade. In my judgment, it was always open to Mrs. Mardon, when she desired to dispose either of the land or the business, to assign the benefit of the covenant with the one or the other or both as she chose. By taking this covenant, she was thereby enabled to sell her premises, or her business, to better advantage as she thought fit. In my judgment, Mrs. Mardon was in the position of the vendor in the example given by COZENS-HARDY, M.R., in *Reid v. Bickerstaff* (7), where he says ([1909] 2 Ch. 320):

"For example, I sell a piece of land with a covenant that no public-house shall be erected thereon. I sell the adjoining lot to a purchaser who is ignorant of the existence of the covenant. I am at full liberty to release the covenant, or to assign the benefit of it to any particular purchaser, or to deal with the rest of my land as I think fit."

Accordingly, in my judgment, the defendants fail on this point.

Counsel's second point was that in order that the benefit of the covenant may be assignable the land for which the benefit of the covenant is taken must in some way be referred to in the conveyance creating the covenant, and I was naturally pressed with the headnote in the *Union of London & Smith's Bank* case (2), which reads as follows:

"Where on a sale otherwise than under a building scheme a restrictive covenant is taken, the benefit of which is not on the sale annexed to the land retained by the covenantee so as to run with it, an assign of the covenantee's retained land cannot enforce the covenant against an assign (taking with notice) of the covenantor unless he can show (i) that the covenant was taken for the benefit of ascertainable land of the covenantee capable of being benefited by the covenant, and (ii) that he (the covenantee's assign) is an express assign of the benefit of the covenant."

In my judgment, BENNETT, J., says ([1933] Ch. 625):

"In my judgment, in order that an express assignee of a covenant restricting the user of land may be able to enforce that covenant against the owner

of the land burdened with the covenant, he must be able to satisfy the court of two things. The first is that it was a covenant entered into for the benefit or protection of land owned by the covenantee at the date of the covenant. Otherwise it is a covenant in gross, and unenforceable except as between the parties to the covenant: see *Formby v. Barker* (5). Secondly, the assignee must be able to satisfy the court that the deed containing the covenant defines or contains something to define the property for the benefit of which the covenant was entered into: see JAMES, L.J., in *Renals v. Cowlishaw* (1)."

With all respect to the statement of the learned judge, I am unable to agree that where a person is suing as an assign of the benefit of the covenant there must necessarily be something in the deed containing the covenant to define the land for the benefit of which the covenant was entered into. In the first place, the passage in the judgment of JAMES, L.J., in *Renals v. Cowlishaw* (1), which I have already read, on which the learned judge relies, does not, in my judgment, support the statement of the law for which it was cited. In *Renals v. Cowlishaw* (1) there was no question of there being any express assignment of the benefit of the restrictive covenant: see the statement of fact (9 Ch.D. 127); and when JAMES, L.J., says that to enable an assign to take the benefit of restrictive covenants there must be something in the deed to define the property for the benefit of which they were entered into, he is, I think, dealing with the case where it is contended that the benefit of the covenant has been annexed to the land so as to run with the land. When he uses the word "assign" he is using the word as meaning an assign of the land and not an assign of the benefit of the covenant. Secondly, the views expressed by BENNETT, J., appear to me to be inconsistent with the views expressed in some of the earlier decisions. I do not propose to quote them, but I refer to the following observations on the law on this point, *viz.*, the observations of COLLINS, L.J., delivering the judgment of the Court of Appeal in *Rogers v. Hosegood* (8) ([1900] 2 Ch. 407); those of VAUGHAN WILLIAMS, L.J., in *Formby v. Barker* (5) ([1903] 2 Ch. 551); and to the observations of COZENS-HARDY, M.R., in *Reid v. Bickerstaff* (7) ([1909] 2 Ch. 319) and the words of BUCKLEY, L.J., in the same case (*ibid.*, 325). Finally, in the *Union of London & Smith's Bank* case (2) itself, ROMER, L.J., reading the judgment of the Court of Appeal, having considered the cases where the benefit of the covenant is annexed to land so as to run without express mention, says ([1933] Ch. 628):

"In all other cases the purchaser will not acquire the benefit of the covenant unless that benefit be expressly assigned to him—or, to use the words of [HALL, V.-C., in *Renals v. Cowlishaw* (1) (9 Ch.D. 130)], 'it must appear that the benefit of the covenant was part of the subject-matter of the purchase'."

Later, he says (*ibid.*, 631):

"It is plain, however, from these and other cases, and notably that of *Renals v. Cowlishaw* (1), that if the restrictive covenant be taken not merely for some personal purpose or object of the vendor, but for the benefit of some other land of his in the sense that it would enable him to dispose of that land to greater advantage, the covenant, though not annexed to such land so as to run with any part of it, may be enforced against an assignee of the covenantor taking with notice, both by the covenantee and by persons to whom the benefit of such covenant has been assigned, subject however to certain conditions. In the first place, the 'other land' must be land that is capable of being benefited by the covenant—otherwise it would be impossible to infer that the object of the covenant was to enable the vendor to dispose of his land to greater advantage. In the next place, this land must be 'ascertainable' or 'certain,' to use the words of ROMER, L.J.,

and SCRUTTON, L.J., respectively. For, although the court will readily infer the intention to benefit the other land of the vendor where the existence and situation of such land are indicated in the conveyance or have been otherwise shown with reasonable certainty, it is impossible to do so from vague references in the conveyance or in other documents laid before the court as to the existence of other lands of the vendor, the extent and situation of which are undefined."

In my judgment, therefore, the problem which I have to consider is, first, when Mrs. Mardon took the covenant in 1923, did she retain other land capable of being benefited by the covenant? If not, *cadit quaestio*. Secondly, was such land "ascertainable" or "certain" in this sense, that the existence and situation of the land must be indicated in the conveyance or otherwise shown with reasonable certainty. Apart from the fact that Mrs. Mardon is described as of Devonian, there is nothing in the 1923 conveyance to define the land for the benefit of which the restrictive covenant was taken, and I do not think that carries one very far, but, for the reasons I have given, I am, in my judgment, entitled to look at the surrounding circumstances to see if the land to be benefited is shown "otherwise" with reasonable certainty. That is a question of fact, and, on the admitted facts, bearing in mind the close juxtaposition of Devonian and the defendants' premises, in my judgment, the only reasonable inference to draw from the circumstances at the time of the 1923 conveyance was that Mrs. Mardon took the covenant restrictive of the user of the defendants' premises for the benefit of her own business of ironmonger and of her property Devonian where at all material times she was carrying on that business, which last-mentioned fact must have been apparent to the purchasers in 1923. I should, perhaps, mention that at the date of her death, Mrs. Mardon owned other property in Fore Street, but counsel on neither side founded any argument on that circumstance. It follows, therefore, in my judgment, that Mrs. Mardon could on any subsequent sale of her land Devonian, if she so chose, as part of the transaction of sale, assign the benefit of the covenant so as to enable the purchaser from her and his assignees of the land and covenant to enforce it against an owner of the defendants' premises taking with notice and her legatee, Leonard Soper Mardon, was in no worse position. I do not regard the fact that he assigned the covenant in the deed containing the assignment of the business as affecting the matter. I say nothing as to the position when the plaintiffs' lease expires so that their estate in Devonian comes to an end, nor whether Leonard Soper Mardon, having apparently assigned away the entire benefit of the covenant, will then be in any position further to enforce it.

Counsel for the defendants took one further point. He submitted that a covenant restrictive of business could not be annexed to land unless it was a covenant not to carry on a business so as to be a nuisance or annoyance to an adjoining occupier, but he cited no authority for that proposition, and, in my judgment, it cannot be maintained: see *Nicoll v. Fenning* (9). Accordingly, in my judgment, the plaintiffs are entitled to succeed in this action and to an injunction as claimed and to costs.

Order accordingly.

Solicitors: *Stileman, Neate & Topping*, agents for *Herbert Priscott & Co.*, Newton Abbot (for the plaintiffs); *H. W. & S. Patey*, agents for *Hutchings & Hutchings*, Torquay (for the defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

WATSON AND OTHERS v. PEOPLE'S REFRESHMENT HOUSE ASSOCIATION, LTD.

[KING'S BENCH DIVISION (Devlin, J.), January 15, 16, 1952.]

Inn—Damage to guest's property—Extension of hospitium—Permission by innkeeper to park motor coach at petrol station—Petrol station owned by inn, but separated by public road—Garages and car park at inn.

A A hotel comprised within its curtilage several lock-up garages for the use of guests and a car park open on one side to a public road, while across the road was a petrol station in the same ownership on the runway of which the hotel manager permitted hotel guests to park their cars when the station was closed in the evening. The driver of an empty motor coach belonging to the plaintiffs, who had engaged a room at the hotel for the night, was unable to put the coach in the car park because it was full of cars belonging to the hotel's customers. The manager suggested he should leave the coach on the runway of the petrol station and bring it to the car park when the customers' cars were gone. The driver left the coach on the runway, and during the night it was removed and damaged by some unauthorised person.

C HELD: (i) as the petrol station was separated from the inn by a public road, as there was accommodation for vehicles in the garages and car park at the hotel, and as the runway was not designed as a car park and could not be so used when the petrol station was open, the petrol station was not actually or constructively a part of the hotel or within its *hospitium*.

D (ii) having regard to the nature of the language he used, the hotel manager had merely given permission, and not an invitation, to the driver to leave the coach on the runway, and by giving such permission he did not extend the area of the *hospitium* so as to bring the runway within it.

(iii) the proprietors of the hotel, therefore, were not liable as innkeepers at common law for the plaintiffs' loss resulting from the damage to the coach.

E AS TO LIABILITY OF INNKEEPER IN RESPECT OF GUEST'S PROPERTY, see HALSBURY, Hailsham Edn., Vol. 18, pp. 150-159, paras. 208-217; and FOR CASES, see DIGEST, Vol. 29, pp. 10-17, Nos. 128-213.

Cases referred to:

(1) *Williams v. Linnitt*, [1951] 1 All E.R. 278; [1951] 1 K.B. 565.

(2) *Harland's Case*, (1641), Clay. 97; 29 Digest 5, 42.

(3) *Jones v. Tyler*, (1834), 1 Ad. & El. 522; 3 L.J.K.B. 166; 110 E.R. 1307; 29 Digest 12, 151.

ACTION for damages for loss sustained through the removal of and damage to a motor coach alleged to have been left within the precincts of an inn by a guest staying at the inn.

G The defendants were the owners of the Norman Cross Hotel, situated at the junction of a road to Peterborough with the Great North Road. The hotel's outbuildings included lock-up garages intended for the use of guests and a car park enclosed on three sides by the hotel, other buildings, and a wall with a gate opening on the Great North Road, being open on the fourth side to the Peterborough road. A notice board stated that this was a free park "at owner's risk only." Across the Peterborough road was a petrol station with a runway from the Great North Road to the Peterborough road, there being petrol pumps on both sides of the station and an office on the side opposite to the Great North Road. The petrol station was owned by the defendants, but there was no evidence of how far it was managed in conjunction with the hotel or under the superintendence of the hotel manager. It was open only during the day, closing at 5.30 p.m. On July 29, 1949, the plaintiffs, motor coach proprietors, sent an empty coach (except for two persons who paid no fares) from their headquarters in Dundee

to London to pick up a party for a trip to Dundee. During the journey, at 9.30 or 10 p.m., the driver stopped the coach for the night at the Norman Cross Hotel. After taking the two passengers to another hotel (there being insufficient rooms at the Norman Cross Hotel) and engaging a single room for himself at the Norman Cross Hotel, he drove the coach to the entrance to the car park in the Peterborough road, but he found it full of cars belonging to the hotel's customers. The manager told him that the coach could not be put there as it would prevent customers getting their cars away, and he suggested that it should be put in the runway of the petrol station and should be brought back to the car park when the customers' cars had gone. There were already cars of other customers on the runway, it being the practice of customers, with the knowledge and acquiescence of the hotel manager, to put their cars there after the petrol station had closed. The driver put the coach into the runway. Shortly after 11 p.m. he looked at the coach to make sure it had not been damaged by any of the cars belonging to the hotel's customers leaving. All the cars in the runway and the car park had then left, but he did not move the coach. Later, he told the hotel manager the coach was still there. During the night the coach was removed by a man who was later convicted of taking it away without the owner's consent and who so seriously damaged it that for some time it could not be used.

The plaintiffs contended that, by virtue of the absolute liability of the defendants as innkeepers at common law for the custody and protection of the coach while it was placed at the petrol station, the defendants were liable for damages in respect of the loss which the plaintiffs had sustained. The defendants denied that the petrol station was part of the *hospitium* of the hotel to which the principle applied, and alleged that the plaintiffs' driver had been negligent in not properly immobilising the coach.

Stephen Chapman for the plaintiffs.

Elwes, K.C., and *Head* for the defendants.

DEVLIN, J., stated the facts and continued: The principle in law is not in dispute. By an ancient custom of the realm an innkeeper who has accommodation is obliged to take in any guest who presents himself, his luggage, and his horse. The horse has now been extended to include a carriage and a motor car. Whether it ought to be extended to include a motor coach is a matter which I have not got to decide, because the defendants did take in the coach and there is no doubt on the authorities that they thereby came under the same liability towards it as if, in the first instance, it had fallen within the category of things which they were bound to receive.

As I have said, an innkeeper is absolutely liable in respect of goods, whether baggage or a conveyance, which he receives within the inn. In the case of baggage there is very little difficulty about determining that those words mean receiving within the inn buildings. In the case of the horse the stables that adjoined were part of the inn buildings for this purpose. It was said in the old cases that the innkeeper who took them into his buildings took them *infra hospitium*. When the categories were extended to include the carriage, and after that the motor car, the position was not quite so clear. Since *Williams v. Linnitt* (1), and probably before that case, it has been clear that the *hospitium* of the inn not only includes the inn buildings themselves with the stables that adjoin it, but that it may also include a yard or other open space, such as a car park, which is within the precincts of the inn, or (putting it more accurately) which is actually or constructively to be regarded as part of the inn.

The test to be applied to determine what parts of the inn are or are not *infra hospitium* has been laid down by the Court of Appeal in *Williams v. Linnitt* (1) where *Asquith, L.J.*, said ([1951] 1 All E.R. 287):

“The absolute liability of the innkeeper for the safety of the plaintiff's goods only attaches where such goods are ‘*infra hospitium*’, namely, within

A the inn buildings themselves or within precincts so intimately related to those buildings as to be treated for this purpose as forming part of them. Stable buildings or garages annexed to the inn, or inner courts enclosed by its walls, have been so treated. Goods placed within these limits by the traveller are '*infra hospitium*' . . . If, on the other hand, the traveller places his property in some outlying area which is not actually or constructively part of the inn—if he, for example, deposits his luggage in what was called in *Harland's Case* (2) an 'outyard' adjacent to the inn, the '*hospitium*' has been held in some of the older cases not to extend to these things. The innkeeper is not absolutely liable for their loss . . . though, if it is not the guest, but the innkeeper himself, who puts the guest's goods in such an outlying area, or invites the guest to put them there, he may by his act extend the '*hospitium*' to cover that area, as, for example, in *Jones v. Tyler* (3), where the innkeeper left the guest's gig in a public street outside the inn."

C That test, therefore, gives rise to two questions—(i) Is the petrol station within the *hospitium* of the inn in the sense that it is actually or constructively a part of the inn? (ii) If it is not, is it an outlying area which the innkeeper on this occasion, and, it has been put, *pro hac vice*, included within the *hospitium* for the benefit of the plaintiffs in this particular case?

D Dealing with the first question, the petrol station and the inn are not adjacent. They are separated by a public road. They are owned by the same people and may be run in conjunction, though how far that is so the evidence did not clearly show. But, however useful it may be as an adjunct of the inn, in my judgment, the petrol station is not an actual part of the inn, or to be regarded constructively as part of it. I do not rest that merely on the fact that they are not adjacent, but are separated by a public road. In certain circumstances a car park may well belong to an inn and be part of the *hospitium* of the inn although it is separated from it by a public road, but other considerations must be taken into account. The first is whether such a part is the only accommodation provided for cars and vehicles. Were that so, one might well hesitate to say that it was not to be regarded as part of the *hospitium* of the inn merely because it was on the opposite side of the road. But this place does not provide the only accommodation for vehicles. Adjacent to the inn, and clearly a part of the inn premises, are, not merely a garage with lock-up accommodation for cars, but also a yard which is proclaimed as a car park. There is, therefore, no inducement for the innkeeper to look elsewhere for a place to provide accommodation for cars and so make it part of the *hospitium*. Again, this space is not designed in any way for use as a car park. It is a runway, and, though cars can be left on a runway, it is not intended to be a place where cars can be parked. In *Williams v. Linnitt* (1) LORD TUCKER said ([1951] 1 All E.R. 284):

G "The liability of the innkeeper, in my view, extends to the goods of his guest which are placed by the guest in that part of the premises in which such goods are usually taken in the inn."

Then he says, as indicating the reasonable test (*ibid.*, 285):

" . . . is the place in question a part of the inn premises intended and suitable for user in connection with some part of the innkeeper's business . . . "

H I apprehend that, if the suggested place is to be part of the *hospitium*, it must be so because it is plain from its situation in relation to the inn that it is so, and it cannot depend on somebody asking the innkeeper on each occasion whether it is so. In this case anyone could drive a car into the car park and assume, quite rightly, that he was putting the car where the innkeeper obviously intended that he should put it, but no one would take it for granted that he was intended to leave his car on the runway while he was in the inn. Thirdly, the runway could not be used as a car park during the hours when the petrol station was open as

it would interfere with the work there, and there is no evidence that it was so used. The petrol station closed at 5.30 p.m. The hotel bar opened at 6.0 p.m., and, no doubt, it was very convenient for customers resorting to the bar that the petrol station should then be closed and be used for putting their cars there, but I find it very difficult to conceive that a place would be actually or constructively within the inn premises from 5.30 p.m. onwards and not before 5.30 p.m. On these grounds, therefore, I consider that the first submission fails, and that the petrol station and its runway were not actually or constructively a part of the inn, and, therefore, not part of the *hospitium* in that sense. A

The second question was whether the *hospitium* was extended *pro hac vice* to embrace the runway. The answer to that question must depend on the conduct at the time of the parties—the manager of the hotel and the driver—and on the words they used. Naturally, there is doubt in their recollection of the exact words used, and it would, in my judgment, be very unwise to attach too much importance to specific words to which one or other of them now deposes. They had no reason to remember with any precision exactly what passed between them because it would never have occurred to either of them that what they were saying affected the legal position at all. It is no use, therefore, asking oneself what either the manager or the driver intended. One has to try to draw the right legal inference from the facts as a whole and from the substance of the conversations which took place between the parties. B
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There appear to be three possible ways in which the area of the *hospitium* can be extended by the conduct of the parties or by what they say. There is, first, the conduct of the innkeeper in actually taking charge of the guest's vehicle and himself disposing of it somewhere. If he does that, on the authorities, and, in particular, *Jones v. Tyler* (3), he is acting in such a way as to extend the area of the *hospitium*. The headnote in *Jones v. Tyler* (3) reads:

"An innkeeper on a fair day, upon being asked by a traveller, then driving a gig of which he was owner, 'whether he had room for the horse?' put the horse into the stable of the inn, received the traveller with some goods into the inn, and placed the gig in the open street, without the inn yard, where he was accustomed to place the carriages of his guests on fair days. The gig having been stolen from thence, *held*, that the innkeeper was answerable."

That is plainly the first and simplest way in which the *hospitium* could be extended. Secondly, the *hospitium* could be extended by the invitation of the innkeeper—I suppose, express or implied. Thirdly, it is said that the *hospitium* can be extended by mere permission given by the innkeeper. The only authority on the matter is *Jones v. Tyler* (3), and it was the view of at any rate two of the four judges who decided that case that it went to the limit. LORD DENMAN, C.J., said (1 Ad. & El. 524): "... This case certainly comes very near to the distinguishing line." LITLEDAL, J., said (*ibid.*, 525): "This case is on the extreme limit . . ." Counsel for the plaintiffs has argued that those expressions

must be taken to refer to the fact that the gig was placed on the public highway and not to the question of the extension of the area of the *hospitium*. However that may be, there is no decided case which goes so far as to say that there is an extension of the *hospitium* where the guest himself puts the vehicle into the outlying area on the permission of the innkeeper. The passage which I read from the judgment of ASQUITH, L.J. ([1951] 1 All E.R. 287) in *Williams v. Linnitt* (1) refers plainly to the two methods of extension, *i.e.*, the innkeeper putting the guest's vehicle in the outlying area or inviting the guest to put it there. He does not refer to permission and there is no authority, and no *dictum* which goes so far as to say, that the innkeeper extends the area merely by giving permission.

It is not suggested that the facts of the present case fall within *Jones v. Tyler* (3) in the sense that the innkeeper himself put the vehicle in the runway and the case has been argued on the footing of either permission or invitation. Counsel for the plaintiffs says that there was an invitation, but that, in any event, permission is sufficient for him. What I have ultimately to determine is whether I ought to draw the inference that the *hospitium* was extended, but it is important to see towards which of those two ends, permission or invitation, the language and conduct of the parties go. It seems to me that it is difficult to infer an extension merely on the giving of permission. That is a passive act done by the landlord and something in which he has got no interest. The essence of permission is that one allows something to happen, but does not invite it. I am disposed to think that, when it comes to ascertaining whether an innkeeper has taken on himself the very heavy liability which the custom of the realm imposes in respect of the additional area, one ought not in the ordinary way to infer that he has done so merely on the passive act of giving permission. In the case of an invitation, however, the matter is a little different. One gives an invitation because one wants it to be accepted. If it was a commercial invitation, as it would be in this case, it is because there is a commercial reason for giving it and accepting it and the innkeeper hopes to get something out of it.

It is, therefore, of value, though not decisive, to determine whether the manager was merely giving permission or was going further and giving something in the nature of an invitation. One has to look at all the circumstances for that. I can well imagine that, even where language is on the face of it no more than permissive, something in the nature of an invitation may be intended. There is obviously a motive for an innkeeper to extend an invitation to the driver of an ordinary car to use another part of his premises when the car park itself is full. If people were in the habit of arriving at the hotel between 6.0 and 10.0 p.m., they would expect to find a place where they could leave their cars, and if, on arriving, they found the car park full and had to go away again or risk having trouble with the police for leaving their cars in the road, their custom would be deterred and the inn would suffer. An innkeeper might well have an interest in giving an invitation in such case. But this is not a case of that type. A motor coach—I think it is reasonably apparent from the driver's evidence—is not always a very welcome visitor at roadside inns. I gathered that a coach driver was lucky to be taken in without trouble on occasions of this sort and would not want to look a gift horse in the mouth. Clearly a landlord has no particular interest in putting up one person for the night in a room and going out of his way to accommodate a large motor coach. He would have been quite within his rights if he had said at 10.0 p.m. "The yard is still full. I am sorry, but I have got no room for this coach in the car park and I am not going to bother about it. You must either find somewhere to leave it yourself or you can go away and find accommodation elsewhere." Merely because he is obliging enough not to do that it does not mean that he is inviting the motor coach to stay. Again, the language which was used, although it does not amount exactly to an invitation, may be language of encouragement. It seems to me that it would not be right to construe what was said in the present case as an invitation on the part of the innkeeper to put the coach into the runway. It

was, in my view, no more than a mere permission and it ought not to be regarded as an extension by the innkeeper of the *hospitium*.

I do not think that the hotel manager's remark about the coach being brought back to the car park when the cars there had gone was intended to make the permission conditional or to impose something on the driver. The permission he gave was an unqualified permission, and not permission to use the runway "provided you bring the coach back into the car park when the cars have gone." It was a permission in these terms: "You may put the coach in the runway" (assuming, no doubt correctly, that the driver would prefer to put it in the car park), and: "You may also put it in the car park once the cars have gone and not until then." Similarly, if it was an invitation, it was not a qualified or conditional invitation. That conclusion disposes of the case. Once I have reached the conclusion that the coach was not within the *hospitium*, the innkeeper is not liable for it as an innkeeper and no other liability is suggested. Accordingly, the claim must fail.

[HIS LORDSHIP held, further, on the evidence that the driver of the motor coach had not been negligent in failing to immobilise the coach and gave judgment for the defendants.]

Judgment for the defendants.

Solicitors: *Fowler, Legg & Co.* (for the plaintiffs); *Hair & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NOTE.

POCOCK AND ANOTHER v. A.D.A.C., LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), December 12, 1951.]

Contract—Memorandum or note—Contract of service—"Consultant"—Need to specify nature of duties—Minute of company directors' meeting—Statute of Frauds, 1677 (c. 3), s. 4.

ACTION for sums claimed to be due to the plaintiffs under agreements of personal service and for declarations that the said agreements were enforceable against the defendant company.

By an agreement, dated Oct. 27, 1944, the defendant company agreed to employ the first plaintiff

"in such capacity as the directors may from time to time require and [the first plaintiff] agrees to serve the company upon and subject to the terms of this agreement."

The first plaintiff also agreed to

"use her best endeavours to promote the interests of the company and . . . give her whole time and attention to the business of the company and . . . not without the consent in writing of the company first obtained be interested either directly or indirectly in any other business or occupation."

She was to be paid a sum of £250 a year. It was further provided that:

"This agreement shall continue in force until either party shall give to the other one month's notice in writing to determine the same. In the event of the termination by the company otherwise than under (b) of this clause, or if the company shall be wound-up by a member's voluntary winding-up, the company will pay to [the first plaintiff] the sum of £2,000. (b) The company shall be entitled to determine this agreement by giving six months' notice in writing to [the first plaintiff] if she shall become physically or mentally incapable of carrying out her duties, or forthwith if she shall be

guilty of any misconduct or shall commit a breach of the terms of this agreement."

On Oct. 16, 1948, it was mutually decided that this agreement should be cancelled at that date, neither party to have any claim against the other in respect of any matter arising thereout, and under a further agreement of the same date it was agreed

A "that, [the first plaintiff] having resigned her position as a director of the company, the company hereby appoints [the first plaintiff] and she agrees to accept the appointment as a consultant for the period from the date hereof until Oct. 31, 1964, or for the period of her life, whichever shall be the shorter period."

B A minute of the defendant company in a book signed by the directors read:

"It was resolved that [the first plaintiff] be appointed as a consultant to the company at a salary of £150 per annum for the period to Oct. 31, 1964, or until her death, whichever is the earlier."

By an agreement under seal entered into by the parties, dated Oct. 27, 1944, the second plaintiff agreed to resign the office which she then held as managing
C director of the defendant company as from Oct. 31, 1944, and to continue in the employment of the company as an assistant managing director for ten years at a salary of £750 a year and a commission equal to ten per cent. of the net profits of the company to be paid in a specified manner. By cl. 2 of the agreement the second plaintiff undertook that she

D "will give all proper attention to the business of the company and will at all times give to the company the benefit of her knowledge and experience and use her best endeavours to promote its interests. During such employment, [the second plaintiff] will not without the consent of the company be interested either directly or indirectly in any business competing in any way with the business of the company."

E On Oct. 18, 1949, by a further agreement:

"It has been agreed between the [defendant company] and [the second plaintiff] that, [the second plaintiff] having resigned her appointment as assistant managing director and as a director of the company with effect as from Sept. 30, 1949, as from Oct. 1, 1949, she shall act as consultant to the company for the balance of the said term of ten years and at the
F salary and on the terms referred to in [the agreement of Oct. 27, 1944]."

Case referred to:

(1) *James v. Thomas H. Kent & Co., Ltd.*, [1950] 2 All E.R. 1099; 2nd Digest Supp.

Beecroft for the plaintiffs.

G *A. F. M. Berkeley* for the defendants.

LORD GODDARD, C.J., said that the claim of the first plaintiff concerned an agreement, namely, that of Oct. 16, 1948, for a period of more than two years so that the Statute of Frauds, 1677, s. 4, applied to it. There was no reference in the agreement to the first plaintiff's remuneration, but that was stated in a minute of the defendant company in the book signed by all the
H directors. To decide whether there was a sufficient memorandum under the Statute of Frauds, 1677, s. 4, it seemed to him that he need not look at more than that minute which meant that the first plaintiff was appointed from Oct. 16, 1948, to Oct. 31, 1964. Nothing was said as to how the salary was to be paid, but that was not necessarily fatal. The agreement did not define the first plaintiff's duties. It simply said "as a consultant." In that way it differed from the agreement of the second plaintiff, which incorporated the clause in the original agreement under which she had already undertaken,

if she were further employed by the defendant company, to use all her best endeavours for and put her experience at the service of the defendant company. His LORDSHIP found the greatest difficulty in distinguishing the case from *James v. Thomas H. Kent & Co., Ltd.* (1), which related to the appointment, recorded in the minutes of the company, of a person as one of two "first directors of the company." SOMERVELL, L.J., there said ([1950] 2 All E.R. 1102):

"... I think it clearly appears that the minute was not a sufficient memorandum because it gave no indication, special or general, as to the nature of the duties which the plaintiff was to perform. Under a service agreement a man may often have to do many things on orders which he receives from his employers, but, it seems to me, to satisfy the statute, there must be some indication of the general nature of the duties he has to perform and his position as an employee in the company's service. I, therefore, think that the learned judge was right in saying there was no sufficient memorandum."

He could not disregard that ruling which was agreed to by ROMER, J., who was sitting as a member of the court but did not deliver a separate judgment. He would have thought that, if a company agreed to employ a man as a director, his duties were sufficiently indicated by the use of the word "director", but that case apparently decided the contrary, and he was bound by it. The present case was *a fortiori*. The position of the first plaintiff, who was employed merely as a consultant, differed from that of the second plaintiff who had already agreed to give the defendant company the benefit of her advice and undertook during her further employment to continue to serve the company, giving them the benefit of her advice, not to enter into any other employment, and so forth. He did not know what work the first plaintiff would have to do, or, if she were consulted, on what she could be consulted. It was too vague to appoint a person as a "consultant", but in any case he was bound by *James v. Thomas H. Kent & Co., Ltd.* (1).

In the second action the plaintiff was entitled to recover the sum claimed. She was to act as a consultant, an expression which, when read in conjunction with cl. 2 of the original agreement expressly incorporated, meant that she was to give the defendants the benefit of her knowledge and experience. He thought, therefore, that for this purpose the expression "act as consultant" was not so vague as to entitle the defendant company to say that there was no enforceable contract.

Orders accordingly.

Solicitors: *McKenna & Co.* (for the plaintiffs); *Forsythe, Kerman & Phillips* (for the defendant company).

F.A.A.

BAKER v. BAKER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), January 11, 1952.]

Divorce—Desertion—Parties living under same roof—House owned by both spouses—No allowance paid to wife—Provision of meals separately—Occupation of separate rooms—Other parts of house shared.

On an undefended petition for divorce brought by a husband against his wife on the ground of desertion it was proved that for more than three years before the presentation of the petition the parties had lived in the same house, which belonged to them both, but each occupied a separate bedroom and sitting-room and cooked their own food separately. During that time the husband had not paid any allowance to the wife. They shared the kitchen and the passages and other parts of the house and did not speak except for the business necessities of the day.

HELD: on these facts it could not be said that the parties had ceased to be one household and had become two separate households, and, therefore, desertion had not been proved.

Observations of DENNING, L.J., in *Hopes v. Hopes* ([1948] 2 All E.R. 925), applied.

AS TO WHAT CONSTITUTES DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 835, para. 1338; and FOR CASES, see DIGEST, Vol. 27, pp. 307-310, Nos. 2840-2880, and p. 322, Nos. 3000-3013, and Digest Supps.

Case referred to:

- (1) *Hopes v. Hopes*, [1948] 2 All E.R. 920; [1949] P. 227; [1949] L.J.R. 104; 113 J.P. 10; 2nd Digest Supp.

UNDEFENDED PETITION by the husband for divorce on the ground of desertion. It was conceded that the parties lived in the same house throughout the three years before the presentation of the petition.

K. G. I. Jones for the husband.

WILLMER, J.: In this extremely difficult case relief is being sought on the ground of desertion, although it is conceded that the parties have continued throughout to live under the same roof. There have been cases of parties living under the same roof in which it has been held that they have been sufficiently separated to give ground for a decree for desertion, but those cases were exceptional and the facts were very strong.

I do not think I can do better than to refer to the words of DENNING, L.J., in *Hopes v. Hopes* (1) where he said ([1948] 2 All E.R. 925):

“That line [*i.e.*, the line between desertion and gross neglect or chronic discord] is drawn at the point where the parties are living separately and apart. In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households . . .”

I have to ask myself the question: Is it proved to my satisfaction that these two parties have ceased to be one household and have become two households? One reason why parties sometimes continue to live under the same roof, although separated, is that it is impossible to find accommodation elsewhere. If that is proved, it goes to negative the inference which would naturally be drawn from the fact of two people living in the same house—the inference that they are living together. Another fact which goes to negative the inference of cohabitation is that one party or the other has installed a lock on the door of his or her part of the house or taken some other step to cut off physical access between one party and the other.

Nothing of that sort has been proved in this case. I gave permission for the husband to be recalled so that he could explain why the parties were still living in the same house. The only explanation he offered was that the house belongs

to both of them. No attempt has been made by either party to buy out the other. It seems to me, therefore, that nothing has been proved to assist in rebutting the natural inference which is normally drawn from the fact of two people living in the same house. All that has been proved is that ever since the husband returned from the war the wife has been neglectful of him, as is instanced by the fact that on the night of his return from the war she put him in a separate room, which he has occupied ever since. The husband said that in March, 1948, he stopped paying his wife any allowance, and that since then he has bought and cooked his own food. I am asked to say that that brought about a *factum* of separation which was thereupon superimposed on an already existing intention to desert on the part of the wife. The husband says that since that date he has occupied and looked after his own bedroom and his own sitting-room. The wife also has her own bedroom and her own sitting-room. They do not speak except for the business necessities of the day, but, although they live in their separate rooms, they still continue to share the house. They share the kitchen. They do not very often meet there, because they try to avoid each other, but they share the passages, the stairs, and the other offices of the house.

When I ask myself the question whether, in those circumstances, I am satisfied that this outwardly one household has in fact become two households, I can only say that I am not satisfied. I find it impossible to say, therefore, that desertion for three years preceding the presentation of this petition has been proved to my satisfaction, and I must dismiss the petition.

Petition dismissed.

Solicitors: *Sidney Davidson & Co.* (for the husband).

[Reported by A. T. HOOLAHAN, Esq., *Barrister-at-Law.*]

NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* MIDLANDS ELECTRICITY BOARD AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), December 13, 14, 17, 1951.]

Real Property—Restrictive covenant—Restriction of matters "which shall injure prejudice affect or destroy the natural aspect and condition of the land"—Validity.

Electricity Supply—Powers of undertakers—Erection of poles to carry supply line—Necessity for consent of local authority—Persons entitled to be heard—"Parties concerned"—Electric Lighting (Clauses) Act, 1899 (c. 19), schedule, s. 10 (b)—Electricity (Supply) Act, 1919 (c. 100), s. 21, s. 22 (1)—Electricity Act, 1947 (c. 54), s. 57 (2), sched. IV, Part III.

By a deed, dated Apr. 28, 1936, and made between the Ecclesiastical Commissioners, of the one part, and the National Trust for Places of Historic Interest, of the other part, it was recited that the commissioners had agreed to impose on certain "common land" belonging to them the restrictive covenants thereafter contained for the benefit of Midsummer Hill and for the purpose of preserving the amenities of the Malvern Hills. It was witnessed that the commissioners covenanted with the National Trust that (*inter alia*) "No act or thing shall be done or placed or permitted to remain upon the land which shall injure prejudice affect or destroy the natural aspect and condition of the land . . ." The restriction was registered under the Land Charges Act, 1925, s. 10 (1). By virtue of the Church Commissioners Measure, 1947, the functions and property of the Ecclesiastical Commissioners were vested in the Church Commissioners for England. The Midlands Electricity Board having entered on the common land and erected thereon poles to carry an overhead electricity supply line, the

National Trust claimed an injunction against the Church Commissioners and the board to restrain the erection or maintenance of the poles.

HELD: (i) it was impossible to ascertain the limits of the prohibition contained in the restrictive covenant, which was, therefore, void for uncertainty.

(ii) notwithstanding the provisions of the Electric Lighting (Clauses) Act, 1899, schedule, s. 10 (b), and the incorporation thereof in the Electricity Act, 1947, by s. 57 (2) of the latter Act, having regard to the Electricity (Supply) Act, 1919, s. 21, it was not incumbent on the board to obtain the consent of the appropriate local authority to the erection of the poles.

(iii) the words "otherwise lawful" in the Electricity (Supply) Act, 1919, s. 22 (1) (which empowers authorised undertakers to place any electric line below ground across any land, and above ground across any land in cases where the placing of such lines above ground is otherwise lawful), related to some direct infringement of some statutory power or some obviously wrong and illegitimate use of the power given by the section, and not to the private rights of any individual, but the National Trust, as the body entitled to enforce the restrictive covenant, were "parties concerned" within the proviso to s. 22 (1), and, as such, were a body to whom, under s. 22 (1), an opportunity of being heard should be given.

AS TO RESTRICTIVE COVENANTS, see HALSBURY, Hailsham Edn., Vol. 13, pp. 125-129, paras. 110, 111; and FOR CASES, see DIGEST, Vol. 40, pp. 310-328, Nos. 2648-2768.

Cases referred to:

- (1) *Wood v. Cooper*, [1894] 3 Ch. 671; 63 L.J.Ch. 845; 71 L.T. 222; 31 Digest, Replacement, 176, 3095.
- (2) *Paddington Corpn. v. A.-G.*, [1906] A.C. 1; 75 L.J.Ch. 4; 93 L.T. 673; 70 J.P. 41; 33 Digest 50, 303.
- (3) *Zetland (Marquess) v. Driver*, [1938] 2 All E.R. 158; [1939] Ch. 1; 107 L.J.Ch. 316; 158 L.T. 456; Digest Supp.
- (4) *Shelfer v. City of London Electric Lighting Co. Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; *subsequent proceedings*, [1895] 2 Ch. 388; 28 Digest 415, 408.
- (5) *Clark v. London School Board*, (1874), 9 Ch. App. 120; 43 L.J.Ch. 421; 29 L.T. 903; 38 J.P. 101; 11 Digest 137, 233.
- (6) *Kirby v. Harrogate School Board*, [1896] 1 Ch. 437; 65 L.J.Ch. 376; 74 L.T. 6; 60 J.P. 182; 11 Digest 145, 297.
- (7) *Metropolitan Asylum District v. Hill*, (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 38 Digest 44, 256.

ACTION by the National Trust for Places of Historic Interest or Natural Beauty for a declaration that they were entitled to enforce certain restrictive covenants contained in a deed dated Apr. 28, 1936, against the Midlands Electricity Board and the Church Commissioners for England. They also claimed an injunction to restrain the erection or maintenance of certain poles erected by the electricity board for the purpose of supporting an overhead electricity supply line on land subject to the said restrictive covenants, and a mandatory order to demolish and remove some of the said poles.

M. Browne for the plaintiffs, the National Trust for Places of Historic Interest or Natural Beauty.

Pennycuik, K.C., and *Bourke* for the first defendants, the Midlands Electricity Board.

F. G. King for the second defendants, the Church Commissioners for England.

VAISEY, J.: These proceedings relate to a place both of interest and also, more particularly, of natural beauty, namely, the Malvern Hills. They consist, as is well known, of a short and narrow range with about twenty summits

varying in height from nine hundred to fourteen hundred feet and forming the watershed between the Severn and the Wye. One of these heights, known as Midsummer Hill, is and has at all material times been owned and occupied by the National Trust, and it has been declared inalienable under certain provisions of the National Trust Act, 1907. At the date of the deed next to be mentioned the Ecclesiastical Commissioners for England were the owners of certain lands in the neighbourhood of Midsummer Hill known as Castlemorton Common, Shady Bank Common, and Holly Bed Common, to which I will refer as "the common lands." By that deed, which is dated Apr. 28, 1936, and made between the said Ecclesiastical Commissioners, of the one part, and the National Trust, of the other part, after recitals which *inter alia* state that the Ecclesiastical Commissioners had agreed to impose on the common lands the restrictive covenants thereafter contained for the benefit of Midsummer Hill and for the purpose of preserving the amenities of the Malvern Hills, it is witnessed that in pursuance of that agreement the Ecclesiastical Commissioners

"with intent and so as to bind as far as practicable [the common lands] into whatsoever hands the same may come and to benefit and protect Midsummer Hill aforesaid"

covenanted with the National Trust at all times thereafter to observe the stipulations and restrictions contained in the schedule thereto. I turn to the schedule, and read the first two of the four paragraphs of which it consists:

"(1) No act or thing shall be done or placed or permitted to remain upon the land which shall injure prejudice affect or destroy the natural aspect and condition of the land except as hereinafter provided. (2) No building shall at any time hereafter be erected upon any part of the land by or with the consent of the covenantors [the Ecclesiastical Commissioners]."

On May 1, 1936, the said restrictions were duly registered under the Land Charges Act, 1925, s. 10 (1), as a land charge affecting the common lands. By virtue of the Church Commissioners Measure, 1947, the functions and property of the Ecclesiastical Commissioners were vested in the second defendants, the Church Commissioners for England, who thereupon became, and still are, the owners of the common lands.

The first defendants to this action, the Midlands Electricity Board, are one of the area boards constituted by or under the Electricity Act, 1947, s. 1, s. 2 and s. 3, and the area which they are concerned to administer consists of the counties of Hereford and Worcester and parts of Gloucestershire, Oxfordshire, Shropshire, Staffordshire and Warwickshire (including Birmingham). Shortly before the commencement of this action, the board entered on a small part of the common lands and erected or began to erect some poles to carry an overhead electricity supply line across part of the common lands. These poles are wooden poles in pairs connected by cross-struts, and are about forty-two feet in height. Lines of cable are carried across the top of the poles and link them together in a continuous line. The National Trust alleges that the erection, existence and maintenance of these poles and this electric supply line constitute a breach of the restrictive covenants. They plead that they have thereby suffered damage, that their enjoyment of Midsummer Hill has been seriously disturbed, and, in particular, that the view from Midsummer Hill over the common lands is prejudicially affected. They claim a declaration that they are entitled to enforce the restrictive covenants against both the defendants, and are entitled to an injunction to restrain the erection or maintenance of certain of the poles and the suspended supply line. They claim also a mandatory order to pull down and remove some of the said poles.

The first and fundamental point to be considered is the meaning and effect of the restrictive conditions. Let me deal first with the second, which reads as follows:

"No building shall at any time hereafter be erected upon any part of the land by or with the consent of the covenantors,"

a word which now, in the events which have happened, means the Church Commissioners. In my judgment, these poles are certainly not buildings though they may well be erections or structures, and for that proposition I rely on *Wood v. Cooper* (1) and *Paddington Corp'n. v. A.-G.* (2). Even if they are buildings, they have not been erected by or with the consent of either the Ecclesiastical Commissioners or the defendants, the Church Commissioners.

A The matter, therefore, in my view, rests on the first of the restrictions, which it will be remembered is to this effect:

"No act or thing shall be done or placed or permitted to remain upon the land which shall injure prejudice affect or destroy the natural aspect and condition of the land except as hereinafter provided."

B The exceptions do not throw any light on the point which has arisen here. In my judgment, the wording of this restriction is extremely inapt and ill-considered. It may, perhaps, be paraphrased thus: "No act shall be done and no thing shall be placed or permitted to remain on the land which shall injure prejudice affect or destroy the natural aspect and condition of the land." It would be difficult to find wider, vaguer and more indeterminate words than those. "Affect" following the word "prejudice" cannot, I think, mean

C "prejudicially affect" and must, therefore, mean "affect whether prejudicially or otherwise," that is to say, change or alter. Who is to say and what is to be the criterion of such an alteration of the natural aspect and condition of the land? There is no such qualification as might have been introduced by such words as "in the opinion of the National Trust" after the words "which shall," a qualification which would appear to have been accepted as sufficient in *Marquess of Zetland v. Driver* (3) where the words were

D "no act or thing shall be done or permitted [on certain lands] which in the opinion of the vendor may be [*inter alia*] prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood."

E It is, no doubt, easy to suggest some acts and things which would come within the prohibition—if, for example, the land were ploughed up or turned into a car-park or building estate. The difficulty here is to ascertain the limits of the prohibited acts. The burning of bracken, for instance, would, I should have thought, obviously affect the aspect and condition of the land. During the hearing counsel for the National Trust was driven to admit that the placing of a basket for litter on a short pole or a seat or a bench would amount to a breach

F of the condition. It is to be noted that it is both the aspect and the condition of the land which must be injured, prejudiced, affected, or destroyed. What does "aspect" mean? Presumably the appearance, but viewed from what point? If a man chooses to stand with his eye against one of these poles, obviously he would be able to see nothing of the land, but that cannot be what is meant. What does "condition" mean? I construe that as referring to

G the presence or absence of cultivation. How do these poles affect the condition of the land? It remains just the same as before. My garden remains a garden even though the post office erect a telegraph pole on it. In my judgment, the omission of any criterion by which these vague and uncertain words can be brought under some control is fatal to the validity of the restriction. I think it is void for uncertainty. It is so vague that it is really impossible of apprehension or construction, and, in my judgment, it is wholly unenforceable, but,

H whether it be wholly unenforceable or not, in my view, the erection of these poles does not come within the prohibition at all. They do, it is true, "affect" to some extent the "aspect" of the land, but how and to what extent they affect the "condition" of the land I fail to see. The land remains in the same condition now that it was before the poles were erected except possibly in regard to the few square inches on which the poles stand. The land remains open country, heath or scrub exactly as it was before the poles were put on it. This

extraordinary combination of "aspect" and "condition" seems to me to involve an interference with the land both in its appearance and in its condition which what has been done and what it is proposed to do do not come anywhere near satisfying.

If, however, I am wrong both as to the unenforceability of the condition and as to the absence of any relevance in its terms to what has actually happened, there is the further difficulty how any restriction so worded can be said to benefit or protect Midsummer Hill. The nearest of these poles to Midsummer Hill is at least eleven hundred yards distant from it. No doubt, the poles are visible from Midsummer Hill on a reasonably clear day, but the effect of their presence or absence from the landscape must be quite infinitesimal. I may here observe that the National Trust has now obtained statutory powers to impose and enforce restrictions in gross, but the present case is not within those powers. I have here to deal with the ordinary case of protected and restricted land, assuming, contrary to my view, that the common lands have been validly restricted by the deed of Apr. 28, 1936. I think that Midsummer Hill has not been validly protected in the circumstances and it is only as the owners of Midsummer Hill that the National Trust can have any right of action in respect of these covenants.

If I am wrong on all these points, the further question arises whether the first defendants, the electricity board, have acted within and are proposing to act within their statutory powers and thereby are relieved from any obligation to observe the restrictions and excused for any breach of them which the erection of these poles would otherwise entail. In my judgment, this question must be answered in the affirmative. In their defence the electricity board claim that by virtue of the provisions of the Electricity Act, 1947, and of those provisions of preceding Acts which are incorporated therein, and pursuant to consents of the Minister of Fuel and Power dated respectively Sept. 14 and 26, 1951, they have statutory power to place electricity poles on and above the common lands, and they say they will refer to such consents for their full meaning and intentment. They further say that, if it is necessary, they have obtained the express consent of the rural district council of Upton-upon-Severn.

The statutory justification for what the electricity board have done, are doing, and are proposing to do has to be ascertained from the actual terms of the legislative enactments. These are very largely what is called referential legislation and are not easy to follow. In the circumstances I do not propose to examine with any great degree of particularity the foundation and nature of these statutory powers. Counsel were good enough to refer me to a very large number of sections which are relevant in this connection, and I will first mention s. 17 of the Electric Lighting Act, 1882, which provides:

"Compensation for damage. In the exercise of the powers in relation to the execution of works given them under this Act, or any licence, order, or special Act, the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation in case of difference to be determined by arbitration."

It is not denied that the National Trust has or may have some right to be compensated under that section, which is still in force, although the amount of compensation which they are likely to recover, and the grounds on which their claim can be based, do not at the moment concern me. I merely state in passing that I think that the electricity board are justified in having pleaded as they do in their defence that under that section a remedy by way of compensation is provided for damage (if any) sustained as a result of the exercise of their powers by the electricity board, and that no other remedy is available to the

plaintiffs. I am, of course, familiar with the principles laid down in *Shelfer v. City of London Electric Lighting Co.* (4) which limits to some extent the grounds on which such damage can be claimed, but that, in my judgment, is a matter with which I am not here concerned.

A Next, I want to refer to s. 1 of the schedule to the Electric Lighting (Clauses) Act, 1899, which (as amended by the Electricity Act, 1947, s. 57 (2)) directs that the provisions of that schedule are to be read and construed in all respects subject to the provisions of *inter alia* the Electricity Act, 1947. The Acts and parts of Acts subject to which the schedule is to be read are collectively referred to in the schedule as the principal Act, and then follow a certain number of definitions. Section 10 (b), as amended by the Electricity Act, 1947, s. 57 (2), and sched. IV, Part III, provides:

B "The undertakers [the electricity board] shall not, without the express consent and authorisation of the Minister of Fuel and Power and the express consent of the local authority also, place any electric line above ground except within premises in the sole occupation or control of the undertakers . . ."

A curious point arises there, because the Electricity Act, 1947, s. 57 (2), provides:

C "The schedule to the Electric Lighting (Clauses) Act, 1899, shall, as from the vesting date, be incorporated with this Act, and shall have effect, as so incorporated, subject to the adaptations and modifications specified in Part III of the said sched. IV."

D But before that enactment took effect, the Electricity (Supply) Act, 1919, s. 21, had come into operation and is now binding on and can be taken advantage of by the electricity board. That section provides:

E "Where the consent of the Board of Trade [now the Minister of Fuel and Power] is obtained to the placing of any electric line above ground in any case, the consent of the local authority shall not be required, anything in the Electric Lighting Acts, or in any order or special Act relating to the undertaking to the contrary notwithstanding . . ."

F The effect of those enactments, in my judgment, is to excuse the Midlands Electricity Board in the present case from obtaining the consent of the appropriate local authority, the Upton-upon-Severn Rural District Council. Supposing I am wrong in that, I hold that express consent has been given by virtue of two letters written by the clerk of that authority to the chairman of the electricity board.

The Electricity Act, 1947, s. 9 (1), relates to the compulsory purchase of land, and provides:

"The Minister may authorise any electricity board to purchase compulsorily any land which they require for any purpose connected with the discharge of their functions . . ."

G The Acquisition of Land (Authorisation Procedure) Act, 1946, with an immaterial exception, is to apply. That section obviously deals with an entirely different matter. First, it may well be that "land" includes easements, and, indeed, s. 9 (2) expressly so states, but this is not a compulsory purchase at all, and, in my judgment, s. 9 in no way limits the generality of the provisions to which I am now about to refer, *i.e.*, s. 21 and s. 22 of the Electricity (Supply) Act, 1919, which is incorporated in the Act under which the electricity board in this case are acting. [His LORDSHIP again read s. 21 of the Act of 1919 and continued:] Section 22 (1) provides:

" . . . any authorised undertakers [in this case, the electricity board] may place any electric line below ground across any land, and above ground across any land other than land covered by buildings or used as a garden or pleasure ground in cases where the placing of such lines above ground is otherwise lawful, and where any line has been so placed across any land the . . .

undertakers may enter on the land for the purpose of repairing or altering the line."

What does "otherwise lawful" mean? In my judgment, it means in every case in which there is not some direct infringement of some statutory right or some obviously wrong and illegitimate use of a power—such, for instance, as putting electric cables too low down across a foot-path, river, road, or railway. I do not think it is possible to regard those words, "otherwise lawful," as referring to the private rights of any particular individual. The proviso to s. 22 (1) is:

"Provided that, before placing any such line across any land, the . . . undertakers shall serve on the owner and occupier of the land notice of their intention, together with a description of the nature and position of the lines proposed to be so placed; and if, within twenty-one days after the service of the notice, the owner and occupier fail to give their consent or attach to their consent any terms or conditions or stipulations to which . . . the undertakers object, it shall not be lawful to place the line across that land without the consent of [the Minister] . . ."

I thought at one time (and I now reject the idea) it could be argued that the owner and occupier of these common lands consisted of the combination of all persons whose consent is necessary in order to convey the unencumbered and unrestricted fee simple of the property to another person—in other words, it would include the Church Commissioners for the purpose of dealing with the freehold and the National Trust for the purpose of releasing their right or easement, assuming that such a right exists, and that the two would be co-owners for the purpose of this proviso. I do not think that is possible.

I think that the objection which was taken—that no proper notice had been served on the National Trust—is a false point. The proviso continues:

". . . and [the Minister] may, if after giving all parties concerned an opportunity of being heard [he thinks] it just, give [his] consent either unconditionally or subject to such terms, conditions, and stipulations as [he thinks] just; and in deciding whether to give or withhold [his] consent, or to impose any terms, conditions, or stipulations (including the carrying of any portion of the line underground) [the Minister] shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed."

At one time the electricity board took the view that the National Trust, in their capacity of persons entitled to enforce these restrictions, was not a "party concerned" to whom opportunity should be given. In my judgment, that view is wrong. Assuming, of course, that the restrictions are valid, and that the National Trust are in a position to enforce them, then I think in that respect they are "parties concerned" who should have been heard. No harm has been done in this case, because they were heard at the inquiry which took place previous to the sanction by the Minister of this scheme, but I put it on record that, in my view (so far as the point is material in the present case), persons entitled to enforce restrictive covenants for land are "persons concerned" to whom an opportunity of being heard should be given. On all the points to which I have referred I am bound to hold that this action fails and must be dismissed.

Action dismissed.

Solicitors: *A. A. Martineau* (for the plaintiffs); *Sydney Morse & Co.*, agents for *G. P. Wilson*, Solicitor to the Midlands Electricity Board; *Milles, Day & Co.* (for the second defendants).

[Reported by *R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

CANADA STEAMSHIP LINES, LTD. v. REGEM.

[PRIVY COUNCIL (Lord Porter, Lord Normand, Lord Morton of Henryton, Lord Asquith of Bishopstone and Lord Cohen), November 12, 13, 14, 15, 19, 20, 1951, January 21, 1952.]

A *Negligence—Contracting out of liability—Lease containing clauses exempting lessor from liability for damage to property leased or goods therein and providing indemnity against claims by third parties—Need of express language to exempt from liability for negligence—Existence of other ground of damage.*

By a lease, dated Nov. 18, 1940, the Crown leased to a shipping company a shed for storing freight situated on the bank of a canal in the city of Montreal. Clause 7 of the lease provided that "the lessee shall not have any claim . . . against the lessor for . . . damage . . . to the . . . said shed . . . or to any . . . goods . . . placed . . . in the said shed." By cl. 8 the Crown undertook to maintain the shed. Clause 17 provided that "the lessee shall at all times indemnify . . . the lessor . . . against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder." On May 5, 1944, while repairs to the shed, involving the use of an oxy-acetylene torch, were being carried out by the Crown's employees, a spark from the torch was negligently allowed to fall on some bales of cotton waste, which caught fire and the shed and its contents were destroyed. In a claim by the company against the Crown for damages for negligence, the Crown relied on cl. 7 as relieving them from liability, and under cl. 17 claimed from the company to be indemnified against claims by the owners of goods destroyed by the fire.

E HELD: a clause purporting to exempt a party to a contract from liability for negligence must contain express language to that effect; in the absence of such language, but if the words used were wide enough, in their ordinary meaning, to cover negligence, the existence of a possible ground of damage other than that of negligence might deprive the party of the protection of the clause on a claim for negligence; on construction, cl. 7 and cl. 17 were not expressed in such clear terms as would exempt the Crown from liability for the negligence of its servants or entitle it to an indemnity from the company for such negligence in the course of carrying out the obligation of the Crown under cl. 8; under the provisions of the Civil Code of Lower Canada the damage might be based on some ground other than negligence; and, therefore, the Crown had failed to establish its defence under cl. 7 or its claim for indemnity under cl. 17.

G Dictum of LORD GREENE, M.R., in *Alderslade v. Hendon Laundry, Ltd.* ([1945] 1 All E.R. 245), applied.

AS TO CONDITIONS LIMITING LIABILITY FOR NEGLIGENCE, see HALSBURY, Hailsham Edn., Vol. 23, p. 670, para. 952.

Cases referred to:

- H (1) *Alderslade v. Hendon Laundry, Ltd.*, [1945] 1 All E.R. 244; [1945] K.B. 189; 114 L.J.K.B. 196; 172 L.T. 153; 2nd Digest Supp.
(2) *Glengoil S.S. Co. v. Pilkington*. *Glengoil S.S. Co. v. Ferguson*, (1897), 28 S.C.R. 146; 41 Digest 200, l.

APPEAL by Canada Steamship Lines, Ltd., from a decision of the Supreme Court of Canada dated June 23, 1950, reversing in part an order of the Exchequer Court of Canada (ANGERS, J.) maintaining petitions of right against the Crown for damages for negligence.

The Crown had leased to the steamship company a warehouse which, through the negligence of the Crown's servants, was destroyed together with its contents by fire. In claims by the company and other owners of the property destroyed, the Crown sought to rely on a clause in the lease purporting to exempt the Crown as lessor from any claims for damage to the warehouse or goods contained therein. Under a further clause the Crown claimed the right of indemnity from the company against the claims of the other owners. The company contended that, on the true construction of the clauses in question, the company was entitled to enforce their claim, and the Crown was not entitled to an indemnity. **ANGERS, J.**, found that the fire and resulting damage were caused by the gross negligence of the Crown's servants and held that by the law of Quebec no clause would extend to relieve the Crown of liability for such negligence. The Supreme Court held that the Crown's negligence did not amount to gross negligence and that, on construction, the clauses barred the company's action and entitled the Crown to indemnity. A

Cross, K.C., Hazen Hansard, K.C. (of the Canadian Bar), and *R. O. Wilberforce* for the shipping company. B

A. J. Campbell, K.C., D. W. Mundell, K.C. (both of the Canadian Bar) and *Gahan* for the Crown. C

Jan. 21. LORD MORTON OF HENRYTON: It will be convenient to refer to the appellant company as "the company" and to the respondent as "the Crown."

This is an appeal by special leave from six judgments of the Supreme Court of Canada dated June 23, 1950, reversing in part a like number of judgments of the Exchequer Court of Canada (**ANGERS, J.**), which had maintained petitions of right against the Crown for damages arising out of a disastrous fire. In the first of these six cases the company was suppliant, claiming from the Crown \$40,713.72 as the value of the property of the company destroyed in the fire. In the remaining five cases the suppliants were owners of other property destroyed by the fire. The suppliants in these five cases and the amounts respectively claimed by them from the Crown were as follows:—**J. H. Heinz Co. of Canada**, \$38,430.88; **Canada & Dominion Sugar Co., Ltd.**, \$108,310.83; **W. H. Taylor, Ltd.**, \$3,670.25; **Raymond Copping**, \$1,662.37; and **Cunningham & Wells, Ltd.**, \$15,159.83. In addition to the present six cases, petitions of right were instituted against the Crown in some 250 other cases involving additional claims arising out of the fire to a total amount of \$325,636.05, which petitions of right have remained in abeyance pending the outcome of these proceedings. D

The events leading up to all these claims must now be set out. By an indenture of lease (hereafter called "the lease") dated Nov. 18, 1940, the Crown leased to the company a piece of land on the western side of St. Gabriel Basin No. 1 of the Lachine Canal in the city of Montreal "together with the right and privilege to occupy, use and enjoy, for the purpose of receiving and storing therein freight and goods loaded onto and/or unloaded from vessels owned and operated by the lessee," the whole of a shed known as St. Gabriel Shed No. 1 and hereafter referred to as "the shed." The shed occupied the greater part of the said piece of land. The company was also granted "the right and privilege to construct, maintain and use, at its own cost and expense and over and/or across the said land, along the whole length of the southerly face of the said shed, a loading platform approximately fourteen feet in width, and a canopy extending approximately twenty feet beyond the southerly edge of the said platform." Between the land demised to the company and the St. Gabriel Basin No. 2 there lay a strip of land thirty feet in width. The term of the lease was twelve years from May 1, 1940, and the rent was over \$12,000 per annum. The lease was expressed to be E

"made and executed upon and subject to the covenants, provisos, conditions and reservations hereinafter set forth and contained, and that F

H

the same and every one of them, representing and expressing the exact intention of the parties, are to be strictly observed, performed and complied with namely . . . ”

Then follow a number of clauses some of which must be set out, as the decision of this appeal ultimately turns on the construction of cl. 7 and cl. 17, and these two clauses must be considered in the light of the lease read as a whole. The

A more important clauses are as follows:

“ 1. That the lessee will pay all rental herein reserved at the time and in the manner in these presents set forth, without any abatement or deduction whatever . . . 5. That the lessor, his servants or agents, shall at all times and for all purposes, have full and free access to any and every part of the said land, the said shed and the said platform. 6. That the said land shall be used for purposes in connection with the lessee's business only, and for no other purpose or purposes whatever. 7. That the lessee shall not have any claim or demand against the lessor for detriment, damage or injury of any nature to the said land, the said shed, the said platform and the said canopy, or to any motor or other vehicles, materials, supplies, goods, articles, effects or things at any time brought, placed, made or being upon the said land, the said platform or in the said shed. 8. That the lessor will, at all times during the currency of this lease, at his own cost and expense, maintain the said shed, exclusive of the said platform and the said canopy. 9. That the lessee shall, in addition to the payment of the yearly rental hereunder, at its own sole cost and expense, insure, concurrently with the execution of this lease or as soon thereafter as possible, and thereafter keep insured during the currency of this lease with an insurance company or companies satisfactory to the Minister of Transport the said shed against fire and other casualty in the sum of forty-eight thousand dollars (\$48,000.00) . . . 10. That the lessee shall before constructing or erecting the said platform, the said canopy or other structures, including alterations to the said shed, on the said land, submit to the general superintendent plans or drawings showing the location and design and nature of construction of the said platform, the said canopy or such structures, and obtain his approval of such plans or drawings, and shall construct or erect the said platform, the said canopy or such structures on the location and in accordance with the designs as shown on the plans and drawings approved by the general superintendent, and thereafter maintain the said platform, the said canopy or such structures in accordance with the designs respecting the same, and shall carry on the work of such construction and maintenance of the said platform, the said canopy and such structures at its own cost and expense and under the control and direction of the general superintendent and to his entire satisfaction . . . 12. That it is distinctly understood and agreed that this lease is granted subject to the condition that the said platform and the said canopy shall forthwith, upon termination of this lease in any manner, except as provided for in cl. 18 hereof, be and become vested in title in the lessor without any payment of compensation to the lessee in respect of the said platform and the said canopy . . . 16. That the parcel or tract of land, thirty (30) feet in width, situated between St. Gabriel Basin No. 2 and the said land may be used by the lessee in common with the public generally, it being understood and agreed, however, that the lessee shall, in the discretion of the superintending engineer and in accordance with his direction, have preference in the use thereof. 17. That the lessee shall at all times indemnify and save harmless the lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or thing done

or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder."

Pursuant to the lease the company took possession of the leased premises and continued to occupy them at all times material to the present litigation. A few days prior to May 5, 1944, the Department of Transport in Montreal, representing the Crown, received a request from the company to effect certain minor repairs to the premises, including the doors of the shed. An inspection was made and the work undertaken by the employees of the Department of Transport almost immediately. At this time the shed contained a large variety of merchandise awaiting shipment, other goods stored there by third parties, and a quantity of equipment belonging to the company. A number of trucks and motor vehicles were on the wharf delivering or about to deliver further goods for transport. The shed was constructed of corrugated iron on a steel frame and the shipping doors were hung on hinges bolted to the uprights of the frame. These uprights were in the form of steel "H-Beams", the flanges of which were one-quarter to three-eighths of an inch thick. The Crown's employees, having almost completed their work on the afternoon of May 5, had removed and straightened the upper hinge of one of the shipping doors which had to be replaced. These hinges had originally been affixed to the "H-Beam" with three-eighths inch bolts. When they came to replace the hinge in question the Crown's employees found that they had no three-eighths inch bolts with them, the smallest size being one-half inch in diameter. They elected to enlarge the three-eighths inch hole in the "H-Beam" so that it would take the half-inch bolt. Inside the door, immediately opposite and a few feet distant from the "H-Beam" in question were piled a number of bales of cotton waste. Having decided to enlarge the hole, the Crown's employees proceeded to make use of an oxy-acetylene cutting torch for this purpose. The operation of this torch involved the use of oxygen and acetylene gas which are combined in a cutting-head under pressure and, when ignited, produce extremely high temperatures of from 5,500° to 6,300° Fahrenheit. The flame of the torch, at such temperatures, will cut through steel. The use of such a torch in the vicinity of inflammable material is dangerous, since, apart from the heat of the torch itself, the operation of cutting the metal necessarily produces a shower of sparks or particles of molten metal which fly off at a tangent from the point of cutting. The Crown's employees directed the torch from the exterior into the interior of the shed. For the purpose of preventing sparks from entering the shed, they placed a board on the inside across the opening of the "H-Beam". This board was some three feet shorter than the beam and did not fit closely at the top because it was cut square whereas the roof of the shed sloped. There were, accordingly, openings at both the top and bottom of the beam through which sparks might escape. One of the workmen was stationed on the top of the bales of cotton waste and a pail of water was placed inside the shed. The operation of enlarging the hole involved using the torch for about three or four minutes. Sparks escaped into the shed. The bales of cotton waste caught fire and the flames spread rapidly to the other contents of the shed and consumed the whole. Hence the claims, already mentioned, by the company and others, against the Crown.

ANGERS, J., after hearing the evidence, found as a fact that the fire and resulting damage were caused by the gross negligence of the Crown's servants while acting within the scope of their duties or employment. The Crown had denied negligence and had pleaded that the company's claim was in any event barred by the provisions of cl. 7 of the lease. In third party proceedings the Crown relied on cl. 17 of the lease as giving rise to a right of indemnity from the company against the claims of the other five suppliants. The learned trial judge did not express any view as to the meaning of cl. 7 and cl. 17 of the lease. It was not necessary for him to do so because, basing himself on the law of Quebec, which he reviewed exhaustively, he found that no clause would extend to relieve

the Crown of liability for damage resulting from the gross negligence (*faute lourde*) of its servants. He, accordingly, refused to regard cl. 7 as a bar to the company's action or to hold that cl. 17 gave the Crown a right to indemnity in the other five cases. In the result, he condemned the Crown to pay to the company and to the other five suppliants the damages respectively claimed by them, and he dismissed the third party proceedings brought by the Crown against the company. The amount of the damages was agreed and is not in issue.

- A The Supreme Court of Canada (RINFRET, C.J., and RAND, KELLOCK, ESTEY, LOCKE, CARTWRIGHT and FAUTEUX, J.J.) by a majority of six to one (LOCKE, J., *dissentiente*) reversed the trial judge in the company's own case and unanimously reversed the trial judge in the cases of the other five suppliants in so far as the third party proceedings of the Crown against the company were concerned.
- B The Supreme Court concurred in the finding of the trial judge that the Crown's servants were negligent, but declined to hold that such negligence amounted to gross negligence (*faute lourde*). On the interpretation which they placed on cl. 7 (LOCKE, J., *dissentiente*) and cl. 17 of the lease, they held that such clauses must be read as barring the company's action and as entitling the Crown to indemnity in the other actions. They, accordingly, dismissed the company's
- C petition, confirmed the judgments maintaining the petitions in the five other cases, and condemned the company to indemnify the Crown in respect thereof.

In view of the findings of the Supreme Court, the Crown does not now seek to deny that its servants were negligent, but contends that their negligence was not gross negligence. Thus, the issues arising on this appeal are whether the Supreme Court rightly construed cl. 7 and cl. 17 of the lease, whether the Crown's servants were guilty of gross negligence, and, if so, whether, by the law of Quebec, clauses stipulating immunity from or limitation of liability for the gross negligence of one of the contracting parties or his servants, or indemnity against such liability, are illegal and void. Counsel for the company conceded that such clauses were legal and effective if they applied only to negligence which did not amount to *faute lourde*. He opened the appeal by submitting that, even if the negligence of the Crown's servants did not amount to *faute lourde*, on the true construction of cl. 7 and cl. 17 of the lease, cl. 7 afforded no answer to the company's claim against the Crown, and cl. 17 did not entitle the Crown to the indemnity claimed in the third party proceedings. As this submission, if successful, would dispose of the appeal, their Lordships thought it well to hear it argued fully before hearing argument on the other issues in the case.

- D In considering this question of construction their Lordships have had in mind art. 1013 to art. 1021 of the Civil Code of Lower Canada and also the special principles which are applicable to clauses which purport to exempt one party to a contract from liability. These principles were stated by LORD GREENE, M.R. ([1945] 1 All E.R. 245), in *Alderslade v. Hendon Laundry, Ltd.* (1), as follows:

- E " . . . where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability and not to liability based on negligence."
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- H

It appears to their Lordships that none of the learned judges of the Supreme Court regarded this passage as being in any way in conflict with the law of Lower Canada, and KELLOCK, J., observed:

"It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case."

Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarised as follows: (i) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the *proferens*") from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed as to whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in *Glengoil S.S. Co. v. Pilkington* (2). (ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. If a doubt arises at this point, it must be resolved against the *proferens* in accordance with art. 1019 of the Civil Code of Lower Canada: "In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation." (iii) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence" to quote again LORD GREENE, M.R., in the *Alderslade* case (1). The "other ground" must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it, but, subject to this qualification, which is, no doubt, to be implied from LORD GREENE'S words, the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are, *prima facie*, wide enough to cover negligence on the part of his servants.

With these principles in mind, their Lordships turn to a consideration of cl. 7, and they will first consider its language apart from the contents of cl. 8 which immediately follows it. The claim of the company in the present case is "a claim . . . against the lessor for damage to . . . goods . . . being . . . in the said shed", and would, therefore, *prima facie*, be barred by cl. 7. It is, however, a claim for damage admittedly caused by the negligence of the Crown's servants. Their Lordships must, therefore, consider the third question stated above, and, in considering this question, it is necessary to bear in mind that the only liability of the Crown in the Province of Quebec in respect of claims arising *ex delicto* is based on s. 19 (c) of the Exchequer Court Act, R.S.C., 1927, c. 34, as amended in 1938 (c. 28). That section is in the following terms:

"The Exchequer Court shall . . . have the exclusive original jurisdiction to hear and determine the following matters . . . (c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment."

Thus, the field for claims against the Crown, not based on negligence and coming within cl. 7, is not a very wide one, but counsel for the company has given the following instances of such claims: (i) Claims under art. 1614 of the Civil Code for

"defects or faults in the thing leased which prevent or diminish its use, whether known to the lessor or not."

There might be, says counsel, a defect in the construction of the roof of the shed, not known to the Crown, and as a result of this defect the roof might fall down and injure chattels in the shed which belonged to the company. A claim for damage to these chattels resulting from this breach of the lessor's obligation under art. 1614 is not a claim based on negligence and it would be barred by cl. 7. (ii) Claims under art. 1612 (3) of the Civil Code. Suppose, for example,

says counsel, that the Crown were to authorise a third party to carry out some operation on adjacent land which caused damage to the shed. In that event, again, the company would have a claim for damages, not based on negligence, which would be barred by cl. 7. (iii) Claims for a reduction of the rent, by the joint operation of art. 1617 and art. 1660 of the Civil Code, if, for instance, a trespasser caused damage to the shed by setting part of it on fire and the lessee's right of action for damages against the trespasser proved to be ineffectual.

A Counsel for the Crown contended that a claim for a reduction of the rent would not fall within cl. 7, but their Lordships think that such a claim, although it would not be a claim for "damages" might fairly be described as "a demand against the lessor for . . . damage . . . of any nature . . . to the said shed" within the meaning of cl. 7.

B It was contended on behalf of the Crown that these instances of possible claims for damages were fanciful and remote, and would not have been within the contemplation of the parties when the terms of the lease were agreed. No doubt, there may be cases in which it may be difficult to draw the line. In the present case, however, their Lordships are not prepared to assume that the obligations imposed on lessors by the Civil Code were not in the minds of the parties. They think that the Crown may well have desired to protect itself from claims for damage arising out of any breach of these obligations, and yet may not have intended to go so far as to stipulate for protection from claims for damage resulting from the negligence of its servants.

C So far, cl. 7 has been considered apart from cl. 8, but these two clauses must be read together, according to the ordinary principles of construction. So reading them, it appears to their Lordships most unlikely that cl. 7 was intended to protect the Crown from claims for damage resulting from the negligence of its servants in carrying out the very obligations which were imposed on the Crown by cl. 8. It is difficult to imagine the Crown saying to the company when the lease was being negotiated: "Notwithstanding that the Crown agrees to maintain the shed at its own expense throughout the term of the lease and notwithstanding that such an agreement implies an obligation to use due care in its performance, if the Crown's servants set about the work of repair in such a negligent manner that the shed and all the goods therein are destroyed, you are to have no claim for damages against the Crown." If the Crown had made such a suggestion, it seems unlikely that the company would have accepted it. Counsel for the Crown submitted that inconsistency between cl. 7 and cl. 8 would be avoided if the former clause were read as barring claims for damages for non-feasance or misfeasance under cl. 8, but leaving open to the company any claims for specific performance which it might make as a result of non-feasance under art. 1641 (1) and (2) of the Civil Code. This is not an impossible construction of cl. 7, but it appears to their Lordships to be a somewhat strained and artificial construction. Counsel for the Crown also relied on the fact that under cl. 9 the company was bound to insure the shed as an indication that the Crown did not intend to be liable for any damage to the shed, howsoever such damage might arise. This argument is not without force, as applied to the shed, but cl. 9 makes no reference to goods within the shed. Their Lordships will shortly consider how far the construction of cl. 7 is affected by cl. 17, for they entirely agree with the view expressed by the majority of the Supreme Court as to the close interrelation of these two clauses. If, however, cl. 7 were to be considered apart from cl. 17, their Lordships would conclude that, even if the case is put at its highest in favour of the Crown, the Crown has failed to limit its liability in respect of negligence in clear terms. They would, therefore, decide against the Crown in accordance with the principles already stated.

H Their Lordships now turn to cl. 17, and observe at the outset that, if the Crown's contention as to this clause is correct, it imposes a very remarkable and burdensome obligation on the company. However widespread may be the destruction caused by the negligence of the Crown's servants in carrying out the Crown's

obligations under cl. 8, the whole of the damage must be paid for by the company. In the present case the claims are heavy, and it is obvious that the damage caused by a fire such as this might be even greater. Such a liability for the negligence of others must surely be imposed by very clear words, if it is to be imposed at all. The opening words of cl. 17 are certainly very wide:

"That the lessee shall at all times indemnify and save harmless the lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted . . ."

They are, however, considerably narrowed in their scope by the words which follow. These words limit the application of the clause to claims, etc., "in any manner based upon, occasioned by or attributable to" any one of three specified matters, namely, (i) "the execution of these presents," (ii) "any action taken or things done or maintained by virtue hereof," (iii) "the exercise in any manner of rights arising hereunder." Are these words, in their ordinary meaning, wide enough to cover the negligent act of the Crown's servants, which caused the damage now under consideration? The learned Chief Justice appears to have placed some reliance on the words "occasioned by or attributable to the execution of these presents," treating "execution" as synonymous with "performance," but their Lordships are unable to take that view. They think that the words "execution of these presents" refer only to the signing and sealing of the lease. This is the usual meaning of these words, and the word "executed" is used in the same sense at the end of the document, where it is stated that "the lessee has executed these presents." Their Lordships think that by this phrase the Crown must have desired to protect itself against third parties claiming that they had contractual rights against the Crown which had been violated by the execution of the lease and the resulting grant of various rights to the company.

The remaining part of cl. 17 gives rise to questions of great difficulty. Counsel for the Crown submitted that the negligent act of the Crown's servants was covered by the words "any action taken or things done . . . by virtue hereof." They contended that the words "by virtue of" may fairly be construed as meaning "in consequence of" and that the act of the Crown's servants in enlarging the hole was done in consequence of the lease, none the less so because it was negligently done. They pointed out, quite rightly, that the intent of the clause was to protect the Crown against claims by third parties and submitted (a) that the only acts which could involve claims against the Crown by third parties would be acts of the Crown's servants, and, therefore, the words in question must refer to, or at least include, acts of the Crown's servants, and (b) that the acts contemplated must be negligent acts, otherwise they would give rise to no liability to third parties. Counsel for the company contended that this argument involved a strained and unnatural construction of the words in question and that the phrase "any action taken or things done by virtue hereof" would naturally refer to the doing of an act in pursuance of some right or privilege conferred by the lease rather than to the doing of an act in performance of some obligation imposed by the lease. They further contended that even if the words in question could cover an act properly done in performance of an obligation imposed by the lease, they could not extend to cover an act negligently done in the course of carrying out such an obligation. They submitted the following argument on the construction of cl. 17. By the phrase "occasioned by or attributable to the execution of these presents" the Crown was seeking to protect itself against the possible claims already mentioned, while by the rest of the clause the Crown was seeking to protect itself against possible liability to third parties occasioned by or attributable to acts of the company. The reference to the execution of the lease is closely linked up with the words which follow it. In executing the lease the Crown was conferring a large number of rights and privileges on the company. The party who is likely to "take action"

A or "do things" or "exercise rights" under the lease is the company. By cl. 17 the Crown is saying, in effect to the company, "Nothing that you do under the lease is to involve the Crown in any liability. Third parties may consider that they have a claim against the Crown by reason of the Crown's act in granting to you the right of occupying the shed, or by reason of acts done by you with the sanction of the Crown, such as the erection of the loading platform and canopy in accordance with plans approved by the Crown under cl. 10 of the lease, or the exercise of 'preferential' rights under cl. 16. If any such claim is made against the Crown, and succeeds, you must indemnify the Crown." In support of this argument counsel referred to the latter part of art. 1618 of the Civil Code as showing that the Crown might become a party to an action by a third party claiming some "right in or upon the thing leased."

B The choice between these two contentions is not an easy one, but their Lordships have come to the conclusion that the company's contention is to be preferred, for the following reasons. First, it gives the more natural construction to the words "any action done by virtue hereof." It is at least doubtful whether these words can be applied to a negligent act done in the course of carrying out an obligation. Secondly, even if the words are wide enough to include such a negligent act, the principle laid down in the *Alderslade* case (1) must be applied and their Lordships are inclined to think that, on the company's construction, "the head of damage may be based on some ground other than that of negligence," although the possible grounds are somewhat limited in extent. Thirdly, their Lordships think it is manifest that the meaning and effect of cl. 17 are far from clear, and, if this is so, the Crown has failed to impose in clear terms the burdensome obligation which has already been described. There would have been no difficulty in inserting an express reference to negligence of the Crown's servants in cl. 7 and cl. 17, if these clauses had been intended to protect the Crown against the consequences of such negligence.

D If their Lordships had agreed with the Supreme Court that cl. 17 extended so far as to cover negligent acts of the Crown's servants, they might well have had to re-consider the provisional view already expressed as to cl. 7, but, as they have arrived at the contrary opinion, their provisional view as to cl. 7, so far from being disturbed, is strengthened. It would seem unlikely that, if negligent acts by the Crown's servants are outside the scope of one clause, they are within the scope of the other. The result is that, after hearing an able argument as to the construction of the lease from both sides, their Lordships find that the Crown has failed to establish either its defence under cl. 7 or its claim for indemnity under cl. 17. This being so, no other question arises for decision on this appeal. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the orders of the Supreme Court on the petition of the company against the Crown and in the five third party proceedings should be set aside, and the orders of *ANGERS, J.*, restored.

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G *Appeal allowed.*
Solicitors: *Lawrence Jones & Co.* (for the company); *Charles Russell & Co.* (for the Crown).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

BANK VOOR HANDEL EN SCHEEPVAART *Reversed.* C.A. [1952] 2 All E.R. 99

(sued as CUSTODIAN OF ENEMY PROPERTY) AND ANOTHER.

[KING'S BENCH DIVISION (Devlin, J.), October 29, November 7, December 7, 12, 1951, January 18, 1952.]

Crown—Servants—Custodian of Enemy Property—Liability for income tax—Trading with the Enemy Act, 1939 (c. 89), s. 7 (1)—Income Tax Act, 1944 (c. 23), s. 42, sched. IV, Part I.

On July 3, 1940, gold belonging to a Dutch banking company was transferred from safe deposit in London to the Custodian of Enemy Property by a vesting order made by the Board of Trade under the Trading with the Enemy Act, 1939, s. 7 (1) and the Trading with the Enemy (Custodian) Order, 1939. On July 24 the Custodian sold the gold and retained the proceeds as enemy property. He subsequently used the proceeds to purchase Treasury bills at a discount and paid income tax on the profits made. In April, 1950, on a demand by the Administrator of Hungarian Property, made under art. 1 (5) (e) of the Treaty of Peace (Hungary) Order, 1948, he transferred the proceeds to the Administrator. On July 30, 1951, the Dutch banking company obtained judgment for the amount of the proceeds of the gold against the Administrator, and it was conceded by the Administrator that any sums earned by the proceeds while in the hands of the Custodian should go with the proceeds. On an application in the action to determine whether such sums should be paid without deduction of the income tax paid by the Custodian in respect of the profits on the Treasury bills,

HELD: the Custodian of Enemy Property used the income of the proceeds of the sale of the gold as a person having Crown status, or, at least, he received it for a Crown purpose, and, therefore, apart from the provisions of the Income Tax Act, 1944, s. 42, sched. IV, Part I, he was exempt from liability to income tax and the Dutch company were entitled to the sums earned by the proceeds without deduction of tax.

FOR THE TRADING WITH THE ENEMY ACT, 1939, s. 7 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 337.

Cases referred to:

- (1) *Re Munster*, [1920] 1 Ch. 268; 89 L.J.Ch. 138; 28 Digest 95, 561.
- (2) *Williams v. Singer. Pool v. Royal Exchange Assurance*, [1921] 1 A.C. 65; 89 L.J.K.B. 1151; 123 L.T. 632; 7 Tax Cas. 387; 28 Digest 78, 425.
- (3) *Kelly v. Rogers*, [1935] 2 K.B. 446; 104 L.J.K.B. 616; 153 L.T. 428; 19 Tax Cas. 692; Digest Supp.
- (4) *Austrian Property Administrator v. Russian Bank for Foreign Trade*, (1932), 48 T.L.R. 37; Digest Supp.
- (5) *Tamlin v. Hannaford*, [1949] 2 All E.R. 327; [1950] 1 K.B. 18; 2nd Digest Supp.
- (6) *International Ry. Co. v. Niagara Parks Commission*, [1941] 2 All E.R. 456; [1941] A.C. 328; 111 L.J.P.C. 55; 2nd Digest Supp.
- (7) *Mersey Docks v. Cameron. Jones v. Mersey Docks*, (1865), 11 H.L. Cas. 443; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 E.R. 1405; 38 Digest 466, 286.
- (8) *Coomber v. Berks JJ.*, (1883), 9 App. Cas. 61; 53 L.J.Q.B. 239; 50 L.T. 405; 48 J.P. 421; 2 Tax Cas. 1; 28 Digest 14, 69.
- (9) *Tunnickliffe v. Birkdale Overseers*, (1888), 20 Q.B.D. 450; 59 L.T. 190; 52 J.P. 452; 38 Digest 471, 323.
- (10) *London County Territorial & Auxiliary Forces Assn. v. Nichols*, [1948] 2 All E.R. 432; [1949] 1 K.B. 35; [1948] L.J.R. 1600; 2nd Digest Supp.
- (11) *Re Ferdinand (Ex-Tsar of Bulgaria)*, [1921] 1 Ch. 107; 90 L.J.Ch. 1; 11 Digest 514, 152.

(12) *Fox v. Newfoundland Government*, [1898] A.C. 667; 11 Digest 582, c.

(13) *Metropolitan Meat Industry Board v. Sheedy*, [1927] A.C. 899; 137 L.T. 782; Digest Supp.

APPLICATION in an action by the plaintiffs, a Dutch banking company, claiming *inter alia* (i) a declaration that the first defendant, the Custodian of Enemy Property, was a trustee for the State of the Netherlands and for the plaintiffs of gold deposited in London of which the plaintiffs were the owners immediately before May 24, 1940, and of balances due at that time to the plaintiffs from certain banks in London, and that he was liable to account to the plaintiffs for the same and all interest and dividends accruing thereto; (ii) damages against the first defendant for conversion of the gold; (iii) a declaration that sums transferred by the first defendant to the second defendant, the Administrator of Hungarian Property, in April, 1950, being the sum received by the first defendant on the sale of the gold and the sum total of the bank balances (less a fee retained by the Custodian under the Trading with the Enemy (Custodian) Order, 1939, art. 7) were not subject to any charge imposed by the Treaty of Peace (Hungary) Order, 1948, and that the plaintiffs were absolutely entitled to them; and (iv) an order for recovery of the sums with interest thereon.

On July 3, 1940, the gold was transferred from safe deposit in London to the Custodian of Enemy Property under a vesting order made by the Board of Trade under the Trading with the Enemy Act, 1939, s. 7 (1), and the Trading with the Enemy (Custodian) Order, 1939. On July 24, under an order made under the said Act and order, the Custodian sold the gold and retained the proceeds as enemy property. He acquired the bank balances from banks holding them under instructions contained in letters from him, dated Jan. 19, 1950, as moneys held by the banks since May 20, 1940, for his account and subject to his direction. In April, 1950, on a demand by the Administrator of Hungarian Property, made under art. 1 (5) (e) of the Treaty of Peace (Hungary) Order, 1948, the Custodian transferred the proceeds and the bank balances to the Administrator.

On July 30, 1951, DEVLIN, J., gave judgment in the action for the Custodian against the plaintiffs and judgment for the plaintiffs against the Administrator of Hungarian Property for the sums claimed and interest thereon at four per cent., with liberty to apply if the amount due in respect of the sums earned by the proceeds of the sale of gold by the Custodian were not agreed (which, it had been conceded, should go to the plaintiffs with the proceeds if they were successful in the action) ([1951] 2 All E.R. 779). The amount was not agreed, and the plaintiffs now applied to the judge to determine the amount due. The plaintiffs claimed that judgment should be entered for £2,224,367 6s. 11d. The Administrator contended that the sum should be £2,148,041 8s., the difference of £76,325 18s. 11d. being income tax paid by the Custodian in respect of profits made from the purchase by the Custodian of Treasury bills at a discount. The plaintiffs contended that the Custodian was a servant of the Crown and was exempt from income tax and should not have paid the tax.

Littman (Foster, K.C., with him) for the plaintiffs.

J. P. Ashworth and R. J. Parker (Upjohn, K.C., with them) for the defendants.

Cur. adv. vult.

Jan. 18. DEVLIN, J., read the following judgment. When, in April, 1950, the Custodian of Enemy Property, pursuant to the Administrator's certificate, handed over to him the sum of £1,962,852 14s., that sum was no more than the proceeds which the Custodian had actually received from the sale of the gold bars ten years before and the balances in the banks which he had taken over. He did not add—the certificate did not require it—any interest or other money which these sums had earned while in his hands. The certificate might have been framed to include that, for art. 1 (3) (i) of the Treaty of Peace (Hungary)

Order, 1948 (S.I., 1948, No. 116) covers "... the net proceeds of the sale, liquidation or other dealings" by a Custodian with any property in his possession. In the course of the argument before me, counsel for the plaintiffs contended that these "fruits", as he called them, ought to go with the property, and the Solicitor-General intervened to concede the point. I recorded this in my judgment as follows ([1951] 2 All E.R. 800):

"The interest payable on the proceeds of the gold bars has not been separately earmarked, but the Custodian says that while it was in his hands it would have earned on the average from 1940 to 1950 about $\frac{3}{4}$ per cent. per annum. The Solicitor-General is willing to treat these fruits as part of the proceeds in the hands of the Administrator, and, accordingly, the judgment which I give will be for the amount which the Administrator actually received increased by that addition."

I gave liberty to apply if the amount of the "fruits" could not be agreed. The amount has not been agreed, and so there has resulted the application which I now have to consider. The plaintiffs contend that judgment should be entered for a total sum of £2,224,367 6s. 11d., and the Administrator contends that it should be for £2,148,041 8s. The difference between those two sums amounts to £76,325 18s. 11d. and is the income tax paid by the Custodian. He purchased Treasury bills at a discount, and it is conceded that the profits which he made by so doing are taxable under the Income Tax Act, 1918. The plaintiffs, however, contend that the Income Tax Acts do not bind the Crown, and that the Custodian is a servant of the Crown, and as such is exempt from taxation; accordingly, he was wrong in paying the tax; and the plaintiffs are entitled under the terms of the concession made by the Solicitor-General, or under my judgment (which is based on it) to have all the fruits which the money earned without deduction. It is not disputed that the Income Tax Acts do not bind the Crown, and so the only point which I have to determine is whether this income was exempt from tax because it was received by the Custodian as a servant of the Crown. But, before I proceed to consider that, I must deal with a number of preliminary points so as to show how in the end the issue has been fined down to this one matter.

In the first place, it was contended by the plaintiffs that the point did not really arise at this stage. The proper course, they said, was for the Administrator, if he thought the Custodian was right in having paid tax, to allow judgment to be entered for the larger sum, and to seek to satisfy that judgment as to £76,325 by tendering certificates that tax had been paid. An issue would then arise on the question whether the defendants were entitled to tender certificates in part satisfaction of the judgment. The Administrator objected to that because he thought that on an issue so raised he might conceivably be at a disadvantage in that he could not contend that tax had been deducted by the Custodian as the plaintiffs' agent. My only duty is to determine for what sum I shall enter judgment. It appears to me that the Custodian could not have been compelled to hand over to the Administrator more than he was entitled to retain, and if, out of the profits he made, he properly paid tax, he could not be compelled to do more than hand over the balance. That balance would, therefore, be all that the plaintiffs would be entitled to obtain on a judgment against the Administrator. If, therefore, the Administrator is right on the tax point, he is, I think, entitled to have the judgment against him entered for the smaller sum. So I think that the point does arise for consideration at this stage. The objection was not strongly pressed by the plaintiffs, since they agreed that it was one of form only, and that the substance of the matter must be argued somewhere and at some time.

Next, I must observe that the contention that the Custodian is a servant of the Crown was not one which was advanced by the plaintiffs in the course of the case. I do not say that by way of criticism. The argument did not

inevitably call for its submission. But the Custodian and the Administrator were treated in the case as separate legal entities, and I think that I so refer to them in my judgment. It can hardly be disputed that, if the Custodian is a servant of the Crown, the Administrator is also (indeed, on the authorities his case is *a fortiori*), and on this view the action might well have been differently constituted. However, it is not suggested that the plaintiffs have precluded themselves from taking the point at this late stage.

A It is convenient to consider next what is common ground about the Custodian's position. He is not a corporation sole, and so one must think of him simply as an individual who for the time being holds the office. It would, of course, be surprising if he were taxed as an ordinary individual. His income as Custodian must be very large, and under current rates of taxation there would
B not be enough of it left to be worth worrying about. But his position is not, on any view, that of an ordinary individual. In *Re Munster* (1) it was decided by RUSSELL, J., that the effect of the Trading with the Enemy Amendment Act, 1914, on property vested in the Custodian was to remove it from the control and beneficial ownership of the enemy, leaving the beneficial ownership in statutory suspense or abeyance, the Custodian having meanwhile such powers
C of dealing with the property as were given to him by statute. Thus, the Custodian is a creature of statute of a type not otherwise known to our laws. He is a trustee with no beneficiary; he holds the legal property only, and the beneficial interest is temporarily non-existent. The Administrator contends that the result from the tax point of view is that he falls to be taxed as a trustee in accordance with the principles laid down in *Williams v. Singer* (2) ([1921]
D 1 A.C. 71), by VISCOUNT CAVE, and in *Kelly v. Rogers* (3) by LORD HANWORTH, M.R. ([1935] 2 K.B. 462) and ROMER, L.J. (*ibid.*, 466). He is liable to pay income tax only at the standard rate, and he is neither entitled to tax reliefs nor obliged to pay surtax, because reliefs are obtainable and surtax is payable only by the beneficial owner. He comes within r. 1 of the Miscellaneous Rules to sched. D as a person who is entitled to or in receipt of income. The plaintiffs
E admit that, but for Crown exemption, he would fall within that rule, although they do not, I think, accept that the decisions to which I have referred are applicable. The Custodian has, therefore, whether rightly or wrongly, always regarded himself as liable to pay income tax on this basis. But by the Finance Act, 1944, sched. IV, Part I, his position was specifically regulated. Paragraph 1 provides that where income from enemy property

F " . . . becomes payable to a Custodian, the same assessments to income tax (other than surtax) shall be made for that year on the Custodian . . . "

as would have been made on the enemy owner. Paragraphs 2 and 3 provide that, where an assessment is made on a Custodian under para. 1, or where any income which is paid subject to deduction of income tax is received by a
G Custodian, the Custodian is to obtain the same relief, or to pay the same amount of surtax, as the enemy owner would have obtained or paid. By para. 13 these provisions are retrospective to 1939. The Administrator says, however, that they do not apply to the Custodian's income in this case, and naturally the plaintiffs do not contend that they do. I do not, as at present advised, see why they do not apply. But since the Administrator, with the assistance,
H I gather, of the Inland Revenue Department, has come to the conclusion that the point is unarguable, I take it that the point would have failed. So the statute is not relied on, and comes only incidentally into the question which I have to determine. Both sides suggest that it sheds a little light on what the tax position was before it was passed. I do not think I can get any help from speculation about whether Parliament did or did not think that apart from the Act the Custodian would be liable to income tax in the way in which the Administrator now contends.

The next point I must consider is how matters stand if the plaintiffs are right in their contention that the Custodian is not liable to tax. The plaintiffs claim that they must then succeed by virtue of the concession made by the Solicitor-General and the judgment which resulted from it. The Solicitor-General conceded that the "fruits" should be handed over. No one then had in mind any question of income tax. But, the plaintiffs say, whether or not its full effect was foreseen, the concession is binding. If the Custodian is not liable to tax, then the "fruits" are the gross sum and cannot be diminished because the Custodian has erroneously paid part away. The Crown contends that the concession is not binding, and that the plaintiffs are back where they were before it was made and must show some right to the "fruits." If this is the correct view of the matter, the plaintiffs might technically be in a difficulty, since the Treaty of Peace (Hungary) Order, 1948, if it is interpreted literally, gives to the plaintiffs a right of recovery only from the Administrator and only to the extent that he has money in his hands. I think that the Administrator acted wisely and properly in the end when, at the conclusion of the argument, he intimated that, if on the true view of the law the Custodian was not liable to tax, he would concede that judgment should be for the higher sum. Indeed, for the reasons which I expressed in the course of the argument (and which I need not now repeat) I do not think that a public servant could fittingly have acted otherwise.

The last matter to which I need refer is this. The Custodian, from September, 1939, until Aug. 10, 1948, was the same person as he who held the office of Public Trustee. Thereafter the office has been held by an official of the Board of Trade. The Board of Trade appears always to have acted on the view that the Custodian is not the servant of the Crown, and I daresay that view has been generally accepted. For example, although there is no special provision with regard to suing the Custodian, he has always been sued in the ordinary way. This is a little surprising, since the only close authority suggests the contrary. In *Austrian Property Administrator v. Russian Bank for Foreign Trade* (4) the Court of Appeal held that the Administrator was the servant of the Crown. There is at first sight a similarity between the two positions of Custodian and Administrator. The defence contend that the similarity is superficial only, and that when the positions of both are analysed, material differences will be found. Before me (although they reserved their rights in any higher court) they accepted the view that the Administrator was a servant of the Crown. I think that there are differences between the two offices, and that it is not possible for me to decide this case simply on the authority of the Court of Appeal. The argument before me has been detailed and exhaustive, and quite rightly so having regard to the amount involved and the importance of the case in relation to the practice which has up to now been followed. I shall, therefore, approach the matter *de novo*, though the *Austrian Administrator* case (4) must necessarily remain of the first importance among the authorities which I have to consider.

The most recent decision on this topic is that of the Court of Appeal in *Tamlin v. Hannaford* (5) in which the court ([1949] 2 All E.R. 328) formulated the question as being whether the person or body claiming Crown privilege was properly to be regarded as the servant or agent of the Crown. In the earlier cases looser expressions had been used and references made to "emanations" of the Crown, "shields," "arms and hands," and even in one case to the "contagion" of Crown immunity. These expressions were criticised by the Privy Council in *International Ry. Co. v. Niagara Parks Commission* (6) ([1941] 2 All E.R. 462) as well as in *Tamlin v. Hannaford* (5). Both tribunals expressed a preference for the term "servant or agent" over such undefined words as "emanation." I, of course, accept this view, but I would respectfully observe that the term "servant or agent" gives an appearance of precision which may on this subject-matter be misleading. Before the days of the constitutional

monarchy, it would have been easy to ascertain who were the King's servants by looking in each case to see whether the ordinary incidents of the relationship of master and servant were present. Most of the great offices of State have their origin in the appointment by the King of men who owed to him personally the same duty of obedience that every servant owes to his master. But from the time that the King became constitutionally bound to act on the advice of his Ministers the ordinary master and servant relationship ceased. It is no longer practicable or useful to inquire whether a Secretary of State has to do what the King tells him to do. Meticulous devotion to theory might have kept the relationship alive as a legal fiction, but even as a fiction it has been largely ignored and overlaid. When the powers and duties of the executive had in the nineteenth century to be extended to match the increasing complexity of government, the process was not performed by adding to the powers and duties of the Sovereign which he would be presumed to instruct a Minister to exercise for him, but by bestowing the power or imposing the duty directly on the appropriate Minister. Instead of expressly extending the limits of the prerogative to cover such matters as, for example, education and health, it was simpler to provide for the appointment first of boards and then of Ministers, and to give to them the necessary powers. Similarly, since Parliament could not, without openly disregarding the theory of the King's supremacy and making him answerable to Parliament, require him to discharge specific duties. It was necessary to lay the task on the Minister or servant.

This has produced some uncertainty about what exactly a lawyer means when he talks of "the Crown." There are passages in MAITLAND'S CONSTITUTIONAL HISTORY OF ENGLAND (1920), pp. 415 to 421, which are illuminating on the topic. As MAITLAND says, the Crown is a convenient term, but one which is often used to save the asking of difficult questions. It is a description of the powers that formerly at common law were exercised by the King in person, and that latterly have been bestowed by statute on the King in Council or on various Ministers. There is, I think, uncertainty about what is meant by the Crown and uncertainty about who are its servants or agents. The only thing that is reasonably certain is that service or agency is not in this connection to be ascertained in the ordinary way. This is clear from the fact that in what is the first and leading authority on this topic, *Mersey Docks v. Cameron* (7), the term is plainly not used in any precise sense. BLACKBURN, J. (11 H.L. Cas. 464), treated the exemption as extending not only to servants of the great departments of State who "might strictly be called the servants of the Crown," but also to persons who "might be considered in *consimili casu*". Those he defined (*ibid.*, 465) as persons whose occupation (the case was concerned with exemption from rates) was for purposes which were all public purposes

"of that kind which, by the constitution of this country, fall within the province of government, and are committed to the Sovereign . . ."

The claim is wide enough to include such persons as justices of the peace, who are not in any sense servants of the Crown, but whose occupation of courts, etc., is for public purposes within BLACKBURN, J.'s description: see *Coomber v. Berks JJ.* (8). In *Mersey Docks v. Cameron* (7) LORD WESTBURY, L.C. (11 H.L. Cas. 505), described the public purposes as

"such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown"; and LORD CRANWORTH (*ibid.*, 508) spoke of extending

"the shield of the Crown to what might more fitly be described as the public government of the country."

In *Coomber v. Berks JJ.* (8) LORD BLACKBURN referred (9 App. Cas. 70) to

". . . purposes of the administration, or those purposes of the government which are, according to the theory of the constitution, administered by the Sovereign."

Earlier he had referred (*ibid.*, 67) to preservation of order and prevention of crime as among "the most important functions of government," and had said that "by the constitution of this country these functions do, by common right, belong to the Crown." In *Tunncliffe v. Birkdale Overseers* (9) (20 Q.B.D. 455) LORD ESHER, M.R., refers to

"... persons who must be considered as servants of the Crown, because entrusted with the performance of duties forming part of the functions of the Sovereign . . ."

These citations, and the considerations which I have earlier set out, satisfy me that the expression "servants or agents of the Crown," when used in *Tamlin v. Hannaford* (5) and other authorities, is used notionally or descriptively and not definitively. The description "servant of the Crown" has a meaning, of course, just as "public servant" has a meaning, but it has no longer a precise legal meaning. It appears at first sight to afford an exact criterion for determining Crown privilege, but on inspection the apparition fades into the same insubstantiality that has dissolved the "emanation" and other metaphors which have emerged from the nebula. I respectfully think that the best and most accurate descriptive phrases are those used by SCOTT, L.J., in *London County Territorial & Auxiliary Forces Assn. v. Nichols* (10), and I shall return to them later.

I have said enough to show that I cannot accept the first submission of counsel for the plaintiffs that the Custodian is a servant of the Crown in the strict sense. The submission fails because there is not, in my view, any strict sense at all, and I have dwelt on the matter because I think that the submission confuses the inquiry. It makes one suppose that the problem can be solved by looking for what are normal incidents of ordinary service and counting their presence or absence as determinative. Submission to orders lies at the heart of service or agency, and, if the obligation to obey cannot be discovered, I do not think it avails to search for other quite usual incidents of ordinary service. The plaintiffs point out that the Custodian is appointed by the Board of Trade. So are many other functionaries, such as the Public Trustee and the Official Receiver, and, if there be a doubt whether such functionaries are servants of the Crown, there can be none in the case of those judges and magistrates who are appointed by the Lord Chancellor and can be removed by him. Likewise, the servants of many public boards and corporations are appointed by a Minister of the Crown. The Custodian, like any civil servant, is paid out of the Consolidated Fund—so also, I suppose, are the Speaker of the House of Commons and all judicial officers. So, a private person may appoint a trustee for a certain purpose, pay him, and reserve the right to direct him on a number of matters, but he does not thereby make him his servant. The plaintiffs rely chiefly on the large measure of control over the Custodian that the Trading with the Enemy Act, 1939, gives to the Board of Trade. While I regard that as relevant on another aspect of the question, I do not think it proves the relationship of master and servant, but rather the contrary. When the Board of Trade appoints an assistant principal, it does not need an Act of Parliament to say that he must do what the President tells him. Though the board's powers to give directions to the Custodian are wide, they are not unlimited, for the directions must be within the scope and purpose of the Act. Since the power to direct a servant how to perform his duties is normally at large, any limitation on it tends to negative the inference of service.

In *Territorial Forces v. Nichols* (10) SCOTT, L.J. ([1948] 2 All E.R. 434), used the term "Crown status" to apply to those persons who, by virtue of their position in the State, enjoy Crown immunity, and "Crown purpose" to apply to those functions of government which extend *pro tanto* Crown immunity to the persons discharging them. Crown status is clearly enjoyed by all those officers of State who obtain it by virtue of the fact that their predecessors were once

truly servants of the King; likewise it extends to their subordinates. It must extend also to those new officers created by Parliament who, by the designation that it confers on them, such as Minister of the Crown, Parliament clearly intends shall have the same status. It is when Parliament creates a new office without any clear designation that the difficulty arises. As SCOTT, L.J., says (*ibid.*), there is no line that can be precisely drawn. Is the "province of government" that attracts Crown immunity co-extensive with the general executive government of the country? Or is the immunity restricted to those discharging duties which, judged by some historical test or otherwise, fall peculiarly within the functions of the Sovereign? There are authorities which point either way, and some of the *dicta* which I have cited above may be used to support either contention.

- A I have reached the conclusion that I need not attempt to decide this question, nor to explore the extremities of Crown status. If the Custodian is an officer of the executive at all, I think he must have Crown status, for his duties bring him within the sphere of two of the most ancient and peculiar prerogatives of the Crown—the power to make war, including the power to take for itself the property of an enemy found within the realm, and the power to make peace.
- C The Custodian is appointed under the Act of 1939, s. 7 (1),

" . . . with a view to preventing the payment of money to enemies . . . " which is a measure of war, and

" . . . of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace . . . "

- D On this aspect of the case, I regard the *Austrian Administrator's* case (4) as conclusive. Speaking of the Administrator, SCRUTTON, L.J., says (48 T.L.R. 38):

" Now, in my view, he is an agent of the Crown to carry out the promises which the King has made by virtue of his prerogative."

- E GREER, L.J., says (*ibid.*, 39):

" . . . the Crown gets the rights, which are to be administered by the Administrator, entirely by reason of its prerogative as the war-making power and the peace-making power . . . What the Administrator is doing is, as agent of the Crown, distributing the funds which the Crown has obtained by reason of its prerogative."

- F The main argument for the Administrator amounts, I think, to a submission that the Custodian is not an officer of the Executive at all. He is, it is said, a creature of Parliament. The Crown could, by virtue of its prerogative and after compliance with due formalities, take for itself all enemy property and do with it what it pleased. It needs no Parliamentary sanction for that. *Re Ferdinand (Ex-Tsar of Bulgaria)* (11) decided that the trading with the enemy legislation in operation in the 1914 war conferred powers so inconsistent with the exercise of the prerogative that it must be treated as temporarily superseded. In the Act of 1939 the prerogative is, by s. 16, expressly preserved. The two things exist together, the machinery of the prerogative, if the Crown chooses to exercise it, and the machinery set up by Parliament, of which the Custodian is the hub. How then can it be said, the argument inquires, that the Custodian emanates from the prerogative? On the contrary, he is a trustee set up by Parliament to hold the property *in medio*, keeping it out of the grasp of the Crown and holding it, as it were, for Parliament, so that Parliament may determine ultimately what is to be done with it. On this view, it is said, the case of the *Austrian Administrator* (4) becomes clearly distinguishable. Before Administrators are appointed, peace has been made. The Crown has entered into treaties which provide for the distribution of enemy assets. Parliament has ratified the treaties, and thus sanctioned what the Crown proposes to do

with enemy property. There is no longer any need for a trustee to hold *in medio*. Parliament can safely release the property to the Crown so that through its servants, the Administrators, the Crown can distribute it in accordance with its treaty obligations. The contrast is between the functions of the Administrators as distributing agents, and the function of the Custodian as trustee. It cannot be under the provision of some statute. It is not, therefore, surprising to find Parliament providing for the use of the Crown more convenient machinery than that afforded by the common law right of seizure, which is obsolescent, cumbersome, and not favourably regarded in international law. I do not think it much matters that the common law right is in the Act expressly saved. That does not indicate to me that Parliament contemplated that it was likely to be exercised, or that some rival machinery to it was being set up. What Parliament was doing (as it has done in so many cases in the past) was to define and modernise the prerogative power, though preserving the common law right for use, one might suppose, in some quite exceptional case. This view of the matter is supported to some extent by the judgment of WARRINGTON, L.J., in *Re Ferdinand* (11) ([1921] 1 Ch. 141), where he refers to the Custodian without discrimination as an officer of the Crown and as an officer designated by the Act. It is also supported by the passage I have cited from the judgment of GREER, L.J., in the *Austrian Administrator* case (4) (48 T.L.R. 39), which refers to funds which the Crown had obtained by reason of its prerogative. These funds must have been obtained through the machinery of the Trading with the Enemy Act.

Secondly, the feature of close control by the Board of Trade, to which I have already referred, is in this connection important. It does not show service in the strict sense, but it does show that the Custodian is intended to be an instrument of government. In the case of a commercial corporation, control may be unimportant: see *Tamlin v. Hannaford* (5) ([1949] 2 All E.R. 330). In the case of an official who has functions of a governmental character, it is, I think, a matter to be given considerable weight. In *Fox v. Newfoundland Government* (12) ([1898] A.C. 672) and *Metropolitan Meat Industry Board v. Sheedy* (13) ([1927] A.C. 904), it was pointed out that the existence of discretionary powers showing independence of the government was a factor for consideration. If Parliament intended the Custodian to act, as it were, in opposition to the prerogative, it is hardly likely he would have been subordinated in so many matters to the Board of Trade.

Lastly, I do not think the argument that the Crown could not take the Custodian's holdings for any purpose it wanted and as freely as any of its own property is as impressive as at first sight it appears. That is one of the reasons why I have sought to labour the unreality of the master and servant test. It is certainly difficult to imagine a master or principal who cannot demand the unconditional delivery of any property held on his behalf. If, however, one thinks of the Custodian, not as a servant, but as a public official with Crown status, the difficulty disappears. The property held by the Custodian cannot, of course, be Crown property in any ordinary sense because the beneficial interest is temporarily extinguished. We are concerned only with legal property. This last conception is also difficult if one tries to personify the Crown and its servants. If the Custodian holds the legal property on behalf of the Crown, then it is certainly putting the Crown in an unusual position to imagine it as a trustee of property for persons still undetermined. But again, if one thinks of the Custodian not so much as a servant, but as an official with Crown status, there is no reason why he should not hold property in such a manner. Finally, under this head it must be remembered that the Custodian, in deciding under the general direction of the Board of Trade, what property he shall take and what release, is much more than a trustee; he is acting then as an instrument of war-making government.

Rule 1 of the Miscellaneous Rules applicable to sched. D provides that

“Tax . . . shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income . . .”

Admittedly, the Custodian received the income. The question which I have to determine is whether he received it as a servant of the Crown, or, as I put it, as a person having Crown status. I am satisfied that he did receive it as a person having Crown status, or, at the least, that he received it for a Crown purpose. Accordingly, I hold that the Custodian is, apart from the Income Tax Act, 1944, sched. IV, exempt from tax. There must, therefore, be judgment for the plaintiffs for £2,224,367 6s. 11d. with interest thereon at the rate of four per cent. per annum as already determined, and costs to include the costs of the further argument before me.

Judgment for the plaintiffs.

Solicitors: *Hardman, Phillips & Mann* (for the plaintiffs); *Solicitor, Board of Trade* (for the Administrator).

[*Reported by F. A. AMES, Esq., Barrister-at-Law.*]

Re ST. GEORGE'S, SOUTHALL.

[CONSISTORY COURT OF THE DIOCESE OF LONDON (The Chancellor (J. P. Ashworth, Esq.)), December 15, 1951, January 12, 1952.]

Ecclesiastical Law—Ornaments—Candlesticks—Legality of six candlesticks on the Holy Table or retable—Exercise of discretion in grant of faculty.

As part of a scheme for the reconstruction and improvement of a church the parochial church council resolved to provide six candlesticks for the high altar. On July 17, 1951, an application was made for a faculty for their use, and on July 20 the candlesticks were purchased and placed on the altar. On Oct. 4 the bishop dedicated the candlesticks, being unaware that the application for the faculty was *sub judice*. Evidence was given that the candlesticks were memorials and that their removal would cause distress to the parishioners. The vicar took the view that the six candlesticks would lend greater dignity to solemn occasions. They were not intended to be used for ceremonial purposes.

HELD: the granting of the faculty was a matter within the discretion of the court, and, although the action taken by the vicar in anticipation of the granting of the faculty was to be deprecated, in all the circumstances the faculty would be granted.

Re St. Hilary, Cornwall ([1938] 4 All E.R. 147) and *Re St. Saviour's, Walthamstow* ([1950] 2 All E.R. 812), considered.

Per THE CHANCELLOR: I treat the present petition as an exceptional case, and it must not be thought for one moment that articles can be introduced into churches as memorials and later dedicated without application to the court and that a faculty will then be granted merely on the ground that their removal would cause distress. The Dean of Arches [in *Re St. Saviour's, Walthamstow* ([1950] 2 All E.R. 815)] emphasised the value of observing the normal English use concerning candlesticks on an altar, and the fact that I am allowing a faculty in full in the present case should not be taken as an indication that I am prepared to exercise my discretion except with the extreme care which the Dean of Arches recommended.

AS TO THE USE OF LIGHTED CANDLES ON THE HOLY TABLE, see HALSBURY, *Hailsham Edn.*, Vol. 11, p. 802, para. 1463; and FOR CASES, see DIGEST, Vol. 19, pp. 439, 440, Nos. 2810-2818.

Cases referred to:

(1) *Re St. Hilary, Cornwall. Roffe-Silvester v. King*, [1938] 4 All E.R. 147; [1939] P. 64; 159 L.T. 546; Digest Supp.

(2) *Re St. Saviour's, Walthamstow*, [1950] 2 All E.R. 812; 2nd Digest Supp.

PETITION for the grant of a faculty for the use, *inter alia*, of six candlesticks on the high altar of the Church of St. George, Southall.

At the first hearing, the case was adjourned for argument whether the decision of the Court of Arches in *Re St. Saviour's, Walthamstow* (2) was in conflict with that in *Re St. Hilary, Cornwall* (1).

Wigglesworth for the petitioners.

The petition was unopposed.

THE CHANCELLOR: The vicar and churchwardens of St. George's, Southall, have asked for leave to carry out certain work of which the material item is the placing of six candlesticks on the altar. There has been no opposition to the petition for a faculty.

When the application was first heard, on Dec. 15, 1951, it seemed that there were two quite distinct issues. The first one was whether, in view of the decision of the Court of Arches in *Re St. Hilary, Cornwall* (1), I was bound as a matter of law to hold that six candlesticks on an altar were illegal, or whether, on the other hand, in view of the decision of the same court in *Re St. Saviour's, Walthamstow* (2), I was entitled to treat the application for a faculty as a matter of discretion. Would the decision in the latter case have been the same if the *St. Hilary* decision (1) had been brought to the notice of the Dean of Arches?

It is necessary, therefore, to examine so far as possible what were the issues in the *St. Hilary* case (1) and what were the contentions put before the Court of Arches when the appeal was heard. I was counsel for the respondents in the *St. Hilary* case (1), and Mr. Vaisey and Mr. Geoffrey Hutchinson appeared for the appellants. It is, therefore, a matter of relief and satisfaction to be able to say that, as a result of the information obtained by counsel for the petitioners from those who had acted as counsel for the appellants as well as from my recollection and note of the proceedings, there are no substantial differences between us on the issues raised in that appeal. The learned chancellor of the Diocese of Truro made an order directing the removal of four of the six candlesticks at St. Hilary on the basis that six candlesticks were illegal. There was an appeal against the order. The argument in support of the appeal was not simply as to legality. Mr. Vaisey supported the view that, whether they were illegal or not, the appellants wished to retain them, and Mr. Hutchinson contended that the test of illegality was the use made of the articles. I now have to consider whether the result of the decision in *Re St. Hilary* (1) should persuade me that I am faced with two irreconcilable decisions of the Court of Arches.

In those circumstances, in my judgment, one is entitled to ask whether the Dean of the Court of Arches in *Re St. Saviour's, Walthamstow* (2) would have reached the same decision had the result of the *St. Hilary* appeal (1) been brought to his notice. I do not think that a clash between the two cases exists and it is clear from *Re St. Saviour's, Walthamstow* (2) that the question whether the faculty now before the court could be granted is one for my discretion.

The church of St. George, Southall, is forty-two years old. Mr. Parker, one of the churchwardens, in his evidence told the court that he had been connected with the church for twenty-six years and that it had always had a high church tradition. The present vicar has only been the incumbent there for eighteen months, and there was no change on his arrival. The altar was destroyed by fire shortly before the present vicar was appointed. Up to that time there had been no decoration behind it. The vicar told the court that he conceived the idea of giving more light and colour to the east end of the church. There was, apparently, no war memorial in respect of the war of 1939-45 in

existence at St. George's, but the parochial church council later passed a resolution concerning a suggested scheme for improving the church by making certain additions to the fabric. An order was placed for a reredos and six candlesticks that they might be exhibited at the Lambeth Palace Exhibition of Church Art which was held in connection with the Festival of Britain. After this a general parish meeting was called to approve the scheme, which was also submitted to the diocesan advisory committee. The committee was not opposed to the triptych reredos, but it did not signify its approval either. Its decision seems to have been an expression of non-opposition. The matter went forward, the reredos was completed, and the candlesticks were bought on July 20, 1951. [THE CHANCELLOR referred to the legal formalities which were put into operation concerning the application for a faculty, and to the registrar's advice to the vicar when it was known that the Bishop of London intended to visit the church to dedicate the new ornaments, and continued:] Despite this the candlesticks were allowed to remain on the altar, and when the bishop visited St. George's on Oct. 4, 1951, he dedicated them. It is quite clear that, had the bishop known that a question relating to the six candlesticks was *sub judice*, he would not have dedicated the candlesticks on that occasion.

The six candlesticks were individual memorials—two were in respect of sidesmen, one was in respect of a server, one was in respect of a churchwarden, and the remaining two were in respect of members of the parochial church council. I was told by Mr. Parker, the churchwarden, that refusal of a faculty would cause very real distress in the parish, especially among the donors of the candlesticks. So far as the vicar's evidence was concerned, he said that he could not remember whether he asked for six candlesticks or whether Faith Craft, Ltd., the contractors responsible for the improvement scheme, suggested six. The vicar also said that he did not attach any importance to the number of candlesticks. He had always worked in churches where there were six on the altar. He preferred to use an English altar in his church, or an altar with six candlesticks provided. He did not like flowers. The vicar told me that normally the candles would all be lit for sung eucharist and choral evensong. Two would be lit for other occasions, and six on any solemn occasions, as the lighting of six added dignity. In the lady chapel of St. George's four candlesticks had been placed on the altar. These had been given as a memorial to someone who had died before the general scheme was conceived. The vicar had a scheme in mind incorporating the four candlesticks and a tabernacle for the lady chapel, but the time was not yet ripe for this to be brought forward. What was material to the present case was the fact that the candlesticks had been placed on the altar of the lady chapel without the sanction of a faculty. No reference was made to them when the present petition was lodged, although the candlesticks had been placed on the altar of the lady chapel.

It seems to me that when I approach the question of discretion two issues present themselves. What would have been the right decision supposing the application had come before me in March, 1951? Have the events that have taken place since then affected the matter in any way? St. George's, Southall, was not a case of the replacement of candlesticks to which the Dean of the Arches had attached some importance when he heard *Re St. Saviour's, Walthamstow* (2). On the other hand, there would have been the positive evidence of the church council's resolution and the vicar's evidence that, in his view, the candles added greater dignity to more solemn occasions. At that time I would have been satisfied, as I am now, that the six candlesticks would not have been the subject of ceremonial use. I have come to the conclusion that I would have granted the faculty in March, 1951, *i.e.*, before the purchase of the candlesticks. Has anything happened since then to cause me to change my mind? It is not an agreeable task to have to comment on what has been done in this case. If I thought for a moment that anyone had challenged the court or that there was any question of this court being approached in the

spirit of the work having been done, and, therefore, a *fait accompli* achieved, I would not have any hesitation in dismissing the application out of hand, but I acquit the vicar of any intention of forcing my hand by carrying out work in advance.

None the less, I feel it incumbent to express in restrained, but emphatic, terms my disapproval of the course that was taken. As I see it, the bishop was induced to dedicate memorials which were the subject-matter of proceedings before this court. Moreover, the vicar introduced into the lady chapel candlesticks for which a faculty was required. The evidence by the vicar that he would wait and see the result of the present petition is not attractive. The vicar has tendered the court an expression of regret, which I am satisfied was sincere and which I am prepared to accept. I regard this as important. These matters cannot be allowed to pass unnoticed. I have been giving anxious consideration to the question whether the court ought to give further weight to what has happened, but I have come to the conclusion that, in all the circumstances, I shall not vary the decision I would have reached in March, 1951, namely, to allow the faculty. One of the reasons to move me considerably is that to remove the candlesticks now would cause great pain and distress in a parish where the vicar is doing good work. It has been said that congregations have increased and that the church is prospering. It would be unfortunate if, through some act of forgetfulness on the vicar's part, the value of the work he is doing were imperilled. I treat the present petition as an exceptional case, and it must not be thought for one moment that articles can be introduced into churches as memorials and later dedicated without application to the court and that a faculty will then be granted merely on the ground that their removal would cause distress. The Dean of Arches emphasised the value of observing the normal English use concerning candlesticks on an altar, and the fact that I am allowing a faculty in full in respect of St. George's, Southall, should not be taken as an indication that I am prepared to exercise my discretion except with the extreme care which the Dean of Arches recommended. I express no view on the possible outcome of a further application. The mere fact that I am allowing six candlesticks on the high altar is not to be taken as involving permission to have four on the lady chapel altar.

Faculty granted for use of six candlesticks.

Solicitors: *Trollope & Winckworth.*

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

Affirmed. C.A. [1952] 2 All E.R. 64.

SAYCE v. AMEER RULER SADIQ MOHAMMAD ABBASI BAHAWALPUR STATE.

[KING'S BENCH DIVISION (McNair, J.), October 19, 1950, January 11, 21, 1952.]

Foreign State—Ruler of—Liability to be sued—Partial dependency on another Power—State of fact to be taken as at date of decision by court—Conclusiveness of certificate of government department—British Nationality Act, 1948 (c. 56), s. 1 (1) (3).

On May 24, 1950, a writ was issued in an action for damages for breach of contract against the Ameer Ruler Sadiq Mohammad Abbasi Bahawalpur State. The Ameer entered a conditional appearance and took out a summons asking that the service of the writ be set aside on the ground that he was entitled to immunity as the ruler of a sovereign State. In a certificate to the court the Commonwealth Relations Office stated that the Ameer "executed on Oct. 3, 1947, an instrument of accession, [to the Federation of Pakistan] and he executed further instruments or agreements on Oct. 1, 1948, Aug. 2, 1949, and Apr. 29, 1951." The certificate stated that the

federal legislature of Pakistan (of which the Ameer was not a member) had power to make laws for Bahawalpur with respect to certain matters, some concurrently with the Bahawalpur State legislature, while the State legislature had exclusive power in other specified matters. Executive authority was exercisable in federal matters through the Ameer and his officers or by officers of the federal government. Other executive authority in the State remained in general with the Ameer. The federal court had prescribed jurisdiction in the State. By the instrument of 1951 the Ameer had agreed to be bound by future changes in the Constitution Act, but his sovereignty and, subject to the instruments, his powers, authority, rights and jurisdiction as ruler were preserved. The certificate concluded: "The government of Pakistan have informed the Secretary of State that the State of Bahawalpur did not, on accession to the Federation of Pakistan, become a part of His Majesty's dominions, and that the view of the government of Pakistan is that the Ameer has continued to be a sovereign ruler and is entitled to immunity before the courts both within and outside Pakistan in civil cases . . . The State of Bahawalpur is not a part of His Majesty's dominions, and . . . the Ameer, within the limitations imposed upon him by the constitutional arrangements set out above, is sovereign ruler of the State."

HELD: (i) the application to set aside the service of the writ must be determined on the state of fact existing at the date when the court made its decision and not at the date of the service of the writ.

(ii) the certificate of the Commonwealth Relations Office was conclusive as to the fact that the State of Bahawalpur was not within His Majesty's dominions: see *per ATKIN, L.J.*, in *The Fagernes* ([1927] P. 324); and that, within the limits imposed by the constitutional arrangements set out therein, the defendant was the sovereign ruler of that State: see *dicta* of VISCOUNT CAVE, VISCOUNT FINLAY, LORD DUNEDIN, and LORD CARSON in *Duff Development Co. v. Kelantan Government* ([1924] A.C. 808, 815, 820, 831), and of LORD ATKIN in *The Arantzazu Mendi* ([1939] 1 All E.R. 722).

(iii) it was consistent with sovereignty that the sovereign in certain respects was dependent on another Power; the limitations on the defendant's sovereignty imposed by the constitutional arrangements set out in the circular had no application over a very substantial sphere; and, therefore, the defendant was entitled to succeed.

Semble: the statement in the concluding part of the certificate was not inconsistent with the Ameer having the status of a British subject under the British Nationality Act, 1948, s. 1 (1) (3).

AS TO OFFICIAL CERTIFICATES, see HALSBURY, Hailsham Edn., Vol. 13, pp. 661-664, paras. 731-733; and FOR CASES, see DIGEST, Vol. 22, p. 318, Nos. 3118-3126.

Cases referred to:

- (1) *Statham v. Statham & Baroda (Gaekwar)*, [1912] P. 92; 81 L.J.P. 33; 105 L.T. 991; 1 Digest 48, 388.
- (2) *Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 11 Digest 309, 17.
- (3) *The Fagernes*, [1927] P. 311; 96 L.J.P. 183; 138 L.T. 30; Digest Supp.
- (4) *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797; 93 L.J.Ch. 343; 131 L.T. 676; Digest Supp.
- (5) *The Arantzazu Mendi*, [1939] 1 All E.R. 719; [1939] A.C. 256; 160 L.T. 513; *sub nom. Spain Republic Government v. Arantzazu Mendi*, 108 L.J.P. 55; Digest Supp.
- (6) *Kahan v. Federation of Pakistan*, [1951] 2 K.B. 1003.

APPEAL by the plaintiff from an order of a master dated Oct. 13, 1950, setting aside the service of a writ issued on May 24, 1950, in an action for damages for

breach of contract, on the ground that the defendant was entitled to immunity as the ruler of a sovereign State.

The question arose whether the application to set aside the service of the writ should be determined on the state of fact existing at the time of the service of the writ or at the time of the decision of the court. The defendant contended that a certificate of the Commonwealth Relations Office was conclusive as to the fact that at the later date the defendant was the sovereign ruler of a foreign State which could not be questioned by reason of limitations on sovereignty set out therein or be made the subject of a further inquiry addressed to the Commonwealth Relations Office designed to ascertain whether the defendant was a British subject by virtue of the Pakistan Citizenship Act, 1951, s. 3, and the British Nationality Act, 1948, s. 1 (1).

Blackledge, K.C., and *J. Chinna Durai* for the plaintiff.

Scott Henderson, K.C., and *H. G. Garland* for the defendant.

Cur. adv. vult.

Jan. 21. **McNAIR, J.**, read the following judgment. This case raises the interesting question of the position in these courts of the ruler of an Indian State which has acceded to the Federation of Pakistan. On May 24, 1950, the plaintiff issued a writ claiming damages for breach of contract against the defendant, described as the Ameer Ruler Sadiq Mohammad Abbasi Bahawalpur State. The writ was served and a conditional appearance was entered by the defendant, who forthwith took out a summons asking that the service of the writ be set aside. In due course the summons came before Master GRUNDY who, on Oct. 13, 1950, ordered that the service of the writ be set aside on the ground that the defendant was entitled to immunity as the ruler of a sovereign State. In reaching this conclusion, the master had before him a letter dated Aug. 3, 1950, from an official of the Commonwealth Relations Office addressed to the defendant's solicitors. By notice of appeal dated Oct. 16, 1950, the plaintiff appealed to me as judge in chambers asking that this order be reversed and that service of the writ on the defendant should stand. On the appeal coming on for argument before me I reached the conclusion that the information contained in this letter was incomplete. I caused further inquiries to be made, and after some delay a further communication addressed to the court was received from the Commonwealth Relations Office. As the question involved seemed to me to be one of public importance I adjourned the matter into open court for further argument. This took place on Friday, Jan. 11, 1952.

The further communication from the Commonwealth Relations Office is in the following terms. It is dated Sept. 4, 1951, and says:

"(1) I am directed by Mr. Secretary Gordon-Walker to refer to your letter dated Nov. 13, 1950, addressed to the Attorney-General, and to express his regret for the delay in replying . . . (2) I am to request you to inform McNAIR, J., that until Aug. 15, 1947, His Highness the Ameer of Bahawalpur was recognised by His Majesty as the ruler of the State of Bahawalpur, which was under the suzerainty of His Majesty. The territory of the State was not part of British India or of His Majesty's dominions, and neither the Ameer nor his subjects were subjects of His Majesty. Although the Ameer was not wholly independent, he exercised as ruler of his State various attributes of sovereignty including internal sovereignty, and his position was similar to that of the Gaekwar of Baroda who was held in *Statham v. Statham & Gaekwar of Baroda* (1) ([1912] P. 92), to be a sovereign ruler entitled to immunity from suit. (3) The position of the State of Bahawalpur as a State under the suzerainty of His Majesty was altered by the Indian Independence Act, 1947, and the Government of India Act, 1935, as modified under the provisions of the 1947 Act. Section 1 of the 1947 Act set up as from Aug. 15, 1947, two independent dominions to be known as India and Pakistan. The

territories of the dominion of Pakistan were, by s. 2 (2), defined as certain named provinces of British India, which formed part of His Majesty's dominions. The Act provided in s. 8 that the dominion should be governed as nearly as might be in accordance with the provisions of the Government of India Act, 1935, subject to any orders made by the Governor-General under s. 9 of the 1947 Act and to any other provisions made by or in accordance with a law made by the Constituent Assembly of the dominion. Copies of the Acts of 1935 and 1947, as modified by the Governor-General's orders and by laws passed by the Constituent Assembly of Pakistan, are enclosed. (4) The Government of India Act, 1935 (as so modified) created by s. 5 a federation to consist of the aforesaid territories of the dominion (including the capital) and such Indian States as might accede to the federation under s. 6. In pursuance of this section His Highness the Ameer of Bahawalpur executed on Oct. 3, 1947, an instrument of accession, and he executed further instruments or agreements on Oct. 1, 1948, Aug. 2, 1949, and Apr. 29, 1951."

Pausing there for a moment, I refer again to the fact that the writ in this action was issued on May 24, 1950. Accordingly, it was issued before the fourth instrument of accession. To continue with the letter:

"As a result of these instruments and of the provisions of the Acts of 1935 and 1947, the constitutional position of the Ameer and of his State is now as follows:—(a) The federal legislature of Pakistan (of which the Ameer is not a member) has power to make laws for Bahawalpur with respect to the matters set forth in Parts I and II of the schedule to the instrument of Apr. 29, 1951, although in respect of the matters set forth in Part II the Bahawalpur State legislature has a concurrent legislative power. The subjects on which the State legislature has exclusive power are set out in Part III of the schedule. (b) Executive authority in the State in relation to federal subjects is exercisable in accordance with ss. 8 and 124 and 125 of the Act of 1935, and art. 3 (b) of the instrument of Apr. 29, 1951, that is, either through the Ameer and his officers, or by officers of the federal government, as the Governor-General may provide by order made after consultation with the Ameer. Otherwise executive authority in the State remains in general with the Ameer. (c) The federal court has the jurisdiction within the State conferred on it by ss. 204 and 207 of the Act of 1935, and as provided by cl. 6 of the 1951 instrument. (d) By cl. 7 of the instrument of accession of Oct. 3, 1947, it was provided that the Ameer was not committed to accept any future constitution of Pakistan, and that his discretion to enter into agreement with any future government of Pakistan was not fettered, but by cl. 4 and 5 of the 1951 instrument he has agreed to be bound by future changes in the Constitution Act. (e) Clause 8 of the instrument of accession and cl. 9 of the 1951 instrument provide that nothing in the instrument is to affect the ruler's sovereignty in and over the State nor (save as provided by or under the instruments) the exercise of any powers, authority, rights and jurisdiction enjoyed by him as ruler. (f) Under the Pakistan Citizenship Act, 1951, the subjects of the Ameer have now in general also become citizens of Pakistan, while remaining subjects of the ruler; they are therefore now British subjects, or Commonwealth citizens, under s. 1 of the British Nationality Act, 1948. (5) The government of Pakistan have informed the Secretary of State that the State of Bahawalpur did not, on accession to the Federation of Pakistan, become a part of His Majesty's dominions, and that the view of the government of Pakistan is that the Ameer has continued to be a sovereign ruler and is entitled to immunity before the courts both within and outside Pakistan in civil cases. (6) In these circumstances I am to say that the State of Bahawalpur is not a part of His Majesty's dominions, and that the Ameer,

within the limitations imposed upon him by the constitutional arrangements set out above, is sovereign ruler of the State."

Inasmuch as this letter refers to, and the conclusion stated in para. 6 appears to be in part based on, events which have taken place since the service of the writ herein, the first question which I have to determine is whether an application of this nature must be determined on the state of fact existing at the time of the service of the writ or on the state of fact existing at the date when the court is called on to make its decision. So far as I am aware, there is no precise authority on this point, though the decision of the Court of Appeal in *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* (2), reversing the decision of ROCHE, J., on the basis of the recognition by His Majesty's government of the Soviet government as the *de facto* government of Russia given subsequent to the hearing before ROCHE, J., lends some support to the view that the latter is the material date. In principle, too, it seems to me that I should decide the matter on the basis of fact as existing today since it is today that I have to decide whether or not the defendant is entitled to the immunity claimed.

In my judgment, the final paragraph of the letter of Sept. 4, 1951, contains a clear and unequivocal statement made on behalf of His Majesty on two points: (i) that the State of Bahawalpur is not a part of His Majesty's dominions and (ii) that the Ameer within the limitations imposed on him by the constitutional arrangements set out in the letter is sovereign ruler of the State. As to (i), it is, in my judgment, settled by authority binding on me that a statement made on behalf of the Crown that a particular area is not within His Majesty's dominions is conclusive on this point: see *per* ATKIN, L.J., in *The Fagernes* (3) ([1927] P. 324):

"What is the territory of the Crown is a matter of which the court takes judicial notice . . . Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive."

As to (ii), it seems to me also to be settled by authority that a statement made on behalf of the Crown that a particular person is (or possibly is recognised to be) a sovereign of a particular State is also conclusive on this point, and that this is the only method by which the court can inform itself of the material fact whether the party sought to be impleaded is a foreign sovereign State or the sovereign ruler of a foreign State: see *Duff Development Co. v. Kelantan Government* (4), and, in particular, the speeches of VISCOUNT CAVE ([1924] A.C. 808), VISCOUNT FINLAY (*ibid.*, 815), LORD DUNEDIN (*ibid.*, 820) and LORD CARSON (*ibid.*, 831) and the speech of LORD ATKIN in *The Arantzazu Mendi* (5) ([1939] 1 All E.R. 722).

Accordingly, I approach the question which I have to decide on the footing that it has been conclusively established that the defendant, within the limits imposed on him by the constitutional arrangements set out in the letter of Sept. 4, 1951, is sovereign ruler of the State of Bahawalpur, which State is not part of His Majesty's dominions. Though to understand this statement it is necessary to examine the constitutional arrangements in order to comprehend the extent of the limitations, it is not, in my view, legitimate for the court as the result of such examination to question the fact that the defendant is sovereign ruler of such a State. As was pointed out by LORD FINLAY in *Duff's* case (4) ([1924] A.C. 814), it is quite consistent with sovereignty that the sovereign may in certain respects be dependent on another Power. An examination of the constitutional arrangements set out in the letter satisfies me that today the limitations imposed on the Ameer's sovereignty have no application over a very substantial sphere. I, accordingly, hold that on the basis of the certificate before me the defendant is entitled to succeed.

At the hearing before me, counsel for the plaintiff appellant suggested that the court should refer the matter back to the Commonwealth Relations Office

for further information on the question whether or not the ruler was himself a British subject as the result of the Pakistan Citizenship Act, 1951, and the British Nationality Act, 1948. Section 3 of the former Act provides:

- A “At the commencement of this Act [*viz.*, Apr. 13, 1951] every person shall be deemed to be a citizen of Pakistan (a) who or any of whose parents or grandparents was born in the territory now included in Pakistan and who after Aug. 14, 1947, has not been permanently resident in any country outside Pakistan . . .”
- B “Territory now included in Pakistan” there includes the territory of acceded States. Section 1 (1) of the British Nationality Act, 1948, provides:
- “Every person . . . who under any enactment for the time being in force in any country mentioned in sub-s. (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject.”

- C The countries mentioned in s. 1 (3) include Pakistan. It was, accordingly, suggested that further inquiries should be made to ascertain whether the defendant or any of his parents or grandparents was born in the territory now included in Pakistan. I have, however, no reason at all to infer that this aspect of the matter was not considered by the advisers of His Majesty before the letter of Sept. 4, 1951, was sent to the court, and I do not regard it as any part of the court's function to cross-examine the executive in matters of this nature. Nor am I satisfied that the statement in the concluding paragraph of the letter is in any way inconsistent with the ruler having the status of a British subject
- D under the British Nationality Act, 1948, s. 1 (1). For completeness I may add that I consider that the statement that the defendant is sovereign ruler of the State of Bahawalpur precludes me from considering the difficult question of the status of component parts of a federation or the question how far the recognition accorded in this case is consistent with the recognition accorded to Pakistan as reported in *Kahan v. Federation of Pakistan* (6). In my judgment, the appeal
- E fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Stanley Johnson & Allen* (for the plaintiff); *Seagrove, Woods & Simmons* (for the defendant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

F
MACLEOD ROSS & CO., LTD. v. COMPAGNIE d'ASSURANCES
GENERALES L'HELVETIA OF ST. GALL.

[COURT OF APPEAL (Somervell and Denning, L.JJ.), January 11, 21, 1952.]

- G *Insurance—Open policy—Certificate of insurance issued in respect of particular goods—Condition in policy that claim be referred to local tribunal of commerce—Jurisdiction of English court.*

- H On Mar. 25, 1949, D. & Co., a French firm of forwarding agents, took out an open policy of insurance with the defendants, a Swiss insurance company, to cover shipments by customers of D. & Co. from France and the Saar to all parts of the world. The policy contained a number of conditions, including one specifying that, in the event of a dispute, the defendants could only be sued before a tribunal of commerce of the place where the contract was entered into. In February, 1951, the plaintiffs, a firm carrying on business in London, contracted to buy from a firm in the Saar a quantity of hams to be shipped c.i.f. London. The defendants issued to D. & Co., as agents for the plaintiffs, two certificates each headed: “Addendum to insurance policy” in respect of the shipment of the goods. The certificates, which purported to have been issued pursuant to the open policy, referred to many

of the conditions incorporated in the open policy, but also contained conditions as to certain risks not referred to in that policy, and no reference was made in the certificate to the condition conferring exclusive jurisdiction on the Swiss courts. In a claim by the plaintiffs against the defendants in respect of damage alleged to have been covered by the insurance, the defendants moved to stay the action.

HELD: on construction, the open policy and the certificates were separate contracts; the plaintiffs were only bound by those conditions which were specifically referred to in the certificates; and, therefore, the condition ousting the jurisdiction of the court was not available to the defendants on an application by them to stay the action.

Phoenix Insurance Co. of Hartford v. De Monchy (1929) (141 L.T. 439), applied.

AS TO RULES OF CONSTRUCTION OF MARINE POLICIES, see HALSBURY, Hailsham Edn., Vol. 18, pp. 187-190, paras. 248-252; and FOR CASES, see DIGEST, Vol. 29, pp. 68-71, Nos. 262-290.

Cases referred to:

- (1) *Phoenix Insurance Co. of Hartford v. De Monchy*, (1929), 141 L.T. 439; 35 Com. Cas. 67; Digest Supp.
- (2) *Thomas & Co., Ltd. v. Portsea S.S. Co., Ltd.*, [1912] A.C. 1; 2 Digest 331, 141.

APPEAL by the plaintiffs from an order of McNAIR, J., dated Nov. 20, 1951, whereby he held that the plaintiffs' claim under certificates of insurance should be stayed under s. 4 (1) of the Arbitration Act, 1950, on the ground that by the contract of insurance sued on the parties had agreed that all claims against the defendants should be determined by the tribunal of commerce for the place where the contract was entered into.

The plaintiffs contended that a clause in an open policy, signed in Switzerland, giving exclusive jurisdiction to the Swiss courts, did not apply to two certificates issued under that policy. The defendants contended that the open policy and the certificates comprised one contract, and, therefore, that the plaintiffs were precluded from proceeding in England.

Mocatta, K.C., and *M. R. E. Kerr* for the plaintiffs.

Scott Cairns, K.C., and *T. G. Roche* for the defendants.

Cur. adv. vult.

Jan. 21. The following judgments were read.

SOMERVELL, L.J.: On Mar. 25, 1949, a French firm of forwarding agents, whom I will call Danzas, entered into a contract with the defendants, who, as their name indicates, are Swiss insurers. The contract was referred to as a floating policy. Subject to various conditions, alternatives and declarations, it was to cover shipments by customers of Danzas from France and the Saar to all parts of the world from Mar. 20, 1949. If Danzas were required by a customer to insure such a shipment, then the business was to go to the defendants under this policy. Although the object was to affect insurances *in futuro* of customers' goods, Danzas as principals had rights and obligations under this contract. It is obvious that at the moment when it was signed there might have been no customers requiring insurances under it. Danzas were described as acting for whom it may concern.

In February, 1951, the plaintiffs agreed to buy from Fleischwerke Ernst Schofer of Saar Louis in France (hereinafter called Schofer) a quantity of French canned hams to be shipped c.i.f. to London. It seems clear that Schofer was a customer of Danzas who had required them to insure the hams. Under art. 2 of the special conditions of the floating policy Danzas had to make declarations in a certain way and at a certain time. These conditions were, no doubt, complied with, as on Feb. 8 and 22, 1951, the defendants issued two sets of

insurance documents in respect of two shipments of the canned hams which were being delivered to the plaintiffs under their contract. In due course these with the other documents were tendered to and accepted by the plaintiffs. The plaintiffs claimed from the defendants in respect of damage which, as they said, was covered by the insurance. The defendants refused to admit liability. The plaintiffs issued a writ. The defendants have moved to stay on the ground that there is in the floating policy a clause—No. 31 of the general conditions—

A of which the agreed translation reads as follows:

“Article 31. 1st. As an exception to all contrary provisions of the laws relating to competency, underwriters, even in cases where there is more than one defendant or of actions regarding indemnity for guarantee, can only be sued before tribunals of commerce of the place where the contract was entered into. However, a company which enters into a contract through an agent or an attorney may also be sued before the tribunal of commerce of the place at which it has its head office. 2nd. If more than half of the insurance value of the articles covered has been underwritten at one and the same place, the assured may sue the other insurers, in order to have the said action adjudicated in respect of them,

C before the tribunal of commerce of that place where an action has already been commenced. 3rd. The assured, even when not a merchant, shall always be sued by underwriters before the tribunal of commerce of the place where the contract was entered into, the assured electing domicile thereat.”

McNAIR, J., stayed the proceedings and the plaintiffs appeal.

D The first question is whether the clause conferring exclusive jurisdiction on a tribunal of commerce was a term of the contract between plaintiffs and defendants. If it is, then a further question arises as to what is the “contract”, the place of entering into of which determines the jurisdiction. Is it the floating policy? Is it the declaration? Is it the insurance document covering the contractual goods?

E I will now consider what I have so far, using a neutral expression, called the insurance documents issued in February, 1951. I will first take that issued on Feb. 8 because its wording is, possibly, more favourable to the defendants' contention than that issued on Feb. 22. Under the defendants' name the description of the document is “Avenant d'assurance.” The agreed translation of this is “Addendum to insurance policy.” One doubts if “addendum” is the

F best English equivalent, but the nature of the document can be gathered from its terms. It proceeds:

“At the request of Danzas & Co., Transports Internationaux Office, in Sarrebruck, we hereby state that in accordance with the declaration No. 32 under the open policy No. 648 we have insured on its general and special

G conditions for the sum of £17,091 10s. (Seventeen thousand and ninety-one pounds sterling and ten shillings) the goods described hereinafter, loaded or to be loaded on board ship . . . for the voyage from Paris to London *via* Dunkirk.”

Then the numbers of the goods, the number and kind of packages and the insured value are stated. The number of the foreign currency bond is given

H and the number of the insurance licence dated July 20, 1950.

“The insurance has been effected on terms called ‘all risks’ in accordance with s. 2 of cl. 2 of the marine insurance printed form, including theft and pilferage, breakage, leakage, loss and damage. The risk of strike is covered on conditions of the printed form of Dec. 23, 1948, attached hereto. The risk of war and sea-mines is covered on conditions of the printed form of Jan. 1, 1947, attached hereto. Any loss is payable at destination. Payments made on terms other than those stipulated in the circular of the

Ministry of Finance No. 233838 of Nov. 2, 1948, will not be binding for the insurance company. Loss and damage is to be ascertained by the company's London representatives, Messrs. Wendt & Co., 16-17, Devonshire Square, Bishopsgate, London, E.C.2, who are to be asked to deal with the matter and whose certificate is to be produced in support of the claim. Any indemnity in respect of the goods mentioned above is solely payable to the holder of this addendum to the insurance policy, endorsed by Danzas & Co. Transports Internationaux Office in Sarrebruck and on the production of this document. This original is not valid should a duplicate be produced earlier. Colmar, Feb. 8, 1951."

That document is signed by the defendants. Then there is a note at the bottom "See back for extracts from printed conditions."

Before considering the further provisions, it seems plain to me that this is a contractual document. It is the document which records the defendants' undertaking to insure these particular goods for so much against various risks and for a defined transit. It is the document issued by the defendants to Danzas as agents for the shipper of these goods. This does not, of course, mean that additional terms and conditions may not have to be sought in the floating policy.

On the back of the document are to be found a large number of clauses headed:

"French Marine Insurance Policy on Cargo Interests. Extract from the printed form of Aug. 17, 1944."

The clauses deal, for example, with (i) object and extent of the insurance, (ii) excluded risks, (iii) duration of risks, (iv) determination of damage and losses, (v) settlement of damage and losses. There is no reference anywhere to the exclusive jurisdiction of any tribunal de commerce. What appeared on the face of the document is aptly described as special conditions. It is with general conditions that the argument is concerned. It seems clear that if, as stated on the face, the general conditions of the insurance are those of the open policy No. 648, then what is printed on the back must be general conditions of that policy. In fact they are. On the back of the document are some eighteen articles out of thirty-seven, including the cl. 2 referred to on the face, which appear as general conditions of the floating policy.

Passing from the addendum itself to the documents annexed, the provisions as to strike risks are set out in six articles and the provisions as to war risks in ten. This, then, is a set of documents with detailed special and general provisions which, having regard to the opening words, are to be regarded, it seems to me, as those special and general conditions of policy No. 648 which are relevant to this particular insurance. The general conditions which are not set out are not, I think, made part of the contract. If the defendants wished others to be applicable they should have made it clear that what appeared to be a complete recital of relevant terms was not. So far as art. 31 is concerned, it seems to me difficult to believe it was not deliberately intended to exclude it. The document itself refers to the payment of losses at destination, and their ascertainment by the company's London representative. If, however distant the destination of the goods, the only tribunal to which witnesses would have to be brought was in France or Switzerland that would be a matter which the defendants would be at special pains to make clear. If any general condition was to be printed it would be that one.

I am fortified in the conclusion to which I have come by the decision and reasoning of the House of Lords in *Phoenix Insurance Co. of Hartford v. De Monchy* (1). There was there an insurance document called a certificate which referred to and was issued under an earlier continuing and floating policy. The floating policy contained, and the certificate did not, a limitation clause which it was sought to enforce against buyers. It was held that, although the

policy and the certificate must be read together so far as was necessary to make the certificate constitute a complete contract of marine insurance, the clause limiting the time in which action could be brought dealt with a matter which was merely collateral and could not be read into the certificate. In the certificate in that case there was the following clause on which reliance was naturally placed:

- A "This certificate represents and takes the place of the policy, and conveys all the rights of the original policy holder . . . as if the property was covered by a special policy . . ."

The learned Lords did not, I think, base their opinions solely on this clause. LORD DUNEDIN uses the following words (141 L.T. 442):

- B "The condition in question is a collateral stipulation imposing a condition precedent. It has nothing to do with insurance particularly, but might be applied to any contract. Common sense and fairness revolt against the idea of this being enforced against the holder or indorsee of the certificate. Neither the holder, as here, nor a possible indorsee could ever have seen the policy. There is not even expressed in the certificate a right to ask for exhibition of the policy. Against them it may be fair to assume ordinary insurance clauses, but not to assume a collateral agreement of this sort."
- C

- That seems to me applicable here. In any case, although the "addendum" contains no such express words as these I have cited, the detailed provisions which it contains lead substantially to the same position. The other addendum refers to the "open policy 648", and the number of the declaration under it, but does not contain the express reference to special and general conditions. Apart from that difference, which I do not think really affects the issue, the form is similar. We have not the advantage of a note of the learned judge's reasons. He gave leave to appeal. I have, for the reasons given, come to a different conclusion. I think in principle the case is governed by the *Phoenix* case (1), although in some respects there the argument was easier and in other respects more difficult for the plaintiff. I think, therefore, the appeal should be allowed.
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- DENNING, L.J.: It was argued on behalf of the defendants that there was only one contract between the defendants and the forwarding agents, namely, that contained in the policy No. 648. I do not think that argument is correct. In my opinion, in respect of each of these parcels of goods, there were two contracts between the defendants and the forwarding agents: (i) The *police d'abonnement* or "open cover" whereby the defendants agreed to insure all goods of which the forwarding agents took charge, provided that their customers had asked them to effect insurance of them. In order that the goods should be covered the forwarding agents, on taking charge of them, had to enter details in a book and send corresponding declarations to the defendants. (ii) The *avenant d'assurance* or "certificate of insurance" whereby the defendants implemented the contract contained in the open cover. Each of these certificates was, I think, a new contract in respect of the goods covered by it. That is shown by the fact that the certificate covered strike risks and war risks on conditions which are not to be found in the open cover. It also contained the special provision that every indemnity for the goods mentioned would only be paid to the holder of the certificate of insurance endorsed by the forwarding agents and against presentation of the certificate, and the original certificate would be of no value if the duplicate were presented before it. That provision did not appear in the open cover. Indeed, the open cover contained no reference whatever to certificates of insurance. This provision, that the indemnity was only payable to the holder of the certificate, was obviously intended to facilitate the transfer of the certificate and to make it freely assignable. It was a new provision of a new contract which was intended to be acted on, not only
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by the forwarding agents, but also by the customer on whose behalf they were acting and any holder to whom it was duly indorsed.

The next question is: What are the terms of the contract contained in the certificate of insurance? The defendants say that the certificate was issued subject to all the conditions of the open cover, and, in particular, that it incorporated art. 31 of the general conditions, with the result that it is compulsory for every holder of every certificate to bring his claim in the Swiss courts. I do not agree with this contention. I do not think that the certificate did incorporate all the conditions of the open cover. For instance, the certificate clearly did not incorporate art. 12 of the special conditions which required the forwarding agents to pay the premiums by monthly account. I think that the certificate only incorporated some of the conditions, and, to ascertain what those conditions were, I think that we should look to the conditions which were printed on the back of the certificate itself. It must be remembered that the defendants issued this certificate with the intention that it should be indorsed to the holder and be acted on by him. When the defendant printed conditions on the back, they presumably printed all those which concerned the holder and omitted those which did not concern him. I do not think it would be right to hold him bound by other conditions which were not drawn to his attention at all, especially procedural conditions which do not affect the insurance itself, but only the way of enforcing it. Article 31 of the general conditions was just such a condition. It was not printed on the back of the certificate and it related only to the competence of the courts. In my opinion, it was not incorporated into the certificate.

This view is supported by the fact that art. 31 is perfectly intelligible when applied to the open cover, but not at all a reasonable condition to apply to the certificates. It is quite reasonable for the forwarding agents to agree that, if they themselves have any dispute with the defendants under the open cover, they will bring their action before the Commercial Court of St. Gall in Switzerland, but it would not be at all reasonable to expect every holder of every certificate to bring his action there. It seems to me that in the circumstances of this case the "contract" referred to in art. 31 is the open cover and not the certificate of insurance. The defendants carry on business in England and must expect to meet claims here as well as in Switzerland. The cases to which we were referred, *Thomas & Co., Ltd. v. Portsea S.S. Co., Ltd.* (2) and *Phoenix Insurance Co. of Hartford v. De Monchy* (1), are not directly in point, but our decision is quite in line with them. I agree, therefore, that this action should not be stayed, and that the appeal should be allowed.

Appeal allowed.

Solicitors: *Ince & Co.* (for the plaintiffs); *Bentleys, Stokes & Lowless* (for the defendants).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

MAHON v. AINSCOUGH.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), January 14, 15, 1952.]

Sale of Land—Warranty—Preliminary inquiry before contract—War damage—Untrue reply.

A Before a contract for the purchase of a dwelling-house was entered into the purchaser's solicitor sent preliminary inquiries to the vendor's solicitor one of which was: "Has the property suffered war damage? If so, please state the date and nature of the damage, the steps which have been taken under the War Damage Acts, and the reference number of any claim made." The vendor's solicitor (in good faith) replied: "I understand not." The form containing the inquiries ended with a note stating: "It is still necessary to make inspection of the property..." In due course the contract was signed and requisitions on title were delivered asking, *inter alia*: "Will the vendor confirm that, if the preliminary inquiries made on behalf of the purchaser and replied to on Mar. 31, 1950, were repeated herein, the replies at the present date would be the same as those already made? If not, please give full particulars of any variation." The vendor's solicitor replied "Confirmed." The sale was completed and subsequently it was found that the premises had sustained substantial war damage. The purchaser claimed damages for breach of warranty.

B HELD: there was no evidence of any intention to make such a separate contract as a warranty imported, and the question and answer relating to war damage in the preliminary inquiries was not intended to and did not constitute such a warranty.

C *Dictum* of ROMER, L.J., in *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co., Ltd.* ([1936] 2 All E.R. 1049), applied.

AS TO WARRANTY ON SALE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 52-54, paras. 64, 65, pp. 240, 241, *n*; and FOR CASES, see DIGEST, Vol. 39, pp. 419-421, Nos. 515-539.

Cases referred to:

- (1) *Gilchester Properties, Ltd. v. Gomm*, [1948] 1 All E.R. 493; 2nd Digest Supp.
- (2) *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co., Ltd.*, [1936] 2 All E.R. 1039; 155 L.T. 190; Digest Supp.
- (3) *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 35 Digest 54, 486.
- (4) *De Lassalle v. Guildford*, [1901] 2 K.B. 215; 70 L.J.K.B. 533; 84 L.T. 549; 35 Digest 14, 79.

G APPEAL by the vendor from an order of His Honour DEPUTY JUDGE ERRINGTON, sitting at the Liverpool County Court, dated Sept. 11, 1951. The purchaser claimed damages for breach of warranty, given orally and/or contained in replies to written inquiries made before the signing of a contract for the purchase of a dwelling-house and repeated in the requisitions on title, that the dwelling-house had not suffered war damage. The county court judge held that the relevant written inquiry and the answer thereto amounted, in the circumstances of the case, to a collateral warranty by the vendor that full and proper inquiries had been made, and that the purchaser could safely rely on the answer given. He was satisfied that the vendor (who was making a "sub-sale" and had in fact no personal knowledge) had not made full inquiries and that the purchaser had been exposed to a risk of damage for which he had not bargained and which was outside the contract. He gave judgment for the purchaser, and the vendor appealed.

Gerson Newman for the vendor.

Aarvold for the purchaser.

SIR RAYMOND EVERSLED, M.R. : On Apr. 12, 1950, the plaintiff in the action, Mr. Edward Mahon, the purchaser, entered into a contract with the defendant, Mr. Ainscough, the vendor, for the purchase by the plaintiff at the price of £1,350 of a dwelling-house known as No. 2, Henley Avenue, Litherland, in the county of Lancaster. A few days after the date of the contract, *viz.*, on Apr. 17, 1950, the solicitor acting for the purchaser sent requisitions on title to the solicitor for the vendor, and the second of those requisitions was as follows:

"Will the vendor confirm that, if the preliminary inquiries made on behalf of the purchaser and replied to on Mar. 31, 1950, were repeated herein, the replies at the present date would be the same as those already made? If not, please give full particulars of any variation."

The reply to that requisition was the single word "Confirmed." The form of the requisitions on title is printed and bears at the heading the words: "For use where preliminary inquiries have already been answered", and it appears from the present case and also from *Gilchester Properties, Ltd. v. Gomm* (1), which came before ROMER, J., in 1948, that there has grown up a practice (of what universality I know not) whereby preliminary inquiries are made by a proposing purchaser or by solicitors on his behalf, addressed to the solicitor for the intending vendor, and it is to such preliminary inquiries that the second requisition relates. On the answer given to one of the questions in that preliminary inquiry turns the question in the present action, which is whether the answer given amounted to a warranty on the part of the vendor so as to give a right of action in damages to the purchaser in the circumstances which I must presently relate. The county court judge held that such was the effect of that answer, and I am bound to say at once that I have not reached that opinion. In my judgment, there is here no room for any such warranty.

Before I discuss the matter further it is convenient for me to refer to one passage from the judgment of ROMER, L.J., sitting in this court in *London County Freehold & Leasehold Properties, Ltd. v. Berkeley Property & Investment Co., Ltd.* (2). There the question did not emerge from preliminary inquiries such as are involved here, but was whether an answer to a question about tenancies amounted to a warranty. ROMER, L.J., said ([1936] 2 All E.R. 1049):

"LORD MOULTON, when advising the House of Lords in *Heilbut, Symons & Co. v. Buckleton* (3) said ([1913] A.C. 51): 'It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent representation, no matter in what way or under what form the attack is made.' I do not doubt that a person can be made so liable if he warrants the truth of the representation, but it must be made abundantly clear by evidence that the warranty was in fact given. It is not permissible to infer such a warranty when the evidence does not plainly require it. To do so would be to disregard the principle to which LORD MOULTON referred. Turning to the evidence in the present case, I confess, with all respect to the learned judge, that I can find no trace of any such warranty having been asked for or given. What is meant by saying that the plaintiffs warranted the truth of the representation? Surely this, that the defendants contracted with the plaintiffs that, in the event of the representation turning out to be untrue, they would indemnify the plaintiffs against any loss which might thereby be occasioned to them."

I am proposing to apply those tests in the present case, and, as ROMER, L.J., observed in the case before him, so, as it seems to me, I can use his language here. For, turning to the evidence in the present case, I confess, with all respect to

the learned judge, that I can find no trace of any such warranty having been asked for or given.

The preliminary inquiries to which allusion has been made were on a printed form which bore the heading:

- A "Inquiries before contract. Note: Approval of the draft contract for sale and purchase of the above property will be much facilitated if the vendor's solicitor will be good enough to reply to the following questions."

The questions did not lack either quantity or scope in the inquiries that they made. They were, in point of fact, eighteen in number, but that does less than justice to the curiosity of the purchaser's solicitor, for many of them contain a number of sub-questions. The inquiries related to such matters as whether the property was vacant and the amount of the sched. A income tax assessable in respect of it, and questions were asked about local authorities in regard to roads and planning authorities. Number 13, which is the vital question, was:

"Has the property suffered war damage? If so, please state the date and nature of the damage, the steps which have been taken under the War Damage Acts, and the reference number of any claim made."

- C I observe in regard to that question that it might well have been intended to elucidate for the benefit of the purchaser the knowledge whether there might be some claim outstanding against the War Damage Commission, the benefit of which would pass to the purchaser. In other words, it by no means follows, to my mind, that an affirmative answer to the question would be disadvantageous to a purchaser, and, particularly, to one who, as was the fact in this case, had inspected the property. However, the answer of the solicitor was: "I understand not," and there is no suggestion that that answer was not *bona fide* and true. The vendor, in fact, was himself purchasing from another, and the solicitor concerned had himself asked a similar question of the solicitor to the head vendor.

The form ends with three notes, and the third of them is:

- E "It is still necessary to make inspection of the property, inquiry of the local authority, the local planning authority, and of any occupier, and the usual searches."

I confess that anything less like asking for a warranty or the giving of a warranty than this document would be difficult to imagine. Counsel for the purchaser was driven to concede that, if he was right in saying that the vendor by his solicitor had warranted that the property had not been damaged by war damage, then all the other answers to all the other questions about the local authorities, the highway authority, and so forth, must likewise have amounted to warranties. Again, without referring for the moment to what the purchaser himself said in evidence, the suggestion that a warranty had been given in any of these answers is, I think, exceedingly difficult to fit in with the second requisition in which the purchaser repeated in effect the questions already asked and invited the vendor's solicitor to say whether the conditions were still the same. But the matter does not rest there. It is necessary to see what the purchaser himself said, according to the note of the evidence on which the learned judge appears to have founded himself. The purchaser said that, having met a certain agent, he went to see the premises:

- H "I considered purchase and consulted surveyor of Nottingham Building Society . . . I inspected property and saw repairs were required. Nothing was told about war damage, and I did not ask . . . I instructed my solicitors to make inquiries and left everything to them."

Later, he said that he consulted his solicitors, and eventually, in answer to the learned judge, I understand, he said: "I would not have bought if I had known war damage. I would not have paid £1,350." In cross-examination he

said: "I inspected premises and was not satisfied until report from surveyors." Counsel for the purchaser founded himself on those two answers: "I would not have bought if I had known war damage," and "I would not have paid £1,350." But those answers are, at their highest, equally consistent with the purchaser saying that he was misled by an innocent representation, and I find nothing whatever in the evidence to which I have referred capable of supporting the suggestion that, by his solicitors or otherwise, the purchaser asked for or obtained a warranty. There seems to be no hint in the evidence of there having been any intention to make such a separate contract as a warranty must necessarily import. It is to be noted that the purchaser himself signed the contract. It does not appear that the solicitor was given any authority to make any contract, and there is no evidence whatever to suggest that the vendor's solicitor had any authority to make any contract on the vendor's behalf. A

It would, perhaps, be tedious to pile Pelion on Olympus, but, assuming such a contract existed, what are its terms? In consideration of the vendor's promise to indemnify the purchaser if there had been war damage, what did the purchaser promise to do? There was, so far as the evidence goes, no draft contract in existence. It is not the kind of case, of which *De Lassalle v. Guildford* (4) is an illustration, where, on a contract being prepared, the purchaser says: "I will only sign it if you assure me that such-and-such a state of affairs exists." I need not pursue the matter. The learned judge, as I follow his judgment, took the view that the document which I have read led to the inference that a warranty was asked for and given. If he found as a fact, after hearing the witnesses, that the two parties intended to make a contract, and based himself on such a finding, then this court would not interfere with that conclusion if there were some evidence to support it. But I do not think the judge based himself on any such finding of fact, and if he did, then, with all respect to him, I can find no evidence whatever capable of supporting such a conclusion. For these reasons I think that this appeal must succeed, and that the order made by the judge must be set aside and the action dismissed. B C D

JENKINS, L.J. : I agree. It seems to me abundantly plain on the face of the document headed "Inquiries before contract" that the answers to the numerous questions contained therein were not intended to constitute warranties, *i.e.*, were not intended to constitute contracts to the effect that the answers to the inquiries were true, so as to give the purchaser a claim in damages in the event of any of the answers proving inaccurate. That applies to No. 13, the particular inquiry and answer on which the present case turns, just as much as it applies to the other numerous inquiries. The document seems to me to speak for itself and serves in itself to negative the contention that the replies constituted warranties. It emanates from the proposed purchaser. Following the heading "Inquiries before contract" is this note: E

"Approval of the draft contract for sale and purchase of the above property will be much facilitated if the vendor's solicitor will be good enough to reply to the following questions." F G

That note shows that the questions are being asked, not for the purpose of constituting a number of contracts or warranties, but merely to enable the proposed purchaser's solicitor to consider whether the contract for sale should be proceeded with, and, if so, what would be the appropriate form for it to take. The inquiries and answers are intended simply to provide preliminary information to assist in the attainment of the object I have mentioned, and not in themselves to have any contractual force. It should be noted further that at the end of the form "Inquiries before contract" there are a number of notes introduced by the letters "N.B.", and the third of those notes is: H

"It is still necessary to make inspection of the property, inquiry of the local authority, the local planning authority, and of any occupier, and the usual searches."

I think that third footnote reinforces the conclusion, if reinforcement were needed, that an inquiry such as No. 13, dealing with the state of repair of the property in the particular respect of war damage, was not intended to constitute a warranty, for, if it had been intended to constitute a warranty, the necessity for inspection of the property to secure the purchaser's position would not be apparent. The implication is that, in accordance with the usual practice, it was for the purchaser to inspect the property and satisfy himself as to condition and state of repair.

I should add that the precise purpose of inquiry No. 13 is not immediately apparent, but, having regard, in particular, to note No. 3, I suspect that its real object may have been, not to elicit information as to the state of repair of the property, which, whether there had been war damage or not, would, *prima facie*, be a matter for inspection, but to elicit information as to its history in regard to war damage, if any, with particular reference to any outstanding claims there might be against the appropriate commission for compensation. I agree with my Lord that requisition No. 2 is very material on the point at issue. If the answers to the preliminary inquiries had in truth been intended to constitute warranties, then requisition No. 2, which asks the vendor to confirm the replies given to the preliminary inquiries, would have been wholly inappropriate.

HODSON, L.J. : I agree.

Appeal allowed.

Solicitors: *Dubovie, Freeman & Co.*, agents for *A. D. Abrahamson*, Liverpool (for the vendor) ; *Isadore Goldman & Son*, agents for *De Cordova & De Cordova*, Liverpool (for the purchaser).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re WYNN'S WILL TRUSTS. PUBLIC TRUSTEE v. NEWBOROUGH (BARON) AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), January 17, 1952.]

Administration of Estates—Jurisdiction of court to control administration—Trustee authorised to determine all questions—Determination to be conclusive and binding on all beneficiaries.

By his will, dated July 31, 1931, the testator, who died on Jan. 20, 1932, gave his landed property to his trustee on trust for sale and settled the proceeds of sale. The will contained a clause whereby the testator authorised his trustee to determine, *inter alia*, "whether any moneys are to be considered as capital or income . . . and to determine all questions and matters of doubt arising in the execution of the trusts of this my will . . . and I declare that every such determination whether made upon a question actually raised or only implied in the acts or proceedings of my . . . trustee shall be conclusive and binding upon all persons interested under . . . my will . . .". Between 1941 and 1948 the trustee sold a quantity of timber and trees on an estate which formed part of the trust property and had not yet been sold under the trust for sale contained in the will. Applying the accepted principle which applies to trees planted for the purposes of amenity, he treated the whole proceeds of the sale as capital although not all the trees sold were planted for the purposes of amenity. On a summons taken out by him to determine whether his decision was correct, it was contended by the beneficiaries interested in capital that under the terms of the will the matter was concluded by his decision and the court had no jurisdiction.

HELD: the provision in the will which referred to the trustee the determination of all questions and matters of doubt arising in the execution

of the trusts of the will and purported to make the determination of the trustee conclusive and binding on all persons interested under the will was void and of no effect, since (a) it was repugnant to the benefits conferred by the will on the beneficiaries, and (b) it was contrary to public policy as being an attempt to oust the jurisdiction of the court to construe the will and to control the administration of the testator's estate, and, therefore, the question of the apportionment of the proceeds of sale of the timber and trees was not concluded by anything which the trustee had done and the matter would have to be re-considered by him according to the principles of law which were applicable. A

Re Raven ([1915] 1 Ch. 673), applied.

AS TO ATTEMPT BY TESTATOR TO OUST JURISDICTION OF COURT, see HALSBURY, Hailsham Edn., Vol. 34, p. 162, para. 214. B

Cases referred to:

- (1) *Re Ridge*, (1885), 31 Ch.D. 504; 55 L.J.Ch. 265; 54 L.T. 549; 34 Digest 643, 411.
- (2) *Re Fenwick's Will Trusts*, [1936] 2 All E.R. 1096; [1936] Ch. 720; 105 L.J.Ch. 351; 155 L.T. 199; Digest Supp.
- (3) *Howe v. Dartmouth (Earl)*. *Howe v. Aylesbury*, (1802), 7 Ves. 137; 32 E.R. 56; 44 Digest 197, 265. C
- (4) *Allhusen v. Whittell*, (1867), L.R. 4 Eq. 295; 36 L.J.Ch. 929; 16 L.T. 695; 23 Digest 464, 5358.
- (5) *Scott v. Avery*, (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 10 E.R. 1121; 2 Digest 350, 263.
- (6) *Philips v. Bury*, (1696), Skin. 447 (90 E.R. 198); Carth. 180 (90 E.R. 709); Comb. 265, 314 (90 E.R. 468, 499); Holt K.B. 715 (90 E.R. 1294); 1 Ld. Raym. 5 (91 E.R. 900); 2 Term Rep. 346 (100 E.R. 186); 4 Mod. Rep. 106 (87 E.R. 289); 1 Show. K.B. 360 (89 E.R. 624); 21 Digest 238, 676. D
- (7) *Re Raven*, [1915] 1 Ch. 673; 84 L.J.Ch. 489; 113 L.T. 131; 8 Digest 303, 823. E
- (8) *Massy v. Rogers*, (1883), 11 L.R.Ir. 409; 44 Digest 533b.
- (9) *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478; 92 L.J.K.B. 81; 127 L.T. 824; 16 Digest 116, 151.
- (10) *Atlantic Shipping & Trading Co. v. Dreyfus (Louis) & Co.*, [1922] 2 A.C. 250; 91 L.J.K.B. 513; 127 L.T. 411; 16 Digest 116, 150. F

ADJOURNED SUMMONS by the Public Trustee, acting as trustee of the will of the Honourable Frederick George Wynn, for the determination of questions arising out of the administration of the testator's estate.

In answer to the first question of the summons, DANCKWERTS, J., held that, on the true construction of the testator's will, his landed property was now subject to an immediate binding trust for sale. The second question of the summons (which is the subject of this report) was whether the proceeds of sale of timber and trees from an estate forming part of the testator's landed property should be treated wholly as capital or partly as capital and partly as income. These proceeds had been treated by the trustee as capital, and it was contended on behalf of the infant remainderman that the court had no jurisdiction in the matter as the will contained a clause whereby the testator directed that it was for the trustees to determine whether any moneys were to be considered as capital or income and that the determination of the trustees was to be conclusive and binding on all persons interested under the will. The beneficiaries interested in income contended that the clause was invalid (a) as it was repugnant to the benefits conferred by the will, and (b) as it was contrary to public policy as an attempt to oust the jurisdiction of the court. G H

J. A. Wolfe for the plaintiff, the Public Trustee.

Sir Lynn Ungood-Thomas, K.C., and *R. L. Edwards* for the first defendant, Lord Newborough (a tenant for life).

Raymond Jennings, K.C., and *H. A. Rose* for the second defendant, Colonel Wynn (a tenant for life) and for the third defendant, *R. C. M. Wynn* (a remainderman).

M. J. Albery for the fourth defendant, *R. V. Wynn* (infant remainderman).

A **DANCKWERTS, J.:** The point I have to decide is concerned with the proceeds of the sale of trees which were cut from the estates of the testator between 1941 and 1948. The testator died on Jan. 20, 1932, and by his will, dated July 31, 1931, he made elaborate provisions which I have held to constitute, at any rate for the present time, an immediate binding trust for sale. The administration of his estate is in the hands of the Public Trustee, the only one of the executors who has proved the will and acted in the trusts. As a result of the provisions of the will there is a conflict between the interests of those interested in capital and those interested in income. Clause 30 of the will is as follows:

C "I authorise and empower my executors until they shall have assented to the bequests contained in this my will or in any codicil hereto and thereafter I authorise and empower my trustees to determine what articles pass under any specific bequest contained in this my will or any codicil hereto and whether any moneys are to be considered as capital or income and how valuations are to be made and/or value determined for any purpose in connection with the trusts and provisions of this my will or any codicil hereto and to apportion blended trust funds and to determine all questions and matters of doubt arising in the execution of the trusts of this my will or any codicil hereto and I declare that every such determination whether made upon a question actually raised or only implied in the acts or proceedings of my executors or trustees shall be conclusive and binding upon all persons interested under this my will or any codicil hereto."

E Counsel for the first defendant, a tenant for life, submits that the principles which apply to the proceeds of sale of trees are perfectly clear, and he has put forward four propositions which are accepted by all parties as being correct. The trustee is a trustee for sale, and the Law of Property Act, 1925, s. 28 (2), directs how the net rents and profits until sale are to be paid and applied,

F "... except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925 . . ."

Section 66 of the Settled Land Act, 1925, deals with the cutting and sale of timber and capitalisation of part of the proceeds. By s. 66 (1) a tenant for life who is impeachable for waste may cut and sell timber ripe for cutting with the consent of the trustees or under an order of the court, and by s. 66 (2):

G "Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits."

Accordingly, so far as timber ripe for cutting is concerned, the matter is settled by the Settled Land Act, 1925, s. 66: see *Re Ridge* (1). The four propositions of law put forward by counsel for the first defendant are as follows. In the case

H of (a) trees which have been planted for the purposes of amenity, the proceeds of sale are capital; (b) timber which is ripe and fit for cutting, three-quarters of the proceeds are capital and one-quarter goes to income; (c) other trees, not being ornamental trees or timber, which are cut when fit for cutting, the proceeds should go to income; and (d) those trees which are cut before their due time for cutting, or windfalls, the proceeds should be allocated between capital and income so as to preserve the rights of the parties in the same manner as they would have existed if there had been no premature sale. Those propositions

are accepted as the principles which apply to the proceeds of sale of the trees which have been cut in this case unless a decision made by the Public Trustee under the terms of cl. 30 of the will regarding the manner in which the proceeds should be dealt with ousts the application of those principles.

The affidavit of Arthur Gilbert Norris, sworn on Apr. 27, 1951, on behalf of the Public Trustee, states, in para. 5, what has been done in regard to the trees in this case:

"Between 1941 and 1948, while the recent war was in progress or during the period of acute shortage which followed it, the Public Trustee sold a considerable quantity of timber and trees from the park at Glynllivon. The net proceeds coming to the hands of the Public Trustee amounted to £7,050 or thereabouts. None, or virtually none, of this wood would have been sold but for the pressure of war or post-war conditions, and, although no compulsory powers were actually put into operation, the Public Trustee feels no doubt that such powers would have been exercised if he had shown any unwillingness to sell. Glynllivon is not a timber estate, and, though trees are sold when ripe, they are not cultivated for that purpose. In the circumstances aforesaid, and as all the trees sold were within the demesne occupied with the house, the trees and timber were then treated as 'amenity trees' and the whole proceeds were treated as capital. There can be no doubt, however, that some of the trees sold were so far from the house that their felling cannot be said to have affected its amenities, and the Public Trustee feels some doubt as to the correctness of his decision and desires to submit the matter for the decision of this honourable court. If a decision is given as to the principles on which the Public Trustee ought to act, he feels reasonably confident that there will be no difficulty in working out its application to the facts of the case."

It is contended by counsel for the fourth defendant, the infant remainderman, that by reason of the terms of cl. 30 of the will the matter has been concluded by the decision of the Public Trustee and that, therefore, there is no room for further argument at the present time. The Public Trustee has referred the matter of principle to the decision of the court, but, if it be the fact that he has already at an earlier date attempted to decide the matter himself in pursuance of cl. 30 and that clause is effective and binding on all the beneficiaries interested under the will, it seems to me that it is not open to the Public Trustee to go back on his decision and leave the matter now to be decided by the court, and that is particularly so, as it seems to me, in the present case, because the clause provides at the end:

"... that every such determination whether made upon a question actually raised or only implied in the acts or proceedings of my executors or trustees shall be conclusive ..."

Therefore, no formal decision, consciously taken as a decision, would appear to be a necessary factor for the matter to have been disposed of finally by the Public Trustee. If, therefore, this clause is binding on all the parties, it appears to me that the matter has been decided by the action of the Public Trustee.

The validity of the clause, however, is attacked by the beneficiaries interested in income. They contend that the clause is wholly invalid because it is repugnant to the benefits conferred by the will or is contrary to public policy as an attempt to oust the jurisdiction of the court. Counsel for the infant remainderman, on the other hand, seeks to uphold the validity of the clause, and he relied on *Re Fenwick's Will Trusts* (2), in which no suggestion was made that a clause, which was on the same general lines as the clause in the will now before me, was invalid and ineffective. In that case, however, only matters of doubt were referred to the trustees' decision by the clause, and the judge decided that the clause did not apply because there was no question of doubt. In further support of his

contention counsel for the infant remainderman pointed out that such a clause as this has appeared for many years in all the well-known books of conveyancing precedents. He referred me to KEY and ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 14th ed., vol. 2, p. 643, PRIDEAUX'S PRECEDENTS IN CONVEYANCING, 23rd ed., vol. 3, p. 767, and DAVIDSON'S CONCISE PRECEDENTS IN CONVEYANCING, 21st ed. (Part II), p. 572. It was also suggested that a clause

A on the same lines was to be found in the Statutory Will Forms, 1925 (S.R. & O., 1925, No. 780), Form 8, para. 7 (c), but it seems to me that the clause does no more than exclude the rules in *Howe v. Earl of Dartmouth* (3) and *Allhusen v. Whittell* (4), which settle the incidence of costs and expenses and other matters between beneficiaries, and it is well established, I think, that a testator may vary the rights of the beneficiaries taking under his will by excluding those rules.

B It may be said that beneficiaries under a will take their gifts under the will purely by the bounty of the testator, and, as they are not entitled to anything of right apart from the provisions of the will, they must take their benefits subject to the conditions which are contained in the will and abide by them. Therefore, it may be said, if that is so, why cannot the testator impose on the beneficiaries conditions which require them to abide by the decision of the trustees

C as to various matters? One's mind naturally turns to provisions which are often found in contracts providing for the decision of disputes by an arbitrator. After considerable doubt the position of an arbitration clause appears to have been settled by *Scott v. Avery* (5), where it was held that such a clause is valid, provided that it is merely a condition precedent to the bringing of proceedings on the contract that there shall have been an arbitration fixing the amounts to

D which the parties are entitled, and, on the other hand, that anything which goes beyond that and attempts to deprive the parties of their right to bring an action is unlawful as an attempt to oust the jurisdiction of the court.

The matter is not entirely devoid of authority, though there are not very many authorities on the question which I have to decide. It appears, for instance, that not all disputes could be referred lawfully to the decision of an arbitrator, and

E that, in particular, in regard to real property the courts were unwilling to allow the jurisdiction of the court to be lessened or impinged on by the decisions of some outside tribunal. As long ago as 1694, in *Philips v. Bury* (6), there is a statement to the effect that the decision of the construction of a will cannot be referred to an arbitration. That case concerned the rights of rectors of Exeter College, Oxford, to the rector's house of the college. In his judgment EYRE, J.,

F said (Skin. 469):

" . . . a man cannot erect a jurisdiction, which shall not be examined, no more than he can appoint by his will, that if any difference arise, that this shall be determined by J.S. and his determination shall be final . . . "

That statement, on its face, seems to me to be contrary to the provisions of the kind which are to be found in cl. 30 of this will.

G In *Re Raven* (7), a decision of WARRINGTON, J., a clause of a will provided that

" . . . if any doubt shall arise in any case to [sic] the identity of the institution intended to benefit the question shall be decided by my trustees whose decision shall be final and binding on all parties."

H It was claimed that the identity of the institution entitled to claim a legacy of £1,000 given to the National Association for the Prevention of Consumption should be decided by the trustees and should not be referred to the decision of the court, but it was held that

" . . . the direction in the will so far as it purported to oust the jurisdiction of the court was void and inoperative (i) on the ground of repugnancy and (ii) as being contrary to public policy."

That decision might be said to be rather an outstanding one which might not apply to somewhat less ambitious circumstances, because, under the terms of that will, the question who was the actual beneficiary was to be referred to the decision of the trustee, but WARRINGTON, J., approved and followed *Massy v. Rogers* (8), an Irish case decided in 1883, which goes much further than *Re Raven* (7) and deals with a much wider clause than that in the will before WARRINGTON, J. It seems to me that *Re Raven* (7) is authority for the proposition that a testator cannot compel the beneficiaries taking under his will to have their rights decided by the trustees of the will. A

The principles on which the law proceeds are explained by the Court of Appeal in *Czarnikow v. Roth, Schmidt & Co.* (9). In that case the contract contained a provision for arbitration, and one of the terms was:

"Neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid, shall require, nor shall they apply to the court to require, any arbitrators to state in the form of a Special Case for the opinion of the court any question of law arising in the course of the reference, but such question of law shall be determined by arbitration in manner herein directed." B

In his judgment SCRUTTON, L.J., said ([1922] 2 K.B. 489): C

"I think it is necessary to add a word about the effect of *Scott v. Avery* (5). I have always understood it to be a decision that while parties cannot agree to oust the jurisdiction of the King's courts, they can agree that no action shall be brought in those courts till the amount of liability has been settled by arbitration. ALDERSON, B., states this as agreed by all parties, and LORD CRANWORTH begins his judgment in the same way. I do not think the language of LORD DUNEDIN in commencing his judgment in *Atlantic Shipping & Trading Co. v. Louis Dreyfus & Co.* (10) can have been meant to impugn the first part of this proposition. The courts always decline to recognise an agreement to refer all disputes to arbitration as compelling them to stay an action, and do so because such an agreement would oust the jurisdiction of the King's courts. I prefer the language of LORD SUMNER, concurred in by LORDS BUCKMASTER and ATKINSON, to the effect that as long as a clause does not exclude the claimant from such recourse to the courts as is always open by virtue of the provisions of the Arbitration Act, 1889, but only requires certain conditions as precedent to a valid claim, it does not oust the jurisdiction. I think that LORD SUMNER would have regarded a clause depriving a claimant of the protection of the Arbitration Act as an ousting of the jurisdiction and unenforceable. And I can conceive some conditions precedent to enforcing a claim which English courts would decline to enforce." D E F

That shows the limitations which are to be imposed even on an arbitration clause in a contract, and it seems to me that, as regards the construction and administration of a will, the policy of the law is still more severe. It seems to me that I am bound to hold, on the authority of *Re Raven* (7), that a provision which refers to the trustees the determination of all questions and matters of doubt arising in the execution of the trusts of a will, and which attempts to make the determination of the trustees conclusive and binding on all persons interested under the will, is void and of no effect, because it is both repugnant to the benefits which are conferred by the will on the beneficiaries and also because it is contrary to public policy as being an attempt to oust the jurisdiction of the court to construe the will and to control the administration of the testator's estate. No doubt, it may be said that it is convenient to have matters as regards the apportionment of capital moneys and the application of moneys in the payment of expenses referred to some informal decision, and that expense may be saved in that way which would be necessarily incurred if the matters had to G H

be referred to the jurisdiction of the court, but, in my view, a clause of this kind has no effect if one attempts to use it so as to prevent the beneficiaries requiring the matter to be decided by the court. So long as the clause is not contested, the beneficiaries may be content to have the matters dealt with by the trustees in the course of their operations in the administration of the estate. The trustees may have applied their minds and carried out their duties in a perfectly proper manner, but it seems to me that any beneficiary is entitled to go to the court to have his rights considered and, if necessary, upheld, and that a testator may not by the provisions of his will exclude the right of the court to decide the matters, even though the trustees have considered them and reached a certain decision. Therefore, in my view, the insertion of a clause of this kind in wills is not very desirable because it is likely to mislead both trustees and beneficiaries as to their true position and right. Accordingly, I come to the conclusion that my right to decide this question is not concluded by anything that has been done by the Public Trustee, and the matter will have to be considered by him according to the principles which have been agreed as being the proper principles of law to apply in this case.

Order accordingly.

Solicitors: *Whitfield, Byrne & Dean*, agents for *Carter, Vincent & Co.*, Caernarvon (for the plaintiff); *Lewis & Lewis and Gisborne & Co.* (for the first defendant); *Robbins, Olivey & Lake*, agents for *Arthur Owen & Co.*, Pwllheli (for the remaining defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

MEEK v. POWELL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 24, 1952.]

Quarter Sessions—Appeal to—Conviction by court of summary jurisdiction under repealed statute—Power of quarter sessions to amend summons—Summary Jurisdiction Act, 1879 (c. 49), s. 31 (1) (vii), as substituted by Summary Jurisdiction (Appeals) Act, 1933 (c. 38), s. 1—Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950 (c. 35), s. 36 (3).

The respondent was convicted by a court of summary jurisdiction on an information charging him with unlawfully selling for human consumption milk to which had been added water, contrary to s. 24 (1) of the Food and Drugs Act, 1938. At the date of the conviction s. 24 (1) had been repealed and replaced by s. 9 (1) of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, which was in the same terms as the earlier section. On an appeal by the respondent to quarter sessions, quarter sessions refused to amend the information and quashed the conviction.

HELD: once there had been a conviction on a defective information the court of summary jurisdiction had no power to amend the information; quarter sessions derived its power to amend the information from s. 31 (1) (vii) of the Summary Jurisdiction Act, 1879 (as substituted by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933), which enabled quarter sessions to exercise any power which the court of summary jurisdiction might have exercised; and, therefore, quarter sessions had no power to amend the information and their decision to quash the respondent's conviction was right.

Per PARKER, J.: "Any document" in s. 36 (3) of the Act of 1950 referred to a document existing at the time that that Act was passed and not to a document which had come into existence subsequently, and, therefore, that sub-section did not apply to cause the reference in the information to s. 24 (1) of the Act of 1938 to be construed as a reference to s. 9 (1) of the Act of 1950.

FOR THE SUMMARY JURISDICTION ACT, 1879, s. 31 (1) (vii), see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 869.

Cases referred to:

- (1) *R. v. Taylor*, (1924), 93 L.J.K.B. 912; 88 J.P. 152; 20 Digest 140, 1146.
- (2) *R. v. Tuttle*, (1929), 140 L.T. 701; Digest Supp.

CASE STATED by Monmouthshire Quarter Sessions.

At a court of summary jurisdiction sitting at Pontypool on informations laid by the appellant, a sampling officer for and on behalf of the Pontypool Urban District Council, the respondent was convicted that on May 10, 1951, he unlawfully sold to the Milk Marketing Board for human consumption milk to which had been added water contrary to the Food and Drugs Act, 1938, s. 24 (1). The respondent appealed to quarter sessions, where it was contended on his behalf that the informations were incurably defective and the convictions were bad because at the time of the convictions s. 24 (1) of the Act of 1938 had been repealed, though it had been re-enacted *ipsissimis verbis* by the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, s. 9 (1). It was contended on behalf of the appellant (i) that the informations were saved by s. 36 (3) of the Act of 1950, and that no amendment of the informations was necessary; (ii) that by pleading to the informations before the court of summary jurisdiction the respondent had waived his right to object to the form or substance thereof; and (iii) that the point taken was unmeritorious, that the court of summary jurisdiction would, in the proper and judicial exercise of its discretion, have amended the informations, had objection been taken to them, and that quarter sessions had the like power and discretion. Quarter sessions allowed the respondent's appeal and quashed the convictions.

Arthur G. Davies for the appellant.

P. E. Underwood for the respondent.

LORD GODDARD, C.J.: BYRNE, J., will give the first judgment.

BYRNE, J.: This is a Case stated by Monmouthshire Quarter Sessions, who allowed the respondent's appeal against two convictions by a court of summary jurisdiction sitting at Pontypool on informations charging that, on May 10, 1951, at Pontypool he unlawfully sold to the Milk Marketing Board for human consumption milk to which had been added water, contrary to the Food and Drugs Act, 1938, s. 24 (1). On Oct. 26, 1950, s. 24 (1) of the Act of 1938 was repealed. The position, therefore, was that a conviction was recorded by petty sessions under a section of a statute which had been repealed. The very words of s. 24 (1) of the Act of 1938 were reproduced in s. 9 (1) of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950.

If a person is charged before a court of summary jurisdiction under a repealed statute, the justices, if the defendant does not object, can amend the summons forthwith, or they can adjourn the case so that the summons may be amended, putting the prosecution on whatever terms they please as the result of the adjournment, or they can dismiss the summons, leaving it to the prosecution in a fresh summons to charge the offence under the correct statute. The powers of quarter sessions on appeal are to be found in the Summary Jurisdiction (Appeals) Act, 1933, which, by s. 1, substitutes the following provisions of the Summary Jurisdiction Act, 1879, s. 31 (1) (vii):

"Quarter sessions may by their order confirm, reverse or vary the decision of the court of summary jurisdiction, or may remit the matter with their opinion thereon to a court of summary jurisdiction acting for the same petty sessional division or place as the court by whom the decision appealed against was given, or may make such other order in the matter as they think just, and by such order exercise any power which the court of summary jurisdiction might have exercised; and any order made by quarter sessions shall have the like effect and may be enforced in the like manner as if it had been made by the court of summary jurisdiction. Quarter sessions may

also make such order as to costs to be paid by either party as they think just."

The question here is whether that paragraph of the sub-section enables quarter sessions on the hearing of an appeal to exercise the power which the justices in petty sessions would have had of amending on the terms I have indicated a summons which was defective. In my view, s. 31 (1) (vii) gives no power to quarter sessions to exercise a power which petty sessions could not exercise because once petty sessions have recorded a conviction on a summons they have no power thereafter to amend the summons. The power of quarter sessions is derived through that of the justices at petty sessions, and it follows that quarter sessions have no power to amend such a summons. What was before quarter sessions in the present case was a conviction under a repealed enactment, and, in my view, that could not be cured under any statutory authority that the justices at quarter sessions had. I am of opinion that this appeal should be dismissed.

LORD GODDARD, C.J.: I agree. If this had been a conviction on an indictment which charged an offence under the wrong section, it seems clear that the Court of Criminal Appeal would have had no option but to quash the conviction although the court of trial would have had power to amend the indictment. That seems to have been decided in *R. v. Taylor* (1) where there was pleaded in an indictment a section which had been repealed and replaced by a section in a later Act and the Court of Criminal Appeal held that, as the wrong section had been mentioned in the indictment, the indictment must be quashed. Contrast that case with *R. v. Tuttle* (2), in which in 1929 a man was charged under s. 21 of the Larceny Act, 1916, with fraudulent conversion in March, 1916. The attention of TALBOT, J. at the trial was called to the fact that s. 21 of the Larceny Act, 1916, was not in force at the time when the conversion was alleged to have taken place, and he allowed an amendment to the indictment by substituting for the section pleaded in the indictment s. 80 of the Larceny Act, 1861, which was in force in March, 1916. The Court of Criminal Appeal upheld the conviction because they held it was within the discretion of the learned judge to allow the amendment, and the defendant was not prejudiced by the mere alteration of the name of the statute. If an indictment mentions the wrong Act and a conviction takes place on that indictment unamended, it is too late to come to the Court of Criminal Appeal and ask them to amend it. The Court of Criminal Appeal must quash the conviction. I do not see any reason why, in the absence of some statutory authority, we should give quarter sessions when they are sitting as a court of appeal larger powers than those which the Court of Criminal Appeal possesses. The reasons given by BYRNE, J., seem to be conclusive of this matter, and I agree the appeal fails.

PARKER, J.: I agree with both judgments delivered, and would only add a word in deference to the argument of counsel for the appellant. His first argument here was that no amendment was necessary as the convictions were good on their face by reason of s. 36 (3) of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950. Section 36 (3) provides:

"Any document referring to any Act or enactment repealed by this Act shall be construed as referring to this Act or the corresponding enactment in this Act."

It seems plain that "any document" in that sub-section must refer to any document existing at the time that that Act was passed, and not a document which has come into existence subsequently. I agree this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *Everett & Tomlin*, Pontypool (for the appellant); *T. D. Jones & Co.*, agents for *R. G. Davies*, Abergavenny (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BRADSHAW v. DAVEY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 24, 1952.]

Rates—Rateable occupation—Yacht mooring.

During the six summer months the ratepayer moored a yacht in a tidal river by means of a mooring which consisted of two anchors connected by a ground chain to which was attached a riding chain, a buoy rope and buoy being attached to the riding chain. The anchors were lowered to the river bed, but were not embedded in the soil. The mooring could be raised to the deck of the yacht, like an ordinary anchor, without the use of a derrick or other machinery. It was taken up each winter and not put down again until the following summer.

HELD: the mooring was to be regarded, not as a fixture, but as a chattel which was used much in the same way as an ordinary ship's anchor, and, therefore, it was not a rateable hereditament.

Cory v. Greenwich (Churchwardens) (1872) (L.R. 7 C.P. 499) and *dictum* of BLACKBURN, J., in *Holland v. Hodgson* (1872) (L.R. 7 C.P. 335), applied.

EDITORIAL NOTE. By the Local Government Act, 1948, s. 33 (1), valuation lists are now to be prepared and amended by valuation officers of the Inland Revenue Commissioners. By s. 37 (4) an appeal from the decision of the valuation officer lies to the local valuation court, but, under s. 50 (1), arbitration is permitted if all persons concerned agree. Under s. 49 (1) of the Act of 1948 and s. 1 (3) (e) of the Lands Tribunal Act, 1949, an appeal from a decision of the valuation court lies to the Lands Tribunal, and by s. 3 (4) and s. 3 (11) of the Act of 1949, the decision of the tribunal is final subject to appeal on a point of law to the Court of Appeal.

AS TO RATEABLE OCCUPATION, see HALSBURY, Hailsham Edn., Vol. 27, p. 351, para. 782; and FOR CASES, see DIGEST, Vol. 38, pp. 426-450, Nos. 10-173.

Cases referred to:

- (1) *Westminster Corpn. v. Southern Ry. Co., Railway Assessment Authority & Smith & Son, Ltd.*, [1936] 2 All E.R. 322; [1936] A.C. 511; 105 L.J.K.B. 537; *sub nom. Re Southern Ry. Co.'s Appeals*, 155 L.T. 33; 100 J.P. 327; Digest Supp.
- (2) *Cory v. Bristow*, (1877), 2 App. Cas. 262; 46 L.J.M.C. 273; 36 L.T. 594; 41 J.P. 709; 38 Digest 451, 178.
- (3) *Holland v. Hodgson*, (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 35 Digest 304, 538.
- (4) *Cory v. Greenwich (Churchwardens)*, (1872), L.R. 7 C.P. 499; 41 L.J.M.C. 142; 27 L.T. 150; 36 J.P. 599; 38 Digest 480, 384.
- (5) *Grant v. Oxford Local Board*, (1868), L.R. 4 Q.B. 9; 38 L.J.M.C. 39; 19 L.T. 378; 33 J.P. 228; 38 Digest 479, 382.
- (6) *Laing (John) & Son, Ltd. v. Kingswood Assessment Area Assessment Committee*, [1949] 1 All E.R. 224; [1949] 1 K.B. 344; 113 J.P. 111; 2nd Digest Supp.

CASE STATED by quarter sessions under the Quarter Sessions Act, 1849, s. 11.

On Jan. 23, 1948, the rating authority for the Fareham Urban District made a proposal for the inclusion in the valuation list of a new hereditament, described as "mooring S.R.H.7 Hamble River", in the sum of £2 gross and £1 rateable value. The ratepayer objected to the proposal, and on Mar. 22, 1948, the Gosport Assessment Committee considered the proposal and the objection and decided to confirm the proposal. The ratepayer appealed to quarter sessions. Under the Local Government Act, 1948, s. 33 (1) (a), and the Local Government Act, 1948 (Appointed Days) Order, 1949 (S.I., 1949, No. 434), made under s. 72 (1)

A and s. 147 (3) of the Act of 1948, the assessment committee ceased to exist on Feb. 1, 1950. On Apr. 14, 1950, in exercise of the power conferred by reg. 5 of the Rating and Valuation (Transitional) Regulations, 1949 (S.I., 1949, No. 2313), made under s. 71 and s. 72 (2) of the Act of 1948, Southampton Quarter Sessions directed that the functions which would have been exercisable by the assessment committee in relation to this matter, had the committee continued in existence, should be exercised by G. H. Davey, the valuation officer appointed by the Inland Revenue Commissioner for the Gosport Valuation Area, who thereby became the respondent in these proceedings in place of the assessment committee. By consent of the parties and by order of PARKER, J., dated Oct. 2, 1951, a Special Case was stated for the opinion of the High Court.

B The ratepayer contended that the mooring was not a rateable hereditament, that there was no rateable occupation by him, and that the mooring should, accordingly, be omitted from the valuation list. The valuation officer contended that the mooring was a rateable hereditament, that the ratepayer was in exclusive beneficial occupation thereof, and that he was correctly rated. The question for the opinion of the court was whether the determination of the assessment committee was correct.

C *Montagu, K.C.*, and *W. L. Roots* for the appellant (the ratepayer).
Scott Henderson, K.C., and *Molony* for the respondent (the valuation officer).

D **LORD GODDARD, C.J.:** This is a Special Case stated under the Quarter Sessions Act, 1849, s. 11, the parties having agreed the facts. The question for our decision is whether a mooring for a boat in the river Hamble, which is a great yachting centre, amounts to a hereditament which can be the subject of assessment for rating purposes.

E By permission of the Southampton Harbour Board a company was allowed to put down some moorings by their ship repairing yard. One of those moorings is used by the appellant, a director of the company, to moor his five-ton cutter during the summer months. The facts, as set out in the Special Case, are as follows:

F "The mooring consists of two Admiralty pattern anchors [*i.e.*, anchors with two flukes], each weighing approximately eighty pounds connected by two lengths $12\frac{1}{2}$ fathoms $\frac{3}{8}$ inch ground chain to the centre of which is attached a riding chain $\frac{5}{16}$ inch in thickness and about eight fathoms in length. A buoy rope and buoy are attached to the chain. A yacht owner must either rent the right to attach to moorings, or, as in the present case, own the necessary cables and weight to provide his own. A mooring as above described is normally laid in the manner of laying two anchors, namely, a laying vessel drops one anchor first, then reverses until she is in a position to lay the second anchor, and then steams half way back to the first anchor, shackles the two anchor cables together and lowers them to the bed of the river by means of the riding chain. No attempt is normally made, and none was made in the case of the particular mooring, to embed or dig the anchors in the soil of the river bed. By the terms of the licence the mooring must be kept secure, which involves the use of anchors and cable of sufficient weight to ensure that the vessel intended to be moored will ride safely and without shifting. This condition of the licence has always been fulfilled. The mooring has been ever since May, 1946, and is primarily used by the five-ton cutter called *Mist*, the property of the appellant. The *Mist* is a cutter rigged sailing vessel some twenty feet in length. She is used for pleasure purposes in and about Southampton Water and is capable of lifting the mooring on deck and has in fact done so. The vessel swings with the tides and never grounds at the mooring. The *Mist* carried ground tackle consisting of one anchor and cable for use when not riding at the mooring. User of the mooring by vessels other than *Mist* is occasional and

occurs only by gratuitous permission of the appellant. The mooring is in use almost continuously during the six summer months, but each winter it is raised and brought to shore for inspection and maintenance. By the terms of the licence the mooring must be replaced at the original site and this requirement has been observed."

This court is not considering the question whether the appellant has an easement or merely a licence. Applying the principles laid down by LORD A
RUSSELL OF KILLOWEN ([1936] 2 All E.R. 329) in *Westminster Corpn. v. Southern Ry. Co.* (1), I will assume that he has a licence, and, therefore, he is a licensee. No doubt, in view of the *Westminster Corpn.* case (1), some of the cases which have been cited to us today would no longer be decided in the same way, or part of the judgments would be held to be wrong. In my opinion, in view of B
the authorities, this court cannot hold that this mooring is a rateable hereditament. It is not for me to say what the Court of Appeal can do, but I very much doubt whether any court, except the House of Lords, could hold that it is rateable. There are several cases on this point, culminating in *Cory v. Bristow* (2). First there is *Holland v. Hodgson* (3), which is a decision of the Exchequer Chamber, and, therefore, binding on this court. BLACKBURN, J., delivering the judgment of the court, said (L.R. 7 C.P. 335): C

"... an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, D
even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that E
they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and, that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel." F

That decision is well known because it is often cited on the question whether certain things are to be regarded as fixtures or not. Applying the test laid down by BLACKBURN, J., I should say that the circumstances here show that the mooring was always intended to be a chattel. It is not one of those heavy moorings which are firmly fixed and would require derricks and elaborate machinery to remove. It can be raised and carried on the deck of a five-ton cutter, and it is taken up every year for the purpose of maintenance and inspection. The fact that it is taken up in the winter months and not put down again until the summer months seems to indicate that it is not a fixture, but is to be regarded as a chattel which does no more than, and is used in the same way as, an anchor which a ship carries, except that it is left in the bed of the river when the ship puts out so that she can fasten to a mooring and slip her mooring instead of having to put down or haul up the anchor every time she comes into or leaves the river. G
H

No doubt, part of the judgment of WILLES, J., in *Cory v. Greenwich (Churchwardens)* (4) would not now be upheld, but the part with which we are concerned here has, I think, been approved by the House of Lords in *Cory v. Bristow* (2). In *Cory v. Greenwich (Churchwardens)* (4) a coal derrick was moored in the Thames

" . . . by two single-fluked anchors on the side nearest the shore, and by two stones on the channel side, and by two stream-anchors one at the head and the other at the stern. The anchors and stones (which could be hauled on board by the machinery on the derrick) were merely dropped into the river, no force being used for the purpose of fastening them, but only a small quantity of ballast being removed in the bed of the river to enable the stones to lie flat."

A

It will be observed that the moorings in that case were of an even more weighty kind than the mooring in the case now before us. If they were hauled up, they had to be hauled up by a derrick, which, of course, a five-ton cutter would not carry. Also, a small quantity of ballast was removed from the bed of the river to enable the stones to lie flat. WILLES, J., described the moorings, and said

B

(L.R. 7 C.P. 503):

"The anchors and stones can be hauled on board the derrick by her own machinery, and she may be moved to any other part of the river. All that that statement amounts to is, that the derrick is anchored at the spot where she floats. It is not like an immoveable thing that is susceptible of occupation; the derrick is fastened to things which are accessories to herself, and which are moveable things, whether silted over or not, and which constitute no more an occupation of any portion of the bed of the river than would the anchor of any other vessel."

C

That case came under review five years later in the House of Lords in *Cory v. Bristow* (2). Referring to the facts of the *Greenwich* case (4), LORD CAIRNS, L.C., said (2 App. Cas. 271):

D

"There was a derrick which, as regards that which was above water, appears to have been of the same character as those which I have just mentioned, and it was moored in the river, but it was moored simply in this way . . ."

E

After describing the mooring in the *Greenwich* case (4), LORD CAIRNS, L.C., said (*ibid.*):

"My Lords, under these circumstances, it was held that the moorings were not immoveable from the bed of the river, that they were only, as WILLES, J., expressed it, 'part of the equipment of the vessel itself', and that therefore there were no moorings which could be said to be fixed to the soil of the river and to be occupied as part of the soil by the plaintiffs. That, my Lords, I think, puts aside that authority, and will enable your Lordships, having regard to the facts which are found in the present case, to arrive, as I think you will, without hesitation, at the conclusion that you have here moorings which are clearly fixed into and bedded in the soil of the river Thames, just as much as if piles had been driven ten or twenty feet deep into the soil, and that if you find any person in occupation of those moorings, and that occupation is a beneficial occupation, the person so occupying is occupying hereditaments within the statutes which create chargeability to the assessment to the poor."

F

G

LORD HATHERLEY said (*ibid.*, 278):

H

"Then the question arises, are the Messrs. Cory the owners in the sense of being occupiers of land situate within the parish? My Lords, I can have no doubt upon that point when I look at the nature and the character of these mooring chains. They are described in the papers before us, and the case is thereby at once differed from two or three of the cases which have been cited, one being with reference to a floating dock, and another being with reference to an arrangement by which these mooring chains were sunk

as they were sunk here, but fixed so far less than here, that they were capable of being moved like other anchors, whereas here they were sunk and fixed, and would have to be hauled up by means of machinery in a derrick. That alters the present case from the case of a floating dock which is, as it were, a vessel floating about upon the water, and which cannot be said to have any immoveability whatever in any given parish, and so can hardly be subject to rates. The circumstance in the other case that the derrick itself, by its own instrumentality, could haul up the stones and mooring chains just as it could any anchor, reduced it again to the case of a ship, of which it could not be predicated that it occupied land situated within a parish. But here we are told by the case itself that the derrick cannot be removed at all except by slipping its chains and cables, because the stones and the rest of the apparatus are so fixed in the bed of the river as to prevent their being hauled up or got up, except by some much more energetic mode of removal."

LORD O'HAGAN's speech (*ibid.*, 279) was to the same effect, as was LORD BLACKBURN's (*ibid.*, 281). LORD BLACKBURN's speech was the more valuable because he was a party to the decision in *Holland's* case (3) and was not a party to the decision in *Cory v. Greenwich (Churchwardens)* (4). I can find no indication in the speeches of any of the noble and learned Lords who decided *Cory v. Bristow* (2) that they differed in any way from the decision to which the Court of Common Pleas had come in *Cory v. Greenwich (Churchwardens)* (4), and, as I read their opinions, I think they thought that the *Greenwich* case (4) was rightly decided. If we held that the mooring in the case now before us was rateable, our decision would be in conflict with *Cory v. Greenwich (Churchwardens)* (4), approved by the House of Lords in *Cory v. Bristow* (2). Therefore, I think we are bound to answer the question submitted to us in this case by saying that the determination of the assessment committee was incorrect and the mooring is not a rateable hereditament. The appellant will have the costs of the case.

BYRNE, J.: I agree.

PARKER, J.: I agree.

Case remitted with opinion of court.

Solicitors: *Layton & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

YOUNG v. BUCKLES.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), January 15, 1952.]

Building Control—Licence—Inclusion of architect's fees in amount authorised by licence—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 56A (4) (6).

The plaintiff, an architect, claimed £48 10s. for professional work in respect of building operations carried out at the defendant's premises. The building licence had been granted for an expenditure of £525, but work costing £700 was executed. At the date of the issue of the plaint the defendant had paid £472 to the contractors, and so, had the plaintiff's claim been paid, the licensed amount would not have been exceeded. The defendant contended (i) that, by virtue of the Defence (General) Regulations, 1939, reg. 56A (4), architect's fees were included in the sum allowed to be spent under the licence, and that, as the licence limit had been exceeded, the plaintiff's claim was unenforceable: and (ii) that an

architect who supervised the execution of an illegal building contract was guilty of an offence under the Defence (General) Regulations, reg. 56A (6), and could not recover his fees.

HELD: (i) assuming that the licensed amount included the plaintiff's fees, at the date of the issue of the plaint payment of the amount claimed, added to the sums already paid, would not have caused the amount limited by the licence to be exceeded; illegality only attached to the excess over the licensed amount, and a contract was only illegal in so far as it involved a claim for payment of a sum larger than that for which the licence was granted; and, therefore, when the plaintiff issued his plaint he had a cause of action, was not a party to an illegal contract, and was entitled to the sum claimed.

Dennis & Co., Ltd. v. Munn ([1949] 1 All E.R. 616), applied.

(ii) in any event, services as an architect such as those rendered by the plaintiff were not "services used for the purpose of a building operation" within the meaning of the Defence (General) Regulations, reg. 56A, and, therefore, fees payable to architects or other professional persons in connection with building operations were not included in the amount of expenditure permitted by the licence.

FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 56A, see HALSBURY'S STATUTES, Vol. 40, p. 1392.

Cases referred to:

(1) *Dennis & Co., Ltd. v. Munn*, [1949] 1 All E.R. 616; [1949] 2 K.B. 327; [1949] L.J.R. 857; 2nd Digest Supp.

(2) *Jamieson v. Watt's Trustee* 1950 S.C. 265; 2nd Digest Supp.

(3) *Brightman & Co. v. Tate*, [1919] 1 K.B. 463; 88 L.J.K.B. 921; 120 L.T. 512; 11 Digest 551, 537.

APPEAL by the defendant from a decision of His Honour JUDGE CROSTHWAITE, sitting at Liverpool County Court, dated Sept. 17, 1951, giving judgment for the plaintiff for £48 10s. on a claim for professional fees and work done as an architect in connection with building operations at the defendant's premises. By her defence the defendant denied that she had ever appointed the plaintiff to act for her in a professional capacity and said that the work was carried out by building contractors. In the Court of Appeal these defences were not raised, and the defendant relied on the contention that the plaintiff was not entitled to recover £48 10s. for professional services since the licence in respect of the building work covered fees for architects and surveyors, work had been done in excess of the £525 for which the licence was granted, and, therefore, the plaintiff's claim was unenforceable.

Youds for the defendant.

Rigg for the plaintiff.

SIR RAYMOND EVERSHERD, M.R.: The defendant, Mrs. Alice Buckles, at all material dates appears to have been the proprietor of premises known as the Boundary Social Club, Blundellsands. The present proceedings arise out of work which was done on those premises on her behalf, and, in particular, relate to certain fees charged by the plaintiff as architect and surveyor for his professional services in connection with that work.

The writ was issued on Jan. 30, 1951. The claim is for £48 10s., and on the writ there is an indorsement, giving the following particulars:

"To professional charges for preparing full set of plans for the alterations to the club, preparing specifications, submitting the same to local authority and obtaining their approval, supervising the carrying out of the said work, registering the club with the Central Land Board *re* future development charges, and receiving their acknowledgment, and work done by the plaintiff as a surveyor."

Further particulars were asked of the charges, and they were given. From those particulars it appears that the sum of £48 10s. is, in fact, made up of three items—(i) A charge of eight per cent. on £525 for preparing and drawing plans for the alterations and obtaining licences, £42. The figure of £525 is the amount for which a licence was granted by the Ministry of Works. (ii) A charge of £2 2s. for making an application under the Town and Country Planning Act, 1947, about development charges. (iii) A charge of £4 8s., representing five per cent. on a sum of £88 8s. paid for supplying and fixing a beer pump. The value of the work which eventually was carried out, and for which the plaintiff from time to time granted certificates, was in all some £700, £175 at least in excess of the £525 which was the amount for which a licence was given under the Defence (General) Regulations, 1939. Because of that excess the defendant contends that the plaintiff is now disabled from making any claim.

There have been several cases before the courts of this character. I cannot look altogether sympathetically on a case made by persons who take the benefit of work done on their premises, and then plead illegality under the Defence (General) Regulations so that they may have that benefit without the obligation of paying for it. Still, that is beside the point, for Parliament has made it plain that, save with the appropriate licences, it is not lawful to spend more than certain sums of money on building operations, and Parliament has taken that step to conserve for the national good such resources in the way of building labour and materials as are available. If people embark on building operations which offend against the prohibition which Parliament has imposed, the general principle of law must be applied, *viz.*, that a person making a claim based on a contract tainted with illegality cannot recover in these courts.

The question here is whether the claim for professional charges which the plaintiff has made falls within that description, *i.e.*, whether it is tainted with illegality consisting of an infringement of the Defence (General) Regulations. The licence was granted for £525, and before the plaintiff and the defendant came into any kind of commercial contact the defendant appears to have engaged the services of another professional man as a surveyor to advise her on the work which should be done to improve the attractions of the club. That gentleman's estimate came to a sum of over £1,000. For that no licence was obtainable, and the whole matter fell to the ground. Later, the defendant appears to have made the acquaintance of the plaintiff and also of a building firm which has the unusual name of the El Kebir Building Co., and the plaintiff and this firm thought that the work could be done for £535. The matter proceeded on that footing, an application for a licence for that sum was made by the plaintiff, and the Ministry of Works in due course issued a licence for £525, dated Dec. 16, 1948, and addressed to the defendant. According to the evidence the work carried out cost £700 or more, but at the date when the plaint was issued, namely, Jan. 30, 1951, the plaintiff confined his claim, as appears from the nature of it (subject to one point with which I will deal later) to his professional charges in respect of the sum of £525 for which a licence had been obtained. At that date the defendant had paid £425 to the builders and, perhaps, £47 to the electricians. It is clear, therefore, that she had not then paid more than the total of those two sums, £472, and that, if the plaintiff's claim had been met, she still would not have paid more than £525 in all.

The significance of those facts appears to me to be as follows. The cases which have been cited to us, such as *Dennis & Co., Ltd. v. Munn* (1), in this court, and the Scottish case of *Jamieson v. Watt's Trustee* (2), seem to show that where under the Defence (General) Regulations work is licensed to cost a certain figure, £x, but work is, in fact, carried out so that the total cost or value is £x plus £y, the illegality only attaches to the excess. In other words, the contract is only illegal in so far as it involves a claim for a payment of a larger figure than that for which the licence was granted. If that be right, then at the date when the plaint was issued (and assuming in favour of the defendant the point

which I must come to discuss presently, namely, that the £525 comprehended the fees due to the architect) it could not be said that the amount claimed plus any sum already paid involved any excess of the amount allowed by the licence. If after the plaintiff issued the plaint the defendant paid other persons, it would be a strange result that the plaintiff's position was thereby worsened. For these reasons, therefore, on any view of it, it seems to me that when the plaintiff issued his plaint he had a good cause of action and was entitled to the sum which he claimed without involving himself in being party to, or enforcing, a contract which had then become illegal.

If that view be not correct, it becomes necessary to consider the main point which counsel for the defendant argued both here and below, namely, that fees payable to architects or other professional persons in connection with building operations are included in and cannot be paid so as to create an excess over the sum for which the Ministry of Works may grant a licence. Such a result would be surprising if it were correct. A man may engage the services of professional men to advise him in regard to his property in many ways. As JENKINS, L.J., pointed out in the argument, a man may engage the services of the most eminent architect in the country to design for him a palace or a cathedral, and the obvious fact that no licence would be granted for that work could not affect the right of the architect to claim payment for professional services. Similarly, a man who is considering doing work on his property may well have occasion to take the advice of a lawyer whether the work, if carried out in a particular way, would be liable to involve the owner in any difficulties with neighbours, *e.g.*, as regards infringements of rights of way. It is easy to imagine many cases in which a building owner may take professional advice in regard to work which he contemplates carrying out, for which services, in the ordinary way, he would be liable to pay the proper professional fees, and it would be surprising if the Defence (General) Regulations had the effect that professional charges of that character which a building owner had rendered himself liable to pay were deemed to be covered by the amount of any licence granted, so that officials of the Ministry of Works were in a position to say how much was to be paid to lawyers, surveyors, and other professional men for the services they had rendered. Yet such, as I understand it, is the contention of the defendant.

The question must turn on the effect of the language used in the relevant part of reg. 56A (4), which is as follows:

"In computing, for the purposes of this regulation, the cost of an operation or of any work, regard shall be had to the value of any goods or services used for the purposes thereof, notwithstanding that the provision thereof did not involve the expenditure of money solely or primarily for the purpose of that particular operation or work."

It is the contention of the defendant that, according to the ordinary usage of our tongue, the work done by the plaintiff as specified in the particulars of claim was "services", and so far I agree. It is further said that they were "services used for the purposes of the operation." It is at that point that I disagree. If it had been intended by Parliament that in computing the cost of an operation there should be included the amount of fees for services rendered in connection therewith, that, or something like it, would have been the obvious form of words to use. The language is quite different. It does not say that there must be taken into account the amount of the charges. It says that regard shall be had to the value of the services. The services are not described as services rendered in connection with the operation, but as services used for the purposes of the operation. Applying the test of ordinary sense to the language, it seems to me that the services rendered by the plaintiff to the defendant in this case cannot be described as services used for the purposes of a building operation. Nor do I think that the earlier words "regard shall be had to the value of those

services" are in the least apt if the intention was that an architect's normal scale of fees should be included in the amount of the licence. I think the clue to the sense and intendment of this paragraph is found in the following words:

"notwithstanding that the provision of the goods and services did not involve the expenditure of money solely or primarily for the purposes of that particular operation or work."

To my mind, but without attempting an exhaustive statement of what the paragraph includes, it is directed in the ordinary way to cases in which, for the purpose of executing the work, use is made of some goods or services which are also being made use of for the purpose of some other work so that there might be no separate charge as regards the particular work for the use of those goods or services and it is necessary to have regard to the value of those services so far as they are used for the purpose in hand. That is borne out by the fact that in reg. 56A (6) special provision is made for dealing with a professional man, as distinct from the builder, who may be party to the execution of some illegal contract, specific reference being made to architects, engineers, and other persons employed in an advisory or supervisory capacity in connection with the execution of the operation, a form of words which is obviously suitable and appropriate to professional men and which is absent from reg. 56A (4). In my judgment, therefore, the fees which the plaintiff was properly entitled to charge in respect of the work specified in the specification are not to be taken as having been comprehended in the licence figure of £525. I do not think that the licence itself is consistent with the other point of view.

That, however, is not quite the end of the matter. I have already said that the figure of £48 10s. includes the item of five per cent. on £88 8s. 4d., the cost of supplying and fixing a beer pump. It might be said in view of the particulars that that was a percentage charge on something, on the face of it, additional to the figure of £525, and, therefore, on the face of it, tainted with the illegality of an excess over the licence figure. The answer, I think, to that suggestion is that there is no sufficient evidence on which the court could come to any view on that matter save only this, that, according to the specification which I have read, the beer pump was included in the total specification for which the licence for £525 was granted. So that on the evidence it would appear that the plaintiff charged eight per cent. on the whole work, including the installation of the beer pump, and an additional five per cent. on the beer pump itself. Whether he was entitled to charge two percentages on that particular item must, perhaps, be open to doubt, though no one has challenged that fact or figure, and, therefore, it must be taken that the sum charged, £48 10s., was a proper charge. Indeed, the county court judge stated in his judgment that the charges as such were proper, and no one has suggested the contrary. The sum is small in any case, and, therefore, I need take no further time on it.

There remains a final point. Even though the argument based on reg. 56A (4), which the defendant has put before us, is erroneous, it might be said that this plaintiff had, as the architect concerned, supervised the execution of the work, granting certificates in respect of it considerably in excess of the licence figure, and, therefore, must be taken as having been, if not a party to the illegality, at least in some measure responsible for the doing of work which was illegal, and that, having so involved himself in an illegality, he cannot now come to the court and make any claim in respect of any professional services which he rendered to the defendant. The present case, however, seems to me to be of a different character. In the first place, I have considerable doubt whether the point was ever taken in the court below, and I have no doubt that it is not taken in the notice of appeal. It certainly was not pleaded. Those are matters which might be cured, and if there was an obvious illegality it might be the duty of the court to take the point in any case, but it is noted here that the charge which the plaintiff has made is limited to the percentage charges in

relation only to such a sum as was properly covered by the licence. It is true that he may have issued certificates for other work, but there is no evidence of the circumstances in which that additional work was done, save only the statement of the plaintiff himself that the defendant ordered this additional work. Even if this matter were open on the pleadings and had been taken in the notice of appeal or otherwise, I am of opinion that it could not avail the defendant, having regard to the fact that the plaintiff has put on his claim a limitation to a professional charge relating exclusively to so much of the work identified in terms of cost as was covered by the licence. The result is that I think the judge correctly concluded this matter.

On the facts in this case, there being no evidence with regard to the circumstances in which the excess came to be put in hand, I think that is a correct and concise summary of the situation. I think the plaintiff was entitled to recover his professional charges, and the defendant had no just or lawful excuse for declining to pay them. I think the appeal ought to be dismissed.

JENKINS, L.J.: I agree that this appeal should fail on both the grounds stated by SIR RAYMOND EVERSHED, M.R. I may add that the construction placed by my Lord on reg. 56A (4)—the construction which excludes from the application of the regulation to such matters as professional fees paid to an architect or surveyor employed by a building owner—finds some support in the form of the application for a licence provided by the Ministry of Works and in the form of the licence itself. The application contains para. 4 which says: "Full description of work for which licence is required (attach specification if available)", and that is answered: "As per attached specification". The specification itself contains no reference at all to any surveyor's fees payable by the building owner. The next relevant paragraph in the application is para. 7: "Estimated cost of proposed work (include value of all materials new or second-hand) and labour", and that is answered "£535". The direction in para. 7 of the application thus, on the face of it, is not designed to elicit from the applicant anything more than the cost of the proposed work, including the value of all materials, new or second-hand, and labour. If it had been intended that the figure inserted in answer to para. 7 was to provide something for an architect's or a surveyor's fees payable by the building owner, I think it would inevitably have been necessary to include a reference to those matters in the form. As it is, I think the £535 was a figure put forward as the cost of the matters mentioned in para. 7 and nothing else. As to the licence, this was expressed to be granted to carry out the work mentioned at a total cost not exceeding £525 in accordance with the application dated Dec. 1, 1948, and specification and drawing submitted therewith. The authorised cost was £525 as compared with a sum of £535 asked for in the application, but it is plain, so far as the documents are concerned, that the licence purported to authorise the £525 as representing the estimated cost of the proposed work, including the value of all materials, new or second-hand, and labour, but not including any such matter as any fees which the building owner might pay to an architect or to a surveyor. I agree that the appeal fails.

HODSON, L.J.: The authorities to which our attention has been drawn, namely, *Brightman & Co. v. Tate* (3), *Dennis & Co., Ltd. v. Munn* (1), and *Jamieson v. Watt's Trustee* (2), indicate that, in so far as the licence is not exceeded, the contract may be legal. At the date of the issue of the plaint it appears that the sum of £525 had not been exceeded, and there was room for the plaintiff's claim of £48 10s. to be met before the total of £525 was reached. In those circumstances, there is an answer to the defendant's case. If that conclusion is wrong, it is necessary to consider the construction of reg. 56A (4) of the Defence (General) Regulations, 1939. Counsel for the defendant argued that the words "regard shall be had to the value of any goods or services used for the purposes

thereof" (that is, the cost of a building operation) must be taken to cover the professional services of a surveyor. Taken in isolation, I think there is force in that argument, but when the whole of the regulation is read, particularly sub-para. (1), which deals with the execution of the operation, sub-para. (2), which refers to the carrying out of the work or maintenance work on a building, and sub-para. (6), which draws a distinction between the work of architects or other persons employed in an advisory capacity and persons who actually execute the operation, it seems to me that the contention of the plaintiff is right. Regulation 56A (4) is not apt to bring into the range of control some new type of work, and the object is to extend the control of the total cost of the operation to work done in the operation concerned, and in that connection the value of the goods and services used has to be regarded. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co.*, agents for *M. J. Canter & Co.*, Liverpool (for the defendant); *Woodcock, Ryland & Co.*, agents for *Grundy & Cartwright*, Manchester (for the plaintiff).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

GOLDER (INSPECTOR OF TAXES) v. GREAT BOULDER PROPRIETARY GOLD MINES, LTD.

[CHANCERY DIVISION (Donovan, J., sitting as an additional judge of the Division), January 14, 15, 1952.]

Income Tax—Deduction against profits—Sum paid to settle action for fraud in conduct of trade—Fraud not proved or admitted—Income Tax Act, 1918 (c. 40), sched. D, Cases I and II, r. 3 (a).

Actions were begun against the taxpayers, a company carrying on the business of company promotion, for damages for fraud in relation to prospectuses issued by companies which they had promoted and for compensation under the Companies Act, 1929. The company did not admit the truth of the allegations, but, having in mind the heavy costs which would be payable even if they defended the actions successfully and the damages as well as additional costs which would be payable if they lost, they settled the claims for a payment of £25,000, having incurred £2,500 in legal costs. The company having sought to deduct both those sums in computing their profits for assessment to income tax,

HELD: the fraud of the company not having been either admitted or proved, it could not be said that the payment in settlement of the action and the payment of the costs were in the nature of payments in respect of damages for fraud; they were payments to avoid serious liability in costs or damages by reason of a claim arising out of the company's trade as company promoters; and evidence of those facts was sufficient to justify a finding by the Special Commissioners that both the sum paid in settlement and the costs incidental thereto were disbursements made wholly and exclusively for the purposes of the trade within the meaning of r. 3 (a) of Cases I and II of sched. D to the Income Tax Act, 1918, and so were deductible in computing the company's profits for income tax purposes.

Inland Revenue Comrs. v. Von Glehn ([1920] 2 K.B. 553), distinguished.

AS TO DISBURSEMENTS OR EXPENSES WHOLLY OR EXCLUSIVELY LAID OUT, see *HALSBURY*, Hailsham Edn., Vol. 17, pp. 152-156, paras. 312-320; and FOR CASES, see *DIGEST*, Vol. 28, pp. 42-45, Nos. 215-226.

Cases referred to:

(1) *Inland Revenue Comrs. v. Von Glehn*, [1920] 2 K.B. 553; 89 L.J.K.B. 590; 123 L.T. 338; 12 Tax Cas. 232; 28 Digest 46, 236.

(2) *Thomson (Archibald), Black & Co., Ltd. v. Inland Revenue*, 1919 S.C. 289; 56 Sc.L.R. 185; 7 Tax Cas. 158; 28 Digest 45, o.

CASE STATED by the Special Commissioners of Income Tax.

Before the Special Commissioners the taxpayers, Great Boulder Proprietary Gold Mines, Ltd., contended that payments made by them to settle actions for damages for fraud and compensation under the Companies Act, 1929, and the payment of legal costs incidental thereto, were either money wholly and exclusively laid out or expended for the purposes of its trade of company promotion, within r. 3 (a) of Cases I and II of sched. D, or a loss arising out of the trade, within r. 3 (e). The Crown contended that the taxpayers were not engaged in any trade of company promotion, or that, if they were so engaged, the moneys were neither expended wholly and exclusively for the purposes of the trade nor were a loss arising out of the trade. Evidence was given that the taxpayers had been assessed to tax on profits from the promotion of two of the three companies with which the actions were concerned, and the Special Commissioners found that they were engaged in the trade of company promoting and that the money was wholly and exclusively laid out or expended for the purposes of the trade. On appeal the Crown abandoned its contention that the taxpayers were not engaged in the trade of company promotion.

Heyworth Talbot, K.C., and *Sir Reginald Hills* for the Crown.
F. N. Bucher for the taxpayers.

DONOVAN, J.: In April, 1934, the taxpayers sold to a newly formed English company, known as Southern Cross Gold Development, Ltd., shares in a Western Australian gold mining company and also a gold mining reservation in Western Australia, both of which assets the taxpayers had recently bought from another concern known as Australian Machinery and Investment, Ltd.—or A.M.I. for short. On this transaction of purchase and re-sale the taxpayers made a profit of £10,000 on which they paid income tax as being a trading profit. In July, 1934, the taxpayers sold to another newly formed English company, known as Murchison Gold Development Co., Ltd., shares in another Western Australian gold mining company, which it had likewise recently bought from A.M.I. On this transaction of purchase and re-sale the taxpayers made a profit of £17,500 and paid income tax on this also as being a trading profit. In July, 1935, the taxpayers sold the investments which it held in certain gold mining concerns to another English company, also newly formed and known as the Great Boulder Mining and Finance, Ltd. These investments included shares in Southern Cross Development, Ltd., and Murchison Gold Development, Ltd., and options to take further shares in those companies, all of which formed part of the purchase consideration moving to the taxpayers when they sold assets to those two companies in 1934, as I have already described. On the transaction of sale completed with the Great Boulder Mining and Finance Company in July, 1935, it does not appear, says the Case Stated, that the taxpayers made any profit.

The taxpayers promoted the first two of the aforesaid three companies and took part in the promotion of the third. The circumstances of these promotions, in particular the contents of the prospectuses, were such as to lead to serious allegations being made against the taxpayers and others and to a legal action, the purpose of which was to recover damages from the taxpayers among others. In a word, it was alleged that the taxpayers, as promoters, or one of the promoters, of the three companies in question, had been guilty of deceit and fraud. The action was at the instance, among others, of persons who had subscribed for shares in the three newly formed companies, Southern Cross, Murchison, and Great Boulder Mining and Finance, on the faith of the respective prospectuses. They alleged that those prospectuses were deliberately misleading. There was also a claim for compensation for breach of statutory duty by the taxpayers

under the Companies Act, 1949. The taxpayers, who were merely one of a number of defendants to the action, took legal advice and were told that it would be wise, if possible, to settle. The taxpayers took that advice, and in 1945 they paid £25,000 to settle. In addition, they had to disburse some £2,500 in costs. The question now is whether the taxpayers are entitled to deduct these disbursements when computing their profits for income tax purposes, the year affected being the fiscal year 1945-46 or 1946-47. The Special Commissioners have answered this question in the affirmative, and against that decision the Crown now appeals.

The Special Commissioners reached their conclusion in favour of the taxpayers in this way. They found, first of all, that the transactions whereby the taxpayers promoted or assisted in promoting the three companies, Southern Cross, Murchison, and Great Boulder Mining and Finance, were, contrary to the contention of the Crown, trading transactions. Their words are these:

"... We have come to the conclusion, on considering all the facts, that they were promotions forming part of the taxpayers' trade, and that the profits therefrom fell to be included—as they were in fact included—in the computation of the taxpayers' liability under Case I of sched. D."

When the Special Commissioners speak of profits from promotions they are obviously referring to the profits which arose when the taxpayers sold assets they had recently acquired to Southern Cross and to Murchison. The commissioners then went on to find that the £25,000 and the attendant legal costs were moneys wholly and exclusively expended for the purposes of the trade and so were deductible in computing the taxpayers' profits for income tax purposes. The commissioners do not specifically identify the purposes for which these payments were made. The decision that the taxpayers were engaged in the promotion of other companies as a trade, and that the profits of £10,000 and £17,500 were profits of that trade, is not now contested, but it is argued that the taxpayers are not entitled to deduct the £25,000 and attendant legal costs on the ground that those sums were not moneys wholly and exclusively expended for the purposes of the trade in question, as is required by r. 3 of Cases I and II of sched. D.

The first ground of this argument is that the £25,000 was really damages paid by the company for fraud and deceit on its own part or was akin to such damages, and that it is no part of its trading to be fraudulent and deceitful. If it is fraudulent and deceitful, then the penalty it pays by way of damages cannot be deducted as a trading expense any more than could the penalty in *Inland Revenue Comrs. v. Von Glehn* (1). In that case the penalty was incurred through trading with the enemy. The answer to this argument is that the £25,000 was not damages for deceit or fraud, and I cannot say it is akin to such damages without ignoring these circumstances:—(i) that the allegations against the taxpayers, although serious and weighty, were never admitted or proved, and (ii) that in express terms the £25,000 was paid in return for an undertaking on the part of the plaintiffs not to sue or continue to sue the taxpayers. It is not possible in these circumstances to assimilate the £25,000 to the penalty paid by *Von Glehn*. The payment of the £25,000 in no way proved the alleged guilt of the taxpayers, which must remain an undetermined question. It was not a penalty for some proved infraction of the law. One legal adviser of the taxpayers, indeed, took the view that the allegations of fraud against them would be unlikely to succeed. For the taxpayers it was argued that, even were the £25,000 damages or akin to damages for fraud and deceit, they would still be entitled to deduct that sum in computing their taxable profits, but as this question, in my view, does not arise, I say nothing about it.

I see no difficulty in the case. The question whether a sum is or is not wholly and exclusively laid out for the purposes of the trade is a question of fact, and, if there were evidence to support the commissioners' finding, I cannot interfere.

Here they had the following evidence. A trade of company promotion was carried on and profits earned by the sale of assets to the company which had been promoted. There was no evidence establishing that such a trade had been abandoned. Arising out of that trade a claim for damages was made against the company which would seriously affect its reputation as a company promoter if the claim succeeded. The company settled with its adversaries for reasons thus described by a director of the company:

A "In seeking a settlement, the board had had in mind the very large and serious liability in costs with which the company would be faced, even if it won the actions, and in costs plus damages, if it lost. Those had been the main considerations. It was a question of saving money, and they had thought it cheaper to settle for £25,000 than to run a risk."

B With that evidence before them the commissioners held that the £25,000 and the attendant costs were disbursements made wholly and exclusively for the purposes of the trade. I cannot say they were bound in law to hold the other way, and I, therefore, am unable to sustain the Crown's appeal.

Appeal dismissed with costs.

C Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Linklaters & Paines* (for the company).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

D *Re HOWELL (deceased). DRURY v. FLETCHER AND OTHERS.*

[CHANCERY DIVISION (Vaisey, J.), January 24, 1952.]

Estate Duty—Incidence—Real property settled by will—Direction that "all devises . . . shall be enjoyed free of death duties"—Payment out of property in respect of which charged.

E By her will a testatrix *inter alia* gave a freehold dwelling-house to her trustees on trust to pay the income arising therefrom to her niece A., and after her death in trust for A.'s son, B., absolutely. She directed "that all legacies and bequests both pecuniary and specific and all devises given by this my will or any codicil hereto (except the gift of residue) shall be enjoyed free of death duties." She gave all the residue of her estate to her trustees "in trust (after paying my debts funeral and testamentary expenses and death duties) for my nieces in equal shares absolutely." On the question of the incidence of the estate duty payable on the death of A.,

F **G** **H** **Held:** partly as a matter of convenience, the court tended to find that future duties were not payable out of the residuary estate unless there was in the will a clear indication to the contrary; in the present case the testatrix had not indicated in unmistakable terms that the distribution of her residuary estate was to be deferred in order to provide for the future estate duty; and, therefore, that duty would be payable out of the property in respect of which it was charged.

Re Laidlaw ([1930] 2 Ch. 392) and *Re Shepherd* ([1948] 2 All E.R. 932), applied.

Re Stoddart ([1916] 2 Ch. 444), not applied.

AS TO "FREE OF DUTY" PROVISIONS IN WILLS, see HALSBURY, Hailsham Edn., Vol. 13, p. 299, para. 312; and FOR CASES, see DIGEST, Vol. 21, pp. 35-38, Nos. 219-243.

Cases referred to:

(1) *Re Stoddart*, [1916] 2 Ch. 444; 86 L.J.Ch. 29; 115 L.T. 540; 21 Digest 37, 232.

- (2) *Re Palmer*, [1916] 2 Ch. 391; 85 L.J.Ch. 577; 115 L.T. 57; 21 Digest 35, 220.
- (3) *Re Parker*, (1917), 86 L.J.Ch. 766; 117 L.T. 422; 21 Digest 37, 233.
- (4) *Re D'Oyly*, [1917] 1 Ch. 556; 86 L.J.Ch. 373; 116 L.T. 442; 21 Digest 35, 225.
- (5) *Re Wedgwood*, [1921] 1 Ch. 601; 90 L.J.Ch. 322; 125 L.T. 146; 21 Digest 36, 226.
- (6) *Re Laidlaw*, [1930] 2 Ch. 392; 99 L.J.Ch. 463; 143 L.T. 761; Digest Supp.
- (7) *Re Shepherd*, [1948] 2 All E.R. 932; [1949] Ch. 116; [1949] L.J.R. 205; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether the direction contained in the will of the deceased that "all legacies and bequests both pecuniary and specific and all devises given by this my will or any codicil hereto (except the gift of residue) shall be enjoyed free of death duties" applied to exonerate settled real property from the burden of the estate duty payable in connection with the death of the life tenant.

J. H. A. Sparrow for the plaintiff, the surviving trustee.

A. F. M. Berkeley for the first to the eighth defendants, remaindermen under the settled devises.

Peter Foster for the ninth to the fourteenth defendants, residuary legatees.

VAISEY, J.: This summons raises the question whether a direction for the discharge of death duties applies exclusively to those duties payable on the death of the testatrix or whether it applies to future claims in respect of duties arising at a later period under the dispositions of her will.

The testatrix, Mrs. Hannah Maria Howell, made her will on Apr. 6, 1946. Among other dispositions she gave a freehold house known as Tobias House, Clacton-on-Sea, to her trustees on trust to pay the income arising therefrom to a niece of hers and after the niece's death in trust for the niece's son, the defendant, Leonard Fletcher, absolutely. She gave a house, No. 64 Warwick Road, Clacton-on-Sea, to her trustees on trust to pay to another niece, Ellen Dean, or to permit her to receive, the net income derived therefrom during her life and after her death on trust for her children living at her death in certain shares therein mentioned. By another clause she gave a house called York House, Clacton-on-Sea, to her trustees on trust to pay to Leonard Fletcher, or permit him to receive, the net income thereof during his life and after his death on trust for all his children in certain shares as therein mentioned. By another clause, she gave another house, called Heathfield, Clacton-on-Sea, to her trustees on trust to pay to Mildred White, or permit her to receive, the net income thereof and after her death on trust for all the children of the said Mildred White living at her death who should attain the age of twenty-one in equal shares. By cl. 14 of the will the testatrix gave the following direction:

"I direct that all legacies and bequests both pecuniary and specific and all devises given by this my will or any codicil hereto (except the gift of residue) shall be enjoyed free of death duties."

Lastly, by cl. 15, she gives all the residue of her estate to her trustees

"in trust (after paying my debts funeral and testamentary expenses and death duties) for my nieces in equal shares absolutely."

The testatrix died on July 27, 1946, and her will was proved on Dec. 4, 1946, in the Ipswich District Probate Registry. Of the two trustees whom she named in her will one died shortly after the testatrix, and this summons is issued by the other trustee asking the question which I have adumbrated. He tells me that all the testatrix' debts and funeral and testamentary expenses, except future duties not yet payable, as well as legacies, have long since been paid and

satisfied. The question has arisen, or will arise, as to all the dispositions to which I have called attention and obviously the same considerations apply to each one of them. Further duty will be payable on the deaths of the life tenants, and the surviving executor is in doubt whether he ought to make provision for the payment of those future duties, or whether, having discharged the duties immediately payable, he will be in order in distributing what remains among the residuary legatees.

A This type of question has engaged the attention of the courts in a long series of cases. Those material are five in number and I will mention them in chronological order. In *Re Stoddart* (1) SARGANT, J., had to deal with a will which contained this direction:

B "I direct all the legacies (whether settled or otherwise) and the annuities hereinbefore bequeathed to be paid and enjoyed free of all death duties."

The real and personal estate was given in that case to the trustees on trust for sale and conversion and out of the proceeds to pay or provide, among other things, "for the legacies . . . and the duties thereon" and to invest the residue in trust for certain charities. It was held, following *Re Palmer* (2), that the

C words of the will threw prospective claims on the residue in relief of the settled legacies. SARGANT, J. ([1916] 2 Ch. 449) calls special attention to the reference to the enjoyment of the legacies free of duty as indicating that the testator must have desired that the gift should be, as he said, "entirely net", and the learned judge pointed out that it would be very difficult for the testator in that case to have used more comprehensive words than those found in the will. There
D the residue was given to charities, and, I think, it is not unimportant to observe that the fact that the funds were given to charities which were permanently established would have involved that the property would almost certainly have remained in existence so that recourse could be had to it without difficulty for the purpose of raising or providing for the future estate duty.

Re Parker (3) is important chiefly because of the observations of BANKES, E L.J. Referring to *Re Stoddart* (1), he says (117 L.T. 425) that what is to be considered is:

"the proper construction to be placed upon the language which the testator has used. He used, as it seems to me, expressions which make his intention perfectly clear. I think the intention, if I may borrow the language of SARGANT, J., in *Re Stoddart* (1) ([1916] 2 Ch. 449), was this: He clearly
F intended that the pecuniary legacies settled on his relations should be enjoyed by them absolutely and entirely, and that would have been the effect of the provision for payment of settlement estate duty only it unfortunately happened that there was a change in the law. That particular
G duty was abolished, and a duty was established which would lead in this particular case, and in many other cases in which wills have been similarly expressed unless they have been altered to meet the change of circumstances, to difficulties."

Having expressed approval of the view stated by SARGANT, J., in *Re Stoddart* (1), BANKES, L.J., in *Re Parker* (3) adopted a similar view, and it was held that
H the declaration exempting from duties operated so as to include and make payable out of the testator's residuary estate all legacy, estate, and other duties whatsoever thereafter arising by virtue of the limitations contained in the will by way of settlement of each of the four funds as well as all such duties as became payable on the testator's death. The reasoning of SARGANT, J., in *Re Stoddart* (1) was preferred by BANKES, L.J., to the reasoning of NEVILLE, J., in *Re D'Oyly* (4).

Re Wedgwood (5) marked a very important stage in this long-drawn-out series of decisions. There it was held by LORD STERNDALÉ, M.R., and WARRINGTON,

L.J., that future legacy duty would be payable out of the ultimate residue of the testatrix' estate, but that the estate duty "would be payable out of the corpus of the settled legacy." YOUNGER, L.J., dissented. LORD STERNDALE, M.R., points out ([1921] 1 Ch. 615):

"Future duties not chargeable by reason of the death of the testator may be charged upon the residue to the exoneration of particular settled legacies. Whether they are so charged or not depends upon the construction of each particular will, and on the construction of this will, in my opinion, they are not so charged."

WARRINGTON, L.J., says (*ibid.*, 620):

"Neither *Re Stoddart* (1) nor *Re Parker* (3) is, in my opinion, in conflict with this view. In the former the words were 'paid and enjoyed', this last word pointing to duties affecting the beneficial enjoyment of the legacy, whether in force at the date of payment to the legatees or not. In the latter the words were 'shall be free of legacy duty, succession duty, settlement estate duty and all other death duties.' Now in that case the will was after the Finance Act, 1914, and, if the direction did not include the estate duty payable by reason of the provisions of that Act, there would be no 'other estate duty' in respect of a settled legacy except the legacy duty already specially mentioned. Moreover, there was no reference to 'payment' sufficient to suggest the time of payment as that at which the class of duties referred to was to be ascertained."

In *Re Laidlaw* (6) EVE, J., came to the conclusion that the direction did not extend to future duties, but was confined to duties payable at the testator's death. That depended on a rather curious circumstance in that case. The words of the direction there were that all legacies and annuities should be "satisfied paid and enjoyed free of death duties." Then there was a direction which contained certain provisions which depended on the amount of the testator's residuary estate undisposed of at the time of his death. EVE, J., found that that was an indication

"that the testator must have intended and contemplated that the value of his residuary estate would be exactly ascertained within a reasonable time"

probably within the executor's year, and the direction with regard to estate duty, therefore,

"applied only to such duty as would become payable on the death of the testator himself and not to any duty which might accrue due in the future by reason of the dispositions of the will."

So, on that ground the learned judge applied *Re Wedgwood* (5) and distinguished *Re Stoddart* (1).

The point came before HARMAN, J., in *Re Shepherd* (7) where there was a direction that

"all the before-mentioned legacies and specific and pecuniary bequests whether settled or otherwise and all the said annuities whensoever payable shall be paid free of all legacy and other death duties (if any) and that all such duties shall be paid out of my residuary estate."

There was also a direction that the testator's trustees should make provision for the payment of duties on any legacies bequeathed free of duty. It was held by HARMAN, J., that there was a presumption that a testator only intended to provide for the payment of the duties arising on his own death, and to rebut it a clear intention to provide for the payment of future duties must be found.

In support of that the judgment of EVE, J., in *Re Laidlaw* (6) is cited. I am not quite sure that I should have put it as strongly as HARMAN, J., did as to the existence of a presumption, but I think it would be accurate to say that there is a strong tendency against coming to such a conclusion based partly on the argument of *ab inconveniente*. It is awkward to have to hold up the distribution of the residue, perhaps, for a number of years. Normally, when the thought of death duties crosses the mind of a testator, he thinks of the imposition which will fall on his estate at the time of his death. So that, while I should not have put it as a matter of presumption, but as a matter of strong inclination and tendency, still, I think in this case there is not enough to justify me departing from the conclusion which HARMAN, J., reached in *Re Shepherd* (7). In that case the testator intended the exoneration from duties to be confined to those arising on his own death. HARMAN, J., treats it as a matter of construction, and he finds that on the death of the life tenant the duty was to be paid out of the capital of the legacy and not out of the residuary estate of the testator. No question of legacy duty, I understand, arises in this case, but, however that may be, as to the future estate duty, I think this is a case where I am bound to follow *Re Laidlaw* (6) and *Re Shepherd* (7). This is pre-eminently the type of case in which there is a strong lead in the direction of the conclusion reached in *Re Laidlaw* (6) as against the conclusion reached in *Re Stoddart* (1).

I think it must be now understood that, if testators desire to provide that the distribution of their estates shall be held up to meet these future duty claims, they ought to say so in unmistakable terms. I do not find any such expression in unmistakable terms in the present will. The will provides that all the devises given thereby (except the gift of residue) "shall be enjoyed free of death duties." I agree that up to that point either view is possible, but it seems to me that the matter is governed by the words the testator uses in the disposition of his residuary estate. He first directs the duties to be paid as provided for and then says that what remains is to be held in trust for his nieces in equal shares. There is no suggestion that anything remains to be done or to be provided for by the executors or the trustee after the devises have taken effect and the first trust has come into operation. There is no suggestion in the will that any provision for future claims for duties has to be made.

Order accordingly.

Solicitors: *Winter & Co.*, agents for *Drury & Powis*, Clacton-on-Sea (for all parties).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

BOTTOMLEY v. HARRISON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 24, 1952.]

Public Health—Statutory nuisance—Abatement notice—"Owner"—Person "receiving the rackrent . . . as agent"—Servant of owner receiving cheques for rent and paying them into owner's account—Public Health Act, 1936 (c. 49), s. 93, s. 343 (1).

During the absence abroad of the owner of premises his secretary received cheques, made payable to the owner, for the rent of the premises, and paid them into the owner's banking account. The local authority served an abatement notice under s. 93 of the Public Health Act, 1936, on the secretary as "owner" within the meaning of s. 343 (1) of that Act.

HELD: in the circumstances the secretary was not receiving the rent as agent or trustee for the owner within s. 343 (1), and, therefore, the abatement notice could not properly be served on her.

Per LORD GODDARD, C.J.: If the money had been paid into the secretary's account, or if it could be proved there was some arrangement under which, during the owner's absence, she (the secretary) had the handling of the money and not merely the cheque, it might have been different, but the only evidence here is that the tenant paid her rent to the owner.

FOR THE PUBLIC HEALTH ACT, 1936, s. 343 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 19, p. 495.

CASE STATED by Morecambe and Heysham justices.

On July 20, 1951, at a court of summary jurisdiction sitting at Morecambe and Heysham, a complaint was preferred by the appellant, the deputy town clerk of the borough, under s. 94 (1) of the Public Health Act, 1936, alleging that the respondent, being a person by whose sufferance a statutory nuisance arising from the disrepair of premises continued, had failed to comply with an abatement notice relating thereto.

A statutory notice to abate the nuisance was served on the respondent because the owner of the property, one Varley, had left the country for a business trip to South Africa. The tenant of the property paid the rent by cheque in favour of Mr. Varley to the respondent who paid the cheque into Mr. Varley's banking account. The receipts in the rent-book bore the initials of the respondent, and on one occasion the respondent called at the house to inspect the defects.

On the part of the appellant it was contended that the respondent was the "owner" within the meaning of s. 343 (1) of the Act of 1936, because she was a person receiving the rent of the property and acting as agent of the owner. For the respondent it was contended that (i) she was not the person by whose sufferance the nuisance continued, (ii) she had never been a rent collector, (iii) she was a secretary in the office of the owner, and in the course of her duties she received the cheques for the rent of the property, made payable to Mr. Varley, and initialled the rent-book by way of receipt. The justices being of the opinion that the respondent was not the owner of the property within the meaning of s. 343 (1), dismissed the information.

Threlfall for the appellant.

Ruttle for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Lancaster. It seems that the local authority of Morecambe and Heysham found that a dwelling-house, 18, Norton Avenue, Heysham, was in a condition which, they contended, was a nuisance. The property is occupied by a Mrs. Harmsworth and is owned by a Mr. Varley. Mr. Varley was out of England at all material times. Mrs. Harmsworth paid her rent by cheque, which she made out to Mr. Varley, and she used to get back her rent-book with some initials

against it, said to be the initials of the respondent, Miss Harrison. Mrs. Harmsworth produced a letter from the respondent which reads as follows:

"Dear Madam, I am dealing with Mr. Varley's property during his absence. On examining his records I find that the amount previously paid to you for garage and water is £3 per annum. Why is this amount now altered to £3 1s. 6d.? Yours truly, *per pro* F. Varley, M. Harrison."

A Section 93 of the Public Health Act, 1936, provides:

B "Where a local authority are satisfied of the existence of a statutory nuisance, they shall serve a notice (hereafter in this Act referred to as 'an abatement notice') on the person by whose act, default or sufferance the nuisance arises or continues, or, if that person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the nuisance and to execute such works and take such steps as may be necessary for that purpose: Provided that—(a) where the nuisance arises from any defect of a structural character, the notice shall be served on the owner of the premises . . ."

For the purposes of this Act "owner" is defined in s. 343 (1) as follows:

C " 'Owner' means the person for the time being receiving the rackrent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if those premises were let at a rackrent."

D The local authority served an abatement notice on the respondent as the owner of the premises within that definition. The only evidence that the respondent was the owner was that Mrs. Harmsworth paid her rent by cheque in favour of Mr. Varley, and the respondent received the cheque, which is a negotiable instrument, and paid it into the bank who would credit Mr. Varley with it. I cannot see that in those circumstances it can be said that the respondent received the rent as agent or trustee for Mr. Varley. She received it as a conduit pipe between Mrs. Harmsworth and Mr. Varley's account at the bank. If the money had been paid into the respondent's account, or if it could be proved there was some arrangement under which, during Mr. Varley's absence, she had the handling of the money and not merely the cheque, it might have been different, but the only evidence here is that Mrs. Harmsworth paid her rent to Mr. Varley. The fact that the respondent sent back the rent-book with her initials on it, indicating that the rent had been paid to Mr. Varley and not her, is neither here nor there. I think the justices were right in holding that there was no evidence before them on which they could hold that the respondent was the owner of the premises. For these reasons the appeal must be dismissed.

E BYRNE, J.: I agree.

G PARKER, J.: I agree.

Appeal dismissed.

Solicitors: Gibson & Weldon, agents for Roger Rose, town clerk, Morecambe and Heysham (for the appellant); Hiscott, Troughton & Page, agents for Bannister, Bates & Son, Morecambe and Heysham (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

ABSON v. ABSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), January 15, 1952.]

Justices—Husband and wife—Maintenance—Discharge of order—Adultery by wife after dissolution of marriage—Preferable jurisdiction of Divorce Court—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7.

On Nov. 29, 1944, justices granted the wife an order for maintenance against her husband on the ground of his desertion. In September, 1948, she obtained a decree for the dissolution of her marriage on the ground of the same desertion. In February, 1951, the husband applied to the justices, under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to discharge the order of Nov. 29, 1944, on the ground that within the preceding twelve months the wife had committed adultery with one R., a married man. The justices found that the wife had had sexual intercourse with R., but doubted whether this constituted an "act of adultery" within s. 7, she at the material time having ceased to be a married woman. Treating that question as irrelevant, they discharged the order on financial grounds.

HELD: in the circumstances of the case the justices should have exercised their discretion to discharge the order on the ground that the wife should be left to seek an order for maintenance in the Divorce Court since that court was free to consider all the circumstances of the case and to assess the true bearing of every part of the wife's conduct, whereas, under s. 7 of the Act of 1895, on proof that the wife had committed an act of adultery the justices were bound forthwith to discharge the order.

Per KARMINSKI, J.: The true test whether, when the wife had intercourse with R. she committed adultery, she being then unmarried, is: Was she then dishonouring or defiling her own marriage bed or that of R? She, being a single woman, could not be dishonouring or defiling her own marriage bed, but R. was married, and, if she had intercourse with him, she was dishonouring or defiling the marriage bed of him and his wife, and so she was committing adultery. The justices having found that she had had sexual intercourse with R. it followed that they had, in effect, found that she had committed an act of adultery within s. 7.

AS TO DISCHARGE OF MAINTENANCE ORDER, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345; and FOR CASES, see DIGEST, Vol. 27, pp. 565, 566, Nos. 6237-6250, and Digest Supps.

Cases referred to:

- (1) *Bragg v. Bragg*, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest 565, 6242.
- (2) *Prest v. Prest*, [1949] 2 All E.R. 790; [1950] P. 63; 114 J.P. 1; 2nd Digest Supp.
- (3) *Mezger v. Mezger*, [1936] 3 All E.R. 130; [1937] P. 19; 106 L.J.P. 1; 155 L.T. 491; 100 J.P. 475; Digest Supp.
- (4) *Kirk v. Kirk*, [1947] 2 All E.R. 118; 177 L.T. 151; 111 J.P. 435; 2nd Digest Supp.
- (5) *Wood v. Wood*, (1949) W.N. 59; 2nd Digest Supp.

APPEAL by the wife against an order of justices for the city of Bradford dated Feb. 21, 1951, whereby they discharged an order, made on Nov. 29, 1944, awarding her maintenance on the ground of her husband's desertion.

J. Stirling for the wife.

The husband was not represented.

LORD MERRIMAN, P.: This appeal by a wife against the decision of the Bradford city justices to discharge an order made in her favour raises an important question. On Nov. 29, 1944, the wife obtained from the justices an

order against her husband on the ground of his desertion for 25s. a week for her own maintenance, and 5s. a week for that of the child of the marriage, the custody of whom they gave to the wife. There was no resumption of cohabitation, and in due course the wife was granted a decree of divorce on the ground of the same desertion, the decree being made absolute in September, 1948. From that moment, therefore, she ceased to be the wife of the respondent, but the justices' order was allowed to stand, and she continued under it to draw her money and to have custody of the child without any other order being made by the Divorce Court. On Feb. 21, 1951, the husband made an application to the Bradford justices to discharge their order on the ground that within the preceding twelve months the wife had committed an act of adultery with a man named Rayner. Any date within the twelve months manifestly was long after that on which she had ceased to be the wife of the husband, and at the very outset of the case it was suggested that the justices had no jurisdiction to discharge the order because she had ceased to be a married woman, and, therefore, the provision with regard to the forfeiture by a married woman of her order, which appears in the Summary Jurisdiction (Married Women) Act, 1895, s. 7, no longer applied. That argument, however, was rejected by this court in *Bragg v. Bragg* (1), and the decision in that case that, divorce notwithstanding, justices still have a discretion to exercise their functions with regard to a pre-existing order has repeatedly been approved. The matter is fairly summarised in a judgment of this court in *Prest v. Prest* (2). That case raised a different point—one in connexion with the resumption of cohabitation—but we there reviewed the authorities in which *Bragg v. Bragg* (1) had been dealt with, and I said ([1949] 2 All E.R. 794):

"The effect of the decision in *Bragg v. Bragg* (1) is that it is a matter of discretion whether or not, in the circumstances of any given case, [justices should] discharge, as against a wife whose marriage has subsequently been dissolved, an order made while she was the wife of the husband. This court, however, has said over and over again that that is not a discretion to be exercised arbitrarily or capriciously. It must be exercised judicially."

I then referred to *Mezger v. Mezger* (3), *Kirk v. Kirk* (4), and *Wood v. Wood* (5), on the facts of which this court decided expressly or impliedly that the discretion was one which could only be exercised by discharging the order under the Summary Jurisdiction Acts.

I think that the same reasoning applies to the present case. Rayner is a married man. It was argued in the court below that, as the wife had divorced her husband, she was no longer a married woman within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, and she was not, therefore, a person who could commit adultery within the meaning of that section, or, to put it another way, that "act of adultery" for the purpose of s. 7 of the Act of 1895 meant something different from an act of adultery which, for example, would be charged against her as a woman named in a divorce suit between Mrs. Rayner and her husband. Pressed to its logical conclusion, that might cut at the root of the decision in *Bragg v. Bragg* (1). However, counsel for the wife has reserved the right to argue that a divorced wife cannot commit adultery with a married man within the meaning of the Summary Jurisdiction Acts.

Counsel for the wife, while maintaining his right to dispute the facts elsewhere, did not, for the purposes of this appeal, contend that there was not sufficient evidence in law to entitle the justices to find as they did. If the facts do convict the wife of adultery within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, there is no more to be said about the matter, because the obligation to set aside the order is absolute. I think, however, that, without resolving the conundrum whether there are two different meanings of "adultery" for the purposes of the Divorce Court and courts of summary

jurisdiction, it can be decided whether this is a proper case, within the decisions in *Bragg v. Bragg* (1) and the cases in which *Bragg v. Bragg* (1) has been followed, for the justices to exercise their discretion whether or not to keep this order alive. If the wife, having obtained a decree of divorce against her husband, had exercised her right to apply for maintenance in the Divorce Court, it would be a matter of judicial consideration whether or not in all the circumstances it was a case in which an order should be made in the first instance, or, whether, if an order had been made in the first instance, it should be cancelled or modified in any way because of the course of conduct which was alleged against her. As between the two tribunals—the Divorce Court and the court of summary jurisdiction—it seems to me that there cannot be any reasonable doubt which should be preferred, and that is the one which has a perfectly free jurisdiction to go into all the circumstances of the case and to assess deliberately the true bearing of every part of the divorced wife's conduct on the questions of maintenance and the custody of the child. I hope that, in spite of the lapse of three years, it is not too late for that tribunal to deal with the matter having regard to the fact that an order has been in existence and has been acted on in the meanwhile until this summons by the husband was served.

The justices have found that, quite apart from whether there had been the commission of any act of adultery on the part of the wife within s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, this was clearly a case for setting aside the order of 1944 on financial grounds. My view of the matter is that the moment this issue appeared, at the very outset of the case, the justices should have said: "This is not a case in which we should keep this order alive. Never mind what the facts are proved to be. There is a charge of adultery against one who was a married woman when the order was obtained and is now a divorced woman. That raises all the complications inherent in the line of authorities beginning with *Bragg v. Bragg* (1)." They should have said that this is essentially a case, within that line of authorities, in which the court should exercise its discretion to discharge the order and leave the wife to her remedies in the Divorce Court. They did not take that view, but it is a view which is open to us if we think that they did not properly exercise their discretion within the meaning of the *Bragg v. Bragg* (1) line of authorities. The result is the same. In my opinion, the appeal must be dismissed and the order discharged, but for the reasons I have given. The wife is left to whatever remedies she may have under the ordinary law of divorce.

KARMINSKI, J.: I agree. The justices found that sexual intercourse had taken place between the wife and Rayner. At the time this intercourse took place it was clear that the wife was no longer a married woman, but was a feme sole because in September, 1948, she had been granted by this court a decree absolute dissolving her marriage with her husband. It was argued that in those circumstances she could not be guilty of adultery within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. I think it is useful to look at s. 3 of the Matrimonial Causes Act, 1950, which provides for making an adulterer a co-respondent and, by sub-s. (2), directs that when a petition for divorce is presented by a wife on the ground of adultery the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent. Neither sub-section of that section makes it a term that the alleged adulterer should himself or herself be a married person. In my view, the true test is this. When the wife took part in an act of sexual intercourse with Rayner, was she then dishonouring or defiling her own marriage bed or that of the man with whom the intercourse took place? Clearly, so far as the wife was concerned, she could not be defiling or dishonouring her own marriage bed, because, as a single woman, she had no marriage bed and no married home, but Rayner was a married man, and, if she had sexual intercourse with him, she was committing adultery, because she was defiling or

dishonouring the marriage bed of Mr. and Mrs. Rayner. The justices having found that sexual intercourse did take place, it must follow that that sexual intercourse amounted to adultery on the part of the wife.

In a case of this kind the High Court is the suitable tribunal to investigate a claim by the wife for maintenance. The fact that a wife has committed adultery is not an absolute bar to the court awarding her maintenance on the dissolution of her marriage. The Matrimonial Causes Act, 1950, s. 19 (2), lays down what facts the court is to take into consideration regarding that matter, and among them is the conduct of the parties. In many cases the wife asks for maintenance although she herself has committed adultery during the marriage and for that reason has had to seek the exercise of the discretion of the court. That factor has to be taken into consideration. Similarly, it has been held that the conduct of the parties after decree must also be considered, and there is no doubt that adultery by a petitioner wife after the dissolution of her marriage is also a matter for consideration. The High Court, therefore, has the power and the duty to consider the conduct of the parties, whereas, under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, once the wife has committed adultery, her order for maintenance must be discharged. In my view, this is a case where the wife should seek permission of the Divorce Court to lodge her application for maintenance although some three years have elapsed since she ought to have done so. At the time of her decree, however, she was in the enjoyment of an order under which payments were being made. All these factors will, no doubt, be taken into account by the court to which she applies for leave to make her application out of time. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co.*, agents for *James A. Lee & Priestley*, Bradford (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

STRINGER v. STRINGER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), January 16, 17, 1952.]

Justices—Husband and wife—Maintenance—Wilful neglect to maintain—Consensual separation—No agreement as to maintenance—Liability of husband.

The husband and wife parted by mutual consent in November, 1946, and from that date the husband had not paid the wife any maintenance nor had she demanded any maintenance until July 17, 1951, when she issued a summons for wilful neglect to maintain.

HELD: proof of a consensual separation of spouses without any agreement by the parties regarding the maintenance of the wife is sufficient to rebut the common law presumption that a husband is liable to maintain his wife, and to that extent the onus is on the wife to prove liability by the husband: observation by HILL, J., in *Papadopoulos v. Papadopoulos* ([1930] P. 68, 69) not applied; and, in the absence of any demand by the wife before she took out the summons, the justices were not justified in making a maintenance order: *Tulip v. Tulip* ([1951] 2 All E.R. 91) distinguished.

AS TO MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1340; and FOR CASES, see DIGEST, Vol. 27, pp. 558, 559, Nos. 6134-6150, and Digest Supps.

Cases referred to:

- (1) *Papadopoulos v. Papadopoulos*, [1930] P. 55; 99 L.J.P. 1; 142 L.T. 237; 94 J.P. 39; Digest Supp.
- (2) *Markovitch v. Markovitch*, (1934), 151 L.T. 139; 98 J.P. 282; Digest Supp.

- (3) *Richardson v. Richardson*, (1942), 167 L.T. 260; 2nd Digest Supp.
- (4) *Winnan v. Winnan*, [1948] 2 All E.R. 862; [1949] P. 174; [1949] L.J.R. 345; 2nd Digest Supp.
- (5) *Churchman v. Churchman*, [1945] 2 All E.R. 190; [1945] P. 44; 114 L.J.P. 17; 173 L.T. 108; 2nd Digest Supp.
- (6) *Robins v. National Trust Co.*, [1927] A.C. 515; 96 L.J.P.C. 84; 137 L.T. 1; Digest Supp.
- (7) *Baker v. Baker*, (1949), 66 (pt. 1) T.L.R. 81; 2nd Digest Supp. A
- (8) *Chapman v. Chapman*, unreported.
- (9) *Tulip v. Tulip*, [1951] 2 All E.R. 91; [1951] P. 378.
- (10) *Morton v. Morton*, [1942] 1 All E.R. 273; 111 L.J.P. 33; 166 L.T. 164; 106 J.P. 139; 2nd Digest Supp.

APPEAL by the husband against an order of Luton justices dated Oct. 1, 1951, whereby they found that he had wilfully neglected to provide reasonable maintenance for his wife and awarded her 10s. a week. B

C. T. Reeve for the husband.

K. B. Campbell for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from an order made by the Luton justices on Oct. 1, 1951, whereby they found that he had wilfully neglected to provide reasonable maintenance for his wife as from July 17, 1951, and awarded the wife 10s. a week. The wife had also charged the husband with desertion. The justices dismissed that summons. Before them the husband opposed an order on the ground that, so far from his having deserted the wife at the time of the parting, she had deserted him. The justices did not find that. They came to the conclusion that there was no desertion on the part of either spouse. The husband had left because the wife said he had better go, but he had been just as willing to part as she had been. In other words, the justices found that it was a simple case of a consensual separation, and it is. This case has been rightly fought by the husband on the basis that that finding could not be challenged. I need not read all the reasoning which the justices have set out justifying their conclusion which was: C
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"While, therefore, there was no evidence of a deliberate agreement to separate, we took the view that in all the circumstances of the case there had been a separation by mutual consent, and that neither party had been guilty of desertion in law. This state of affairs, it seemed to us, did not relieve the husband of his duty to provide reasonable maintenance for his wife and we decided on the evidence that the husband had been guilty of wilful neglect in that respect." F

I think that this is an important case, because it brings to a head a point about which there is surprisingly little authority. Counsel for the wife called our attention to a passage in the judgment of HILL, J., sitting in this court with LORD MERRIVALE, P., in *Papadopoulos v. Papadopoulos* (1), and submitted that, where there is a separation of this sort, with nothing said one way or the other about the question of maintenance, the common law liability of a husband to maintain his wife subsists unless the contrary is shown, that it is for the husband to show the contrary, and, if the matter is left in doubt and he does not maintain his wife, that there is evidence on which the court can find that he has been guilty of wilful neglect. I think it is necessary to preface the reading of this passage, by saying that in that case it was hardly necessary to lay down any proposition about where the onus of proof lay. The main issue was whether there had been a good and lawful marriage in this country according to the laws of England between a Cypriot and a Frenchwoman, and, if so, what was the effect of certain proceedings in the Cypriot court at Nicosia purporting to set aside that marriage by a decree by consent and on certain monetary terms. On an investigation of the law on that subject the court unanimously came to G
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the conclusion that the whole of the proceedings in the Cypriot court were worthless and that the attempt by the husband to repudiate the marriage in this country could not succeed. That was the view that LORD MERRIVALE, P., took. I doubt whether it was necessary to say much more, but HILL, J., expressed the same thing in other words, in the course of which he said ([1930] P. 68):

"The question is whether the husband neglected to provide maintenance.

- A / He did not in fact provide maintenance. Neglect means failure in a duty to provide maintenance, and the question is whether he was under a duty to maintain the wife. *Prima facie* he was. That is the common law of England, and it was for the husband to show that he was excused from that duty. A husband may show it in various ways. For instance, he may show that his wife has been guilty of adultery, neither condoned nor
 B connived at, nor condoned to by the husband, or that she had deserted him and was continuing to desert him, or that there is a subsisting binding contract performed and not repudiated by him that she should not claim maintenance otherwise than as provided by the contract, or that a court of competent jurisdiction in a proceeding between husband and wife had
 C / already determined the rights of the wife in respect of maintenance and that he had fulfilled the obligations so imposed on him."

- With regard to the last two matters, which had been put forward in that case, if there ever had been a subsisting binding contract, it certainly had not been performed and it had been repudiated, and there was no determination by a court of competent jurisdiction of the rights of the parties, for the court unanimously held that the Cypriot court had no jurisdiction to do what it did. Finally, and
 D in relation to the whole of the group of examples, HILL, J., said (*ibid.*, 69):

"But the onus is on the husband to prove the excuse."

- From that it is sought to deduce, with regard to a matter which was not mentioned by HILL, J., that, if there is a mere agreement to separate and nothing is said about maintenance, it is for the husband to prove affirmatively that there
 E was a positive agreement that there should be no maintenance and otherwise his common law liability subsists. We have to consider whether that is sound.

- Consciously or unconsciously the justices applied that passage to this case—very likely consciously for it is reasonably clear that they framed their decision either on reading this passage or on some reference to it in a text-book, for their finding is stated very much on those lines. It is right to say that the passage
 F has been cited with approval more than once. I am not going through all the various cases, but I think that on investigation it will appear that it has been cited as a very concise and accurate statement of some of the instances, as HILL, J., himself called them, in which a husband has a complete answer to a demand for maintenance. It was, for example, referred to as being a sufficient guidance for this court by a court composed of BATESON, J., and LANGTON, J., in
 G *Markovitch v. Markovitch* (2). It was cited by this court, composed of BUCKNILL, J., and HENN COLLINS, J., in *Richardson v. Richardson* (3) as an answer to a claim for maintenance on the part of a wife who was in a state of desertion. BUCKNILL, L.J., in *Winnan v. Winnan* (4), referred to it in his judgment, the question being whether there was any difference between active desertion and constructive desertion for the purposes of applying the proposition stated by
 H HILL, J. In the course of that judgment ([1948] 2 All E.R. 865), BUCKNILL, L.J., also cited his decision in *Richardson v. Richardson* (3). I think it may fairly be said that it was used in these cases, without exception, for the purpose of supporting the proposition that these various instances were all absolute defences to a claim for maintenance on the ground of wilful neglect to maintain, and that the court was not thinking in particular whether in any given instance the burden of proof lay on the one side or the other. If the fact was established, wherever the burden of proof lay, it was decisive. At any rate, I think it is

open to us to say that, unimpeachable as the passage itself is, the one sentence: "But the onus is on the husband to prove the excuse", was not necessary to the decision of that case. It is just as well to bear in mind that the question where the onus of proof lies may be of very minor importance, for it will be recalled that in *Churchman v. Churchman* (5), in giving the judgment of the Court of Appeal, I said ([1945] 2 All E.R. 195), even with regard to the deliberate change of wording effected by the Matrimonial Causes Act, 1937, in s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925: A

"After all, as DU PARCQ, L.J., pointed out during the argument, the incidence of the burden of proof as a determining factor of the whole case is only of importance if the tribunal finds the evidence, *pro* and *con*, so evenly balanced that it can come to no definite conclusion. Then the onus will determine the matter. In *Robins v. National Trust Co.* (6) VISCOUNT DUNEDIN said ([1927] A.C. 520): 'But if the tribunal after hearing and weighing the evidence comes to a determinate conclusion the onus has nothing to do with it and need not be further considered'." B

That brings me to consider this question in relation to a particular instance which was not one of those mentioned by HILL, J., in *Papadopoulos v. Papadopoulos* (1), and that is the instance of a consensual separation where nothing is said, one way or the other, about maintenance. About that, this court made a pronouncement in *Baker v. Baker* (7) where I said: C

"There is no law involved in this case; it is merely an application of the principle that, if a wife is living separate and apart from her husband, it is not enough for her to give evidence that her husband had money and that she needed maintenance. The question is: What was the nature of the parting? If the wife can prove desertion, she is, of course, entitled to a maintenance order on that ground. If the separation was consensual, then, if she can prove—and Mr. Crispin accepted that the onus was on the wife—that this was on the basis, expressed or implied, that the husband undertook to be responsible for her maintenance, she is entitled either to the agreed amount (if there was an agreed amount) or to a reasonable amount under the section, although she is living apart from her husband. But unless she can show, where the separation was consensual, that the husband had accepted the liability, expressed or implied, to maintain her, she has no case at all." D

I need not read the rest of the judgment, which merely dealt with the application of that principle to the facts of the case, but I should like to say that PEARCE, J., agreed with what had been said. He said (*ibid.*): E

"In this case desertion has been negatived, and the wife's evidence makes it clear that there was here a separation by consent. If by her evidence she could establish that there was expressed or implied in that separation a continuing liability on the husband's part to support her, this order could stand, but her evidence has not done this, and therefore, in my opinion, there has not been wilful neglect to maintain, and the appeal should be allowed." F

There is no doubt that it does appear, subject to the qualification I have already mentioned as to the importance or unimportance of the onus of proof, that there the burden is placed differently—at any rate in this particular class of case—from the way in which it is stated in *Papadopoulos v. Papadopoulos* (1). G

In the case now before us five years elapsed after the parting in the course of which, until this summons was served on the husband, he received, neither by word of mouth nor by writing, at the time of the parting or at any subsequent time, any request from his wife for maintenance. She had kept herself, and made it clear that she meant to go on keeping herself. She had done nothing to disabuse her husband's mind of the idea that that was a state of things with which she was content until she issued this summons asserting that he had been guilty of H

wilful neglect to provide reasonable maintenance. I ask myself, wherever the onus may be, what is the inference which should be drawn here from that, and in the circumstances of this case I can only say that the proper inference is that during the time between November, 1946, and the date on which this summons was issued this was a consensual separation without any sort of stipulation that the husband should provide maintenance for the wife, and I do not think it is of any importance to pursue further the question of the onus of proof. In justice to this court, however, I ought to point out that the Court of Appeal have plainly accepted our statement of the matter as correct. I do not suggest that *Papadopoulos v. Papadopoulos* (1) was brought to their notice or that it was suggested that there was any importance in the issue on whom lay the onus, but in *Chapman v. Chapman* (8), an appeal from a decision of this court consisting of WALLINGTON, J., sitting with me, heard by ASQUITH, L.J., BIRKETT, L.J., and HARMAN, J., the Court of Appeal gave approval to the passage to which I have just referred. I do not ignore the point that in one sense the approval may be said to be *obiter*, because the case was one in which, contrary to the finding of the justices, we had taken the view that the husband had, in effect, (a) consented to a separation, and (b) consented in circumstances which implied an undertaking to maintain his wife. The Court of Appeal said we were wrong on the point of fact in coming to the conclusion that there had been a consensual separation, and in that sense the second point did not arise, though they also expressed the opinion, which followed almost necessarily from what they had already said about the nature of the parting, that, even if it could be said to be consensual, it certainly was not consensual on the basis that the husband undertook the obligation to maintain his wife. The facts of the case are of no importance whatever. What is of importance is that in two passages in the judgment of ASQUITH, L.J., which was concurred in by HARMAN, J., he first of all stated the proposition that summonses for desertion and wilful neglect to maintain do not necessarily stand or fall together and then continued:

“Often two such summonses do so, and if the wife fails on desertion she automatically fails on wilful neglect to maintain, but that is not necessarily or inevitably so. Sometimes, where, for instance the evidence is that the separation was consensual she may fail on desertion and win on maintenance; in cases, that is, where the consensus impliedly includes a term that the wife should be entitled to some support from the husband.”

He concludes his judgment with this passage:

“In those circumstances [*i.e.*, of that case], with great respect, I am of opinion that the inference of consensus cannot be supported; and, if it cannot, then there can be no possible claim to maintenance. There is, indeed, authority which has been cited to us, a case called *Baker v. Baker* (7) . . . which decides very clearly that, even where a separation is admittedly consensual, it has to be shown either that there was an expressed agreement to pay maintenance or that such an agreement must be implied from the circumstances. In this case I think that the conclusion that there was a consensus at all cannot be supported, and therefore the other point does not really arise.”

As I have already indicated, in the opening passage of his judgment, ASQUITH, L.J., accepted the statement of principle the affirmation of which he very briefly repeated in the passage I have just read. BIRKETT, L.J., said:

“I agree with what my Lord has said, and I do not think for my own part that, on the evidence before the justices and the evidence before the Divisional Court, this inference of consensus can really be supported; but I would just like to add a final word: Assuming for the moment that there

had been, in the circumstances of this case, a consensual separation I do not think it by any means follows that an inference is to be drawn that it was upon the basis that attached to it should be an undertaking to provide maintenance. I think, on the contrary, almost everything in the case would appear to be against it . . . It does not look, as I say, upon the face of it, that any such inference could be drawn, even if there had been anything in the nature of an agreement to separate, that it should be upon the terms that he would provide maintenance."

I am prepared, supported and reinforced by that authority, to stand by what we said in *Baker v. Baker* (7). But, as I have said already, I do so with the feeling that in the present case it does not matter in the least which way the onus is, because on the facts, in my opinion, there is only one inference that can be drawn. The only way in which the case can be put is to say that the common law liability raises a presumption which must be rebutted, but what is necessary to rebut it? It does not advance the argument any further because, plainly, where there is an agreement to separate, with a specific agreement, whether for a nominal or a substantial payment, that agreement is substituted for the presumption. Why is it necessary, therefore, to say that there must be an express agreement before there can be any inference that there is to be no maintenance, if all the facts point to an inference that that must be the condition on which the parties separated? However, if the question of onus arises, I think that I prefer, and, indeed, I am now bound to prefer, the judgment of this court in *Baker v. Baker* (7), with the meed of approval which has been accorded to it in the Court of Appeal, to the inference to be drawn from one sentence in an otherwise unimpeachable passage in the judgment of HILL, J., in *Papadopoulos v. Papadopoulos* (1).

That brings me to the only other point. It is said that, while what I have said may well be so, nevertheless, by taking out this summons the wife has re-opened the whole matter and it is still open to the court to say that an order should be made on the ground of wilful neglect to maintain. In support of that *Tulip v. Tulip* (9) was cited. All that the Court of Appeal there decided was, on the basis of the decision of this court in *Morton v. Morton* (10), that the existence of a separation agreement was not a bar to the jurisdiction of the justices, however high was the evidential value of the agreement itself, of its punctual performance, and so on, in guiding the justices in the exercise of their jurisdiction. In remitting the case for a decision on the issue whether the husband had been guilty of wilful neglect to maintain, considerable emphasis was laid on the fact that before any proceedings were taken the wife had put forward by letter a reasoned claim for re-consideration of the amount payable to her under the agreement which there existed, on the ground that circumstances, not only financial, but also physical, had changed very much for the worse for her, and financially very much in favour of the husband. It was not a case in which it was held that, without any warning, a man could be charged with wilful neglect to provide reasonable maintenance when, without any complaint before the issue of the summons, he had done everything that he was bound to do under the terms of the separation. I can see nothing here which justifies the wife, at the time when she issued this summons, in asserting that her husband had been guilty of this offence. It does not follow that the husband will be able to take up that position indefinitely. It is not for us to lay down what steps it may be appropriate for the wife to take to put herself in a position to claim maintenance, but it must be acknowledged that it is easier for her to do so in a case like this where there was no formal agreement to live separate and apart and no particular terms were specified as to the conditions on which they were to live apart. The result is that, in my opinion, on the facts as they stood when the justices decided this case, there was no ground for making this order. The appeal will, therefore, be allowed and the order set aside.

KARMINSKI, J.: I agree. The justices found as a fact that there had been a separation by mutual consent, and that neither party had, therefore, been guilty of desertion. With that finding of fact there has been no quarrel, and it is clearly supported by the evidence, but the justices also said:

A "This state of affairs, it seemed to us, did not relieve the husband of his duty to provide reasonable maintenance for his wife and we decided on the evidence that the husband had been guilty of wilful neglect in that respect."

It is possible that this paragraph is founded on a misapprehension as to the matter set out in *STONE'S JUSTICES' MANUAL*, 83rd ed., pp. 1092 to 1093. The only matter about which I have found any difficulty arises from some observations to which my Lord has referred in the judgment of *HILL, J.*, in *Papadopoulos v. Papadopoulos* (1), where he gave a number of examples whereby a husband was excused from his common law duty to maintain his wife. I do not think for a moment that *HILL, J.*, meant that list of instances to be conclusive. He was merely exemplifying his proposition, because, after the words to which my Lord has referred—"But the onus is on the husband to prove the excuse"—he set out what in that case the particular excuses were supposed to be—namely

C that the husband was excused (i) by a decree of a court in Nicosia, and (ii) by an agreement between the spouses embodied in the decree of that court. *HILL, J.*, was not considering what we have to consider here—a case where the spouses have separated by mutual consent and there has been no desertion on either side. On a careful consideration of the decision in *Papadopoulos v. Papadopoulos* (1) together with the more recent decision by this court, in *Baker v. Baker* (7) I

D can find no inconsistency. The principle as set out in *Baker v. Baker* (7) is simply that where the separation is consensual the wife must show that the husband had accepted the liability, expressed or implied, to maintain her—otherwise she has no case to put forward on neglect to maintain. That decision, as my Lord pointed out, has recently been approved by the Court of Appeal. I find that on the facts in the present case before the justices the wife did not prove any agreement,

E expressed or implied, that her husband would maintain her, and for that reason I agree that this appeal succeeds.

Appeal allowed.

Solicitors: *Peacock & Goddard*, agents for *Cooke & Sons*, Luton (for the husband); *Machin & Co.*, Luton (for the wife).

[Reported by *A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

QUALITY DAIRIES (YORK), LTD. v. PEDLEY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 22, 29, 1952.]

Food and Drugs—Milk—Unclean container—Milk bottled and delivered to customer by agent of distributor—Liability of distributor—Milk and Dairies Regulations, 1949 (S.I., 1949, No. 1588), reg. 26 (1).

The appellants were a company of milk retailers and "distributors" within the meaning of the Milk and Dairies Regulations, 1949. By a contract between them and Y.P. & Co., wholesale dairymen, Y.P. & Co. agreed to supply, bottle, and deliver milk to certain of the appellants' customers. Under this arrangement at no time did the appellants handle the milk or the bottles into which it was put. On Sept. 11, 1950, Y.P. & Co. delivered a bottle of milk to one of the appellants' customers which was found not to be in a state of thorough cleanliness.

HELD: regulation 26 (1) of the Milk and Dairies Regulations, 1949, imposed an absolute duty on a distributor to ensure that every vessel used for containing milk should be in a state of thorough cleanliness, and so made him liable for the acts of his servants or agents done within their authority, and, therefore, the appellants were guilty of a breach of that regulation.

Dictum of ATKIN, J., in Mousell Brothers v. London & North-Western Ry. Co. ([1917] 2 K.B. 845), applied.

Cases referred to:

- (1) *Mousell Brothers v. London & North-Western Ry. Co.*, [1917] 2 K.B. 836; 87 L.J.K.B. 82; 118 L.T. 25; 81 J.P. 305; 8 Digest 207, 1323.
- (2) *Linnett v. Metropolitan Police Comr.*, [1946] 1 All E.R. 380; [1946] K.B. 290; 115 L.J.K.B. 513; 174 L.T. 178; 110 J.P. 153; 2nd Digest Supp.

CASE STATED by the Recorder of York.

On Oct. 9, 1950, at a court of summary jurisdiction sitting at York, the appellants were convicted on an information laid by the respondent, the deputy town clerk of York, charging them with an offence against reg. 26 (1) of the Milk and Dairies Regulations, 1949, for that they, on Sept. 11, 1950, being milk distributors, failed to ensure that a vessel used for containing milk, viz., a milk bottle, was, immediately before use by them, in a state of thorough cleanliness in that there was dirt on the inside of the vessel. By an oral agreement between the appellants and York Producers, Ltd., a firm of wholesale dairymen, York Producers, Ltd. undertook to supply and deliver milk to certain of the appellants' customers, and the bottle in question was delivered pursuant to this contract. On Mar. 21, 1951, the appellants appealed against the conviction to York quarter sessions. It was submitted for the appellants (i) that proof of use of the bottle by them was necessary before the offence charged was made out and that there was no evidence of such use, (ii) that at no time they had any control over the cleansing of the said bottle or the filling of the same with milk and had no opportunity to inspect it before it was finally sealed by York Producers, Ltd. and delivered to the customer. It was submitted for the respondent (i) that the bottle was used by the appellants to fulfil their contract with their customers, (ii) that the appellants, by reason of their contractual relationship with York Producers, Ltd., were in a position to inspect the bottle before delivery, and (iii) that the appellants, as purveyors, were under an absolute duty to ensure that the bottle was thoroughly cleansed. The recorder was of the opinion that the appellants were in such a relationship to York Producers, Ltd. that there was a duty on them to ensure that the bottle was thoroughly cleansed, and, therefore, he affirmed the conviction and the appellants appealed.

Hylton-Foster, K.C., and A. G. Sharp for the appellants.

Ahern and I. Percival for the respondent.

Cur. adv. vult.

Jan. 29. **PARKER, J.**, read the following judgment of the court. This is an appeal by way of Case Stated from the decision of the recorder for the city of York dismissing an appeal by the appellant company against its conviction by a court of summary jurisdiction of an offence against reg. 26 (1) of the Milk and Dairies Regulations, 1949, made under the Food and Drugs Act, 1938, as amended by the Food and Drugs (Milk and Dairies) Act, 1944, for that it, on Sept. 11, 1950, being a milk distributor, failed to ensure that a vessel used for containing milk, namely, a milk bottle, was, immediately before use by it, in a state of thorough cleanliness, in that there was dirt on the inside of the said vessel.

Regulation 26 (1) provides, so far as is material, as follows:

"Every . . . distributor shall ensure that every vessel (including the lid) used for containing milk shall, immediately before use by him, be in a state of thorough cleanliness . . ."

The facts found by the recorder are, so far as is material, as follows. The appellant company carries on business as milk retailers in and around the city of York, and is a milk distributor within the meaning of reg. 2 (1) of the above-mentioned regulations. The appellant company had a contract with the York "A" and Tadcaster Hospital Management Committee under which it had undertaken to continue to supply pasteurised milk in bottles to certain hospitals in the area, including a hospital known as The Grange, York. Next door to the appellant company a business of wholesale dairymen was carried on by a company referred to as York Producers, Ltd., and the appellant company had arranged that for a consideration York Producers, Ltd. would supply, bottle, and deliver all the milk that might be required for delivery to The Grange. The procedure was that York Producers, Ltd. purchased the necessary milk from the Milk Marketing Board. They then cleansed, pasteurised, and bottled the milk on their own premises, using their own bottles, and under a contract with British Road Services, caused the bottles to be delivered to the hospital. From the time when the milk was received from the Milk Marketing Board to the time it was delivered to the hospital no servant of the appellant company in any way whatsoever touched the milk or the bottles in which it was put. On Sept. 11, 1950, a bottle containing milk was delivered to The Grange pursuant to the contract between the appellant company and the said hospital management committee and pursuant to the procedure outlined above. That bottle, when delivered, was not in a state of thorough cleanliness in that there was a light, fawn coloured marking down the side of and inside the said bottle.

The decision here depends on the true application to the facts of this case of the principle laid down by **ATKIN, J.**, in *Moussell Brothers v. London & North-Western Ry. Co.* (1), where he said ([1917] 2 K.B. 845):

"I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

The regulation in question comes within a group of regulations relating to the cleansing and storage of vessels, utensils and appliances used in the preparation

and delivery of milk for sale, and made under s. 20 (1) of the Food and Drugs Act, 1938, as amended by the Food and Drugs (Milk and Dairies) Act, 1944, s. 1 (2). These regulations, as it seems to us, were made to ensure, so far as possible, that milk delivered to the consumer should be as clean as possible, and by this particular regulation an obligation is put, *inter alia*, on the distributor to ensure the thorough cleanliness of all vessels used in the preparation of milk for sale, including, of course, the bottles in which the milk is delivered. It seems to us, therefore, that, applying the principle referred to above, the legislation in question has the effect of imposing an absolute duty so that a principal would be liable for the acts of his servant or agent done within his authority. Further, as was pointed out by LORD GODDARD, C.J. ([1946] 1 All E.R. 382), in *Linnett v. Metropolitan Police Comr.* (2), the principle set out in *Mousell's* case (1), as applied in the various decisions thereon, does not depend on the legal relationship existing between master and servant or between principal and agent, but depends on the fact that the person who is responsible in law, as, for example, a licensee under the Licensing Acts, has chosen to delegate his duties, powers, and authority to another. The principle applies, as it seems to us, to a case where, as here, the distributor who is selling milk in bottles sub-contracts the bottling and delivery to another.

It was contended on behalf of the appellant company, both before the recorder and before us, that, though a distributor within the regulation and though selling the milk to the hospital, it was not personally using the bottle in question, and, therefore, cannot be held guilty of an offence against the regulation. This, however, begs the question, since it can be said, and, we think, can properly be said, that the use of the bottle by York Producers, Ltd. was use by the appellant company. It may be that York Producers, Ltd. could also have been prosecuted, or that the appellant company could, when prosecuted, have raised a defence under s. 83 (1) of the Food and Drugs Act, 1938, but we are not called on to decide these questions in the present case. In the premises we think that the appellants were rightly convicted, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Ridsdale & Son*, agents for *Crombie, Wilkinson & Robinson*, York (for the appellants); *Sharpe, Pritchard & Co.*, agents for *T. C. Benfield*, town clerk, York (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CUMMINGS v. LONDON BULLION CO., LTD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), January 14, 15, February 1, 1952.]

Currency Control—Debt in foreign currency—Rate of exchange—Creditor resident abroad outside scheduled territories—Date when debt became payable—Date when Treasury permission obtained—Exchange Control Act, 1947 (c. 14), s. 33 (1).

In July, 1949, while on a visit to England, the plaintiff, who was resident in the United States of America, bought a brooch from the defendants for \$3,200, it being a term of the contract that, if the plaintiff returned the brooch within an agreed time, the defendants would re-purchase it at the same price. Both parties knew that, under the Exchange Control Act, 1947, s. 1 and s. 6 (1), the permission of the Treasury would have to be obtained before the defendants could pay the \$3,200 to the plaintiff, if required to do so. The plaintiff decided to return the brooch, and on Aug. 15, 1949, it was received by the defendants. The rate of exchange on that date was \$4.02 to the pound, and the defendants were credited with £796 Os. 8d. in respect of the cheque. On Sept. 29, 1949, when the rate had altered to \$2.80 to the pound, the defendants received the permission of the Treasury to obtain the dollars and to transfer them to the plaintiff, who had returned to the United States, but they failed to act on the permission. In an action against the defendants the plaintiff claimed the sum of £1,142 17s., being the sum of \$3,200 converted into sterling at the rate of \$2.80 to the pound. The defendants contended that the date to be taken to ascertain the rate for the conversion of the dollars into sterling was Aug. 15, when the brooch was returned, and, therefore, they were only liable for £796 Os. 8d.

HELD: under the Exchange Control Act, 1947, the permission of the Treasury was required for the performance of the defendants' promise to pay the dollars to the plaintiff and under s. 33 (1) of the Act it was an implied condition in the contract between the parties that that promise should not be performed except in so far as the permission was given; the dollars, therefore, did not become payable to the plaintiff until Sept. 29 when the permission was given; and, consequently, the plaintiff was entitled to be paid at the rate of exchange prevailing on that day.

Vionnet (Madeleine) et Cie. v. Wills ([1939] 4 All E.R. 136), applied.

AS TO CLAIM IN FOREIGN CURRENCY, see HALSBURY, Hailsham Edn., Vol. 23, p. 173, para. 251; and FOR CASES, see DIGEST, Vol. 35, pp. 173, 174, Nos. 38-48.

FOR THE EXCHANGE CONTROL ACT, 1947, see HALSBURY'S STATUTES, Second Edn., Vol. 16, p. 559.

Cases referred to:

- (1) *Vionnet (Madeleine) et Cie. v. Wills*, [1939] 4 All E.R. 136; 161 L.T. 311; Digest Supp.
- (2) *S.S. Celia v. S.S. Volturno*, [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 35 Digest 174, 39.
- (3) *Société des Hôtels Le Touquet Paris-Plage v. Cummings*, [1922] 1 K.B. 451; 91 L.J.K.B. 288; 126 L.T. 513; 35 Digest 173, 36.

APPEAL by the plaintiff from an order of SLADE, J., dated Jan. 25, 1951.

Under an agreement between the parties the defendants promised to pay \$3,200 to the plaintiff, who was resident in the United States of America, on receiving back a brooch from him. The defendants received the brooch on Aug. 15, 1949, and on Sept. 29, 1949, they obtained permission from the Treasury, under the Exchange Control Act, 1947, s. 1 and s. 6 (1), to buy the dollars and to transfer them to the plaintiff, but they did not act on the permission. The

plaintiff brought an action claiming £1,142 17s., being the sum of \$3,200 converted into sterling at the rate prevailing on Sept. 29, 1949. SLADE, J., held that the debt became payable on Aug. 15, when the brooch was received back by the defendants, and, therefore, the sum of \$3,200 should be converted into sterling at the rate which prevailed on that date.

S. Pascoe Hayward, K.C., and I. H. Jacob for the plaintiff.
T. G. Roche for the defendants.

Cur. adv. vult.

Feb. 1. The following judgments were read.

SOMERVELL, L.J.: This is an appeal by the plaintiff from a decision of SLADE, J. The plaintiff is a citizen of the United States of America resident in that country. In July, 1949, while on a visit to this country, he bought from the defendants, a company carrying on business in London, a platinum brooch. The agreed price was \$3,200. This was paid. It was a term of the contract that, if the brooch proved unsatisfactory, the defendants would re-purchase it within ninety days for the cost price, namely, \$3,200. A week later, after consultation with his wife, for whom the brooch was intended, the plaintiff decided to exercise his right to return the brooch, and he wrote to this effect from Paris on July 22. The brooch was received by the defendants on Aug. 15, 1949.

Under the Exchange Control Act, 1947, to which I will have to refer in some detail, permission had to be obtained from the Bank of England to obtain the dollars and transfer them to the plaintiff. For some reason which was unexplained, the defendants do not appear to have sought this permission until they had received a letter from the plaintiff, dated Sept. 12, 1949, and sent from the United States, to which the plaintiff had by then returned. He wrote to ask why he had not received his price. Permission was in fact obtained on Sept. 29. The defendants did not act on this permission. The reason, undoubtedly, was that on Sept. 18 the pound sterling in relation to the dollar had been devalued. When the defendants received the plaintiff's cheque, the rate was \$4.02 to the pound and the defendants were credited with £796 0s. 8d. in respect of the cheque. This rate prevailed on Aug. 15 when the brooch was received. On Sept. 29 the rate was \$2.80 to the pound and it would have required £1,142 17s. to obtain \$3,200. There were further letters from the plaintiff demanding his dollars. The line taken by the defendants on Mar. 21, 1950, and later was that they had not agreed to refund the price in dollars. It is now conceded that they had so agreed. The writ was issued on June 20, 1950, claiming £1,142 17s. Various points were raised in the statement of claim, but the issue before the learned judge and the first issue before us is whether, for the purposes of the judgment, the sum of \$3,200 falls to be converted into sterling at the rate prevailing on Aug. 15, which gives a sum of £796 0s. 8d., or at the rate prevailing on Sept. 29, which gives a sum of £1,142 17s.

There is a recent authority of this court, *Madeleine Vionnet et Cie. v. Wills* (1), which decides that the correct date on which to convert a debt in foreign currency sued for in this country is the date when the debt became due. In *S.S. Celia v. S.S. Volturno* (2) the House of Lords decided that in the case of a claim for damages for breach of contract the conversion must take place at the rate of exchange prevailing at the date of the breach: [see *per* LORD BUCKMASTER ([1921] 2 A.C. 548)]. It was argued in *Vionnet's* case (1) that a different principle should apply to a claim for a debt in foreign currency and that the conversion should take place at the rate of exchange prevailing at the date of the writ or, in that case, at the date when a sum paid into court was ordered to be paid out to the plaintiff. In the absence of a payment out of money in court, it had been suggested, for example, by ATKIN, L.J. ([1922] 1 K.B. 465), in *Société des Hôtels Le Touquet Paris-Plage v. Cummings* (3), that the correct date might be the date of the judgment of the English court. In *Vionnet's* case (1) this court

rejected the contention. CLAUSON, L.J., delivering the judgment of the court, said ([1939] 4 All E.R. 138):

A "If this be the position, the only question open in this court would seem to be whether or not any distinction can in principle be drawn between the case of a claim in respect of breach of contract which results in relief by way of damages and a like claim which results in relief by way of judgment for a fixed sum. We can find no logical ground for such a distinction either in reason or in any principle which can be deduced from the decided cases. Indeed, counsel supporting the judgment below was not able to formulate any such principle, still less to point to any decided cases from which any such principle could be deduced."

B The date, therefore, in the present case is the date when the defendants were in breach in not transmitting to the plaintiff the sum in dollars which they had undertaken to pay. The learned judge found that this date was Aug. 15, when the brooch was received back.

C Counsel for the plaintiff argued, in the first place, that there was no breach, and that payment was not due, until the permission under the Exchange Control Act had been given, i.e., on Sept. 29. He sought to argue in the alternative that the decision in *Vionnet's* case (1) was inconsistent with the decision of this court in the *Le Touquet* case (3), and that it was, therefore, open to us to follow either. In the *Le Touquet* case (3) the debt in francs which was payable in France was incurred in 1914 and was for 18,035 francs. After a writ had been issued in November, 1919, in this country, the defendant paid 18,035 francs to the plaintiffs in France, and it was held she had thereby discharged her debt. The franc had by that time depreciated. If the action had proceeded to judgment and the date when the debt became due had been taken, the plaintiff would have obtained judgment for a sum in sterling which would have been the equivalent of a very much larger sum in francs than the amount of the original debt. It is clear from the judgments that the court did not base its decision on the principle that, if no payment in francs had been made, the francs would fall to be converted at the date of the judgment. ATKIN, L.J., stated expressly ([1922] 1 K.B. 465) that that point was open and there is a sentence to the same effect in the judgment of BANKES, L.J. In *Vionnet's* case (1) the court referred to the *Le Touquet* case (3) and clearly did not regard it as deciding the point. Their decision as to what the *Le Touquet* case (3) did or did not decide would, I think, in itself be binding on us, but it seems to me plain that the *Le Touquet* case (3) cannot be regarded as affecting or in any way impairing the authority of *Vionnet's* case (1), which, therefore, binds this court. Should this case go to the House of Lords, counsel for the plaintiff desired to be free to argue that *Vionnet's* case (1) was wrong. Counsel for the defendants objected that no reservation of the point had been made below and that, although the pleading contained contentions of law as well as allegations of fact, this was not among the former. The point is one of law on the facts as disclosed by the correspondence which was the only evidence before the learned judge, and we thought that, so far as this court is concerned, the plaintiff should be free to raise the point in the House of Lords, should there be an appeal. An amendment to the pleading was, therefore, drafted.

G I will now return to the first submission for the plaintiff, namely, that, having regard to the provisions of the Exchange Control Act, 1947, there was no breach, and the debt was not due within the meaning of the decision in the *Vionnet* case (1), until the permission required under that Act was granted. The learned judge, as I have said, rejected this contention, and I will come back to his reasons later. Section 1 of the Act imposes restrictions on the obtaining of foreign currency, and s. 5 and s. 6 (1) impose restrictions on making payments to persons resident outside the scheduled territories. It is agreed that the plaintiff was such a person. It is also agreed that, under the powers of delegation contained in s. 37 (4), the "permission of the Treasury", which, under s. 1, s. 5 and s. 6 (1),

the plaintiff required for this transaction, could be obtained from the Bank of England. To obtain the dollars the defendants had to obtain permission under s. 1. In the form which was submitted, the purpose for which the dollars were required, namely, for payment to the plaintiff, is set out. Section 6, which is the relevant section with regard to payment, reads:

"(1) Except with the permission of the Treasury, no person resident in the United Kingdom shall, subject to the provisions of this section, make any payment outside the United Kingdom to or for the credit of a person resident outside the scheduled territories. (2) Nothing in this section shall prohibit the doing of anything otherwise lawful by any person with any foreign currency obtained by him in accordance with the provisions of Part I of this Act or retained by him in pursuance of a consent of the Treasury."

There were, therefore, two permissions which were required, one for dollars under s. 1, and a second for payment under s. 6 (1). That, at any rate, was the basis of the argument. I do not think the issue is affected if one regards the permission to be given under s. 1 as covering both the obtaining of the dollars and their use when obtained.

The next relevant provisions are contained in s. 33 (1) and s. 33 (3) which read:

"(1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Treasury is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required: Provided that this sub-section shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of the provisions of this Act or for any other reason. (3) The provisions of sched. IV to this Act shall have effect with respect to legal proceedings, arbitrations, bankruptcy proceedings, the administration of the estates of deceased persons, the winding-up of companies, and proceedings under deeds of arrangement or trust deeds for behoof of creditors."

The proviso to s. 33 (1) does not arise here. It is not suggested that either party contemplated a contravention of the Act. It is, indeed, plain from the correspondence that both plaintiff and defendants realised the necessity of obtaining Treasury permission. The effect of the earlier words of s. 33 (1) on the contract in this case is, I think, plain. One must read into the contract a term that payment is not to be made except in so far as permission is given. The effect of this term has to be considered in the light of the provisions of sched. IV if legal proceedings are taken. Schedule IV, para. 1, applies the provisions of Part II of the Act, *i.e.*, s. 5 to s. 7, dealing with payments to be made, to sums to be paid under any judgment or order. Paragraph 2 reads:

"Nothing in this Act shall be construed as preventing the payment by any person of any sum into any court in the United Kingdom but the provisions of Part II of this Act shall apply to the payment of any sum out of court, whether under an order of the court or otherwise, to or for the credit of any person resident outside the scheduled territories."

Paragraph 3 gives power to make rules of court. Rules have been made which provide for payment into court of sums due under any judgment, order or award in cases where permission is required under the Act and has not been given: R.S.C., Ord. 42, r. 1 (2) and r. 1 (3). There is a further rule (R.S.C., Ord. 22, r. 22) which lays down the procedure enabling the plaintiff to get money paid into court, in cases covered by the Act, paid out when the necessary permission has been obtained. Paragraph 4 of sched. IV is important and reads:

"(1) In any proceedings in a prescribed court and in any arbitration proceedings, a claim for the recovery of any debt shall not be defeated by

reason only of the debt not being payable without the permission of the Treasury and of that permission not having been given or having been revoked. (2) No court shall be prescribed for the purpose of this paragraph unless the Treasury are satisfied that adequate provision has been made therefor by rules of court for the purposes specified under the last preceding paragraph."

A It is agreed that the proceedings here were in a prescribed court.

These provisions disclose the purpose of the Act. Parties are free to make contracts, or, at any rate, certain contracts of which this is one, on terms the fulfilment of which, or some of which, require permission under the Act. That term cannot be performed unless or until permission is given. The effect of the provisions with regard to payment into and out of court are simpler if one considers a case where the prohibited payment is in sterling. The person entitled to the payment issues a writ. The fact that permission has not been obtained is not a defence to the action. On the one hand, the plaintiff can obtain judgment, the money due under the judgment being subject to Part II of the Act and the rules to which I have referred. The defendant, assuming that he is admitting liability, apart from the provisions of the Act, can make a payment into court.

C The Act is not to be used to enable the defendant to retain the money in his pocket, but to control its reaching its destination, namely, the plaintiff.

The question is: How does one apply the decision in *Vionnet's* case (1) to these provisions? SLADE, J., held that the Act did not alter the contractual obligation, but interfered only with the time of performance. I agree with this, but he then held that the debt became due on precisely the same date as it would have done under the contract apart from legislation. I agree that in one sense it became due. If a writ had been issued on Aug. 16, 1949, there would have been no defence to the action, although the defendants still could not have lawfully paid either the dollars or their equivalent, whatever that might be, to the plaintiff. A writ was not issued, and what one has to identify under *Vionnet's* case (1) is the date of the breach. At what date can it be said that the defendants were in default in not paying this sum in dollars? Having regard to s. 33 (1) of the Act, I think the answer is Sept. 29. At that date the rate of exchange was \$2.80 to the pound. In the present case this is disadvantageous to the defendants, but it seems to me illogical to apply a rate prevailing at a time when they could not lawfully obtain the foreign exchange required.

F It was rightly pointed out that, if a writ is issued before permission is given, a further problem arises if the learned judge was wrong in holding that Aug. 15 was the date for the conversion. The combination of s. 33 and sched. IV produces a novel position. Until a writ is issued, the person liable cannot legally make the payment in dollars. Once a writ is issued, he can legally discharge his obligation by payment of whatever is the appropriate sum in sterling into court. This is an obligation created by the statute on the issue of a writ. We have not got

G to decide that point on this appeal. It was, however, suggested that it sets a problem incapable of solution, unless one applies the principle adopted by the learned judge. The problem seems to me, at any rate, capable of solution in accordance with the principles of *Vionnet's* case (1). If there are legal proceedings, the defendant can discharge his obligation forthwith by paying the proper sum, whatever that may be, into court. It could, I think, be said with force that an

H obligation to pay the sterling equivalent arises on that date. The defendant could, no doubt, on the authority of the *Le Touquet* case (3), if permission was obtained before judgment, satisfy the claim by paying the dollars to the plaintiff, though he would, presumably, be liable for costs up to that time. If, however, he pays into court, or if the case goes to judgment, I, at any rate, see no difficulty or illogicality in taking the date when the obligation could have been discharged by a payment into court as the proper date for conversion. I agree with the learned judge that the Act presents a difficult problem in its application to a

transaction of this kind. For the reasons which I have given I have come to a different conclusion from that of the learned judge, and think that this appeal should be allowed, and judgment entered for £1,142 17s.

DENNING, L.J.: I take it to be clear law that, when a creditor comes to the courts to enforce a debt payable in a foreign currency, he is entitled to be put into as good a position as if the debtor had done his duty under the contract and had paid the debt in the foreign currency without the intervention of the courts. To do this, judgment must be given for the creditor for the debt turned into sterling at the rate of exchange ruling at the date when it should have been paid. The critical date is not so much the date when the cause of action arose, but rather the date when the debt should have been paid. Usually, the two coincide. The cause of action nearly always arises at the same time as the debt is payable. That is what happened in *Madeleine Vionnet et Cie. v. Wills* (1). But sometimes the dates diverge. The debt may be *debitum in presenti solvendum in futuro*. The present is an illustration of a divergence. The cause of action here arose on Aug. 15, 1949. That is shown by the fact that at any time thereafter the creditor could have brought an action in the English courts and recovered judgment: see sched. IV, para. 4 (1), to the Act of 1947. But the debt was not payable on Aug. 15, 1949. It was not payable until the debtor was given permission to buy \$3,200 and pay them to the creditor: see s. 33 (1) of the Act. He was given permission on Sept. 29, 1949. It was on that day, therefore, that the debtor, if he had done his duty, would have paid the creditor \$3,200. The creditor was entitled to be put in as good a position as if the debtor had paid the dollars on that day. To do this the rate of exchange must be taken on that day.

I would add one further observation. If the debtor does not ask for permission and the creditor brings an action in the English courts, under sched. IV, para. 4, the debt becomes payable as soon as the writ is served and the debtor is able to pay into court, and the rate of exchange must be taken on that day. I agree that the appeal should be allowed.

ROMER, L.J.: I agree that this appeal should be allowed. In my judgment, the date for conversion of the dollars into sterling is the date when they became "payable" by the defendants to the plaintiff in the sense that the defendants could be regarded as contractually in default if they failed to make the payment. Apart from the Exchange Control Act, 1947, that date would undoubtedly have been Aug. 15, 1949, when the brooch was returned by the plaintiff to the defendants. The question, therefore, is whether the Act operated so as to postpone the defendants' liability to make this payment to the plaintiff (and I emphasise the words "to the plaintiff") beyond the time as fixed by the express agreement between the parties themselves. The defendants' promise to pay was clearly a term which required Treasury consent for its performance and was: thus within the scope of s. 33 (1) of the Act. The effect of the sub-section on the promise was to defer its fulfilment until (in the events which happened) Sept. 29, 1949, and s. 6 (1) of the Act rendered its earlier performance illegal. One, accordingly, finds that the plaintiff and the defendants entered into an agreement under which the defendants promised to pay the dollars to the plaintiff on a date which might, and probably would, precede the date when, by the law of the country which governed the contract, the payment to the plaintiff could either be enforced or lawfully made. The provisions of s. 33 (1) are to be regarded as incorporated in the agreement and constitute an implied term thereof. An implied term has just as much force as a term that the parties express themselves, and, in these circumstances, I am unable to see how, as a question of construction of the contract, the plaintiff could treat the defendants as in default of their promise to pay during such time as both parties agreed (by implication) that it should not (and lawfully could not) be performed. Taking the contract as a whole the parties agreed, in my opinion, that the promise to pay should not be

performed until Treasury permission had been obtained, and there could, accordingly, be no liability or default in respect of the promise until the requisite authority was received.

I appreciate the force of the contention of counsel for the defendants (which impressed the learned judge) that on the view above expressed the defendants, although in possession of the brooch, would never become liable to repay to the plaintiff the purchase price if Treasury consent to the payment was withheld. The plaintiff would not, however, be wholly without redress. The defendants' inchoate or conditional liability to the plaintiff under the express terms of the contract is, for many purposes, treated as a "debt" by sched. IV to the Act and sufficiently preserves the character of a debt to enable the plaintiff to sue. On obtaining judgment in such an action, the sterling equivalent of the money (to be converted, I agree, in accordance with the principle which SOMERVELL, L.J., has indicated) would be brought into court and thus kept safely for the plaintiff, who could have then applied for the consent of the Treasury to payment out to himself. In the very unlikely event of the Treasury refusing his application, it is true that the plaintiff would have neither the brooch nor his money. This unfortunate result of legislation designed for the financial protection of this country cannot, however, in itself impose on the defendants a liability to the plaintiff from which, in my judgment, they are free under the terms of the contract itself.

Appeal allowed.

Solicitors: *Kaufman & Seigal* (for the plaintiff); *S. Rutter & Co.* (for the defendants).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

SHERWOOD (BARON) v. MOODY AND OTHERS.

[KING'S BENCH DIVISION (Ormerod, J.), January 24, 25, 1952.]

Agriculture—Agricultural holding—Notice to quit—Protection of sub-tenant—Tenant's counter-notice—Minister's consent to operation of notice to quit—Notice to quit by tenant to sub-tenant—Minister's consent to operation of tenant's notice to quit revoked on appeal—Agricultural Holdings Act, 1948 (c. 63), s. 24 (1).

The landlord of an agricultural holding served a notice to quit on his tenants, who served a notice to quit expiring on the same day on their sub-tenant without referring therein to the notice they had received from their landlord. The tenants served a counter-notice on their landlord under s. 24 (1) of the Agricultural Holdings Act, 1948, but the county agricultural executive committee, acting on behalf of the Minister of Agriculture and Fisheries, consented to the operation of the landlord's notice. The sub-tenant also served a counter-notice on the tenants and the committee consented to the operation of the tenants' notice, but the Agricultural Land Tribunal allowed an appeal by the sub-tenant, thereby, under s. 24 (1), rendering the tenants' notice of no effect.

HELD: the notice to quit served by the landlord on the tenants, having been approved by the Minister, was a valid notice to quit which put an end to the tenancy of the whole of the property at the expiry of the notice, and, in the absence of any provision in the Agricultural Holdings Acts and the regulations made thereunder enabling a sub-tenancy to exist after the tenancy had been terminated by a notice to quit which was valid under the Acts, by the ordinary application of common law, put an end also to any sub-tenancy which had been created during the existence of the tenancy; the proceedings relating to the sub-tenant's counter-notice were of no effect; and, therefore, the notice to quit served by the landlord

on the tenants effectively determined their tenancy and the sub-tenancy they had created and the landlord was entitled to possession of the whole holding.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 24 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 46.

Case referred to:

- (1) *Cow v. Casey*, [1949] 1 All E.R. 197; [1949] 1 K.B. 474; [1949] L.J.R. 565; 2nd Digest Supp. A

ACTION for possession of an agricultural holding and for mesne profits and damages for trespass.

The plaintiff was the landlord of Shalcombe Farm, in the Isle of Wight. He had given notice to quit to the tenants, George and George Henry Moody, who had given notice to quit expiring on the same day to their sub-tenant of part of the farm, one Barnes, but had not stated in that notice that they had received notice to quit from their landlord. The tenants had served a counter-notice on the landlord under the Agricultural Holdings Act, 1948, s. 24 (1), but the county agricultural executive committee, acting for the Minister of Agriculture and Fisheries, confirmed the landlord's notice and the tenants did not appeal against that decision. The sub-tenant, Barnes, also served a counter-notice on the tenants under s. 24 (1), and the county agricultural executive committee subsequently confirmed the tenants' notice. The sub-tenant, Barnes, appealed against the decision to the Agricultural Land Tribunal, who allowed his appeal. For the landlord it was contended that his notice to quit, so confirmed, determined the tenancy and the sub-tenancy created by his tenants and that no provision in the Agricultural Holdings Act, 1948, or regulations made thereunder enabled the sub-tenant, Barnes, to remain in occupation. For the sub-tenant, Barnes, it was contended that (i) the county agricultural executive committee, when considering the counter-notice of the tenants, thought it was considering also the counter-notice of the sub-tenant, Barnes, and that when it later considered Barnes' counter-notice it was not in a position impartially to re-consider it and the decision of the Agricultural Land Tribunal should, therefore, be effective as reversing both decisions of the county agricultural executive committee; and (ii) that the sub-tenant was a "tenant" within the meaning of the Agricultural Holdings Act, 1948, s. 94 (1), and as such was entitled to the protection conferred by s. 24 (1) on a tenant who serves a counter-notice to any notice to quit given by his landlord and has such counter-notice upheld. It was also contended by two sub-tenants of the sub-tenant, Barnes, that they were entitled to the protection of the Rent Restrictions Acts. B C D E F

Lawrence, K.C., and *A. P. Fletcher* for the landlord (the plaintiff).

Karmel, K.C., and *Aggs* for the sub-tenants (the second and other defendants).

ORMEROD, J.: The landlord, Lord Sherwood, who is the owner of estates in the Isle of Wight, brings this action against a number of defendants for the possession of Shalcombe Farm, a farm of approximately 116 acres, in the Isle of Wight. The farm was let by the landlord to the first defendants, the tenants, George Moody and George Henry Moody, under an agreement in writing dated June 18, 1941. No question is raised as to the restrictions on sub-letting which it contained, it being agreed that the sub-lettings by the tenants of two parcels of this farm were within the terms of the agreement for the purpose of this action. In 1941 a portion of the farm was occupied by the tenants, thirty-four acres and the farmhouse were occupied by the defendant, Barnes, to whom they had been sub-let by the tenants, another portion of the land was occupied by the defendant, Walmesley, to whom it had been sub-let by the tenants, and two portions of the farmhouse had been sub-let by the sub-tenant, Barnes, to the defendants, Woolley and Eldridge, who were not farming the land but were merely occupying those portions of the farmhouse as a dwelling-house. On G H

Oct. 10, 1949, the landlord, in accordance with the terms of the agreement gave to the tenants notice to quit, requiring them to deliver up possession of the premises on Oct. 11, 1950. On Oct. 11, 1949, the tenants gave a notice to quit to their sub-tenant, Barnes, to deliver up possession of the premises on the same day, Oct. 11, 1950. It is not contended that that was other than a proper notice, subject to the provisions of the Agricultural Holdings Act, 1948, and the regulations made thereunder. No evidence was called in this case, because all the evidence and documents had been admitted, but it appears that when this notice was handed to Barnes by the tenant, George Moody, on Oct. 11, 1949, Mr. Moody told Mr. Barnes that the notice was being served because he himself had received a notice to quit from his landlord. Had he incorporated that statement in writing in the notice instead of merely saying it to the sub-tenant, Barnes, the situation today would have been very different.

Apart from any statute, those notices would have involved no difficulty. By the terms of the notice which the tenants served on Barnes, Barnes would have been under a duty at law to deliver up possession of the portion of the farm which he held from Messrs. Moody, the tenants, and likewise the tenants would have been under an obligation to deliver up to the landlord possession of the whole of the 116 acres. It is submitted on behalf of the landlord and agreed by counsel for the sub-tenants that at common law, if a tenancy is terminated by notice, any sub-tenancy comes to an end simultaneously, but, it is submitted, the position has been altered by considerable statutory enactment.

Section 24 (1) of the Agricultural Holdings Act, 1948, provides:

“Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit, then, subject to . . . [certain provisions which do not affect this case] the notice to quit shall not have effect unless the Minister consents to the operation thereof.”

That means that, if a tenant receives a notice to quit and chooses not to accept it without protest, he may invoke the procedure of s. 24 (1) under which, if within one month he serves a counter-notice on the landlord, the notice to quit shall not be a valid notice unless the Minister consents to its operation. By s. 25 (1) the Minister may only consent to the notice if he is satisfied that one or other of certain conditions has been fulfilled. In this case the condition on which he was required to be satisfied was that the carrying-out of the purpose for which the landlord proposed to terminate the tenancy was

“desirable in the interests of efficient farming . . . as respects good estate management . . . ”

The Minister is enabled to delegate his powers under these Acts, and by the Agriculture (Delegation to County Agricultural Executive Committees) Regulations, 1948 (S.I., 1948, No. 187) (made under s. 72 of the Agriculture Act, 1947), he delegated to county agricultural executive committees his power to consent or not consent to notices to quit under s. 24 (1).

Within the prescribed time the tenants served on the landlord a counter-notice invoking the provisions of s. 24 (1). Barnes also in due course served a counter-notice on his landlords, the tenants, in his turn invoking the provisions of s. 24 (1). He was able to do that because the tenants omitted to include in the notice to quit served on him their reason for serving the notice. By reg. 9 (1) of the Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I., 1948, No. 190), made under the repealed Agriculture Act, 1947, s. 31 (8), but which is still effective by virtue of s. 100 (1) of the Act of 1948:

“The provisions of s. 31 (1) of the Act shall not apply where notice to quit a holding or part of a holding is given to a sub-tenant thereof by a tenant

who has himself been given by his landlord notice to quit that holding or that part of a holding, and the fact that he has been given such notice is stated in the notice given to the sub-tenant."

Section 31 (1) of the Act of 1947 there referred to corresponds with s. 24 (1) of the Act of 1948, and had the tenants, at the time of handing the notice to quit to Barnes, stated in the notice that they had received a similar notice from their landlord, Barnes would have had no right to serve a counter-notice within the terms of s. 24 (1). On Dec. 13, 1949, the notice served by the landlord on the tenants was confirmed by the county agricultural executive committee and the Minister's consent to the notice was given. The tenants did not exercise their right under s. 25 (4) of the Act of 1948 to appeal to the Agricultural Land Tribunal against the decision of the Minister, but they accepted the decision of the Minister and the notice became an effective notice. At the expiry of the notice the tenancy of the tenants came to an end, and they were under an obligation to hand over possession of the farm to the landlords. After some delay it was decided that it was still open to Barnes to proceed with the counter-notice which he had served on the tenants and to have the matter determined by the Minister. In July, 1950, the county agricultural executive committee considered the notice given by the tenants to Barnes and the counter-notice given by Barnes, and they approved the notice given by the tenants which, therefore, became a good one. Barnes, however, appealed against the decision to the Agricultural Land Tribunal who reversed the decision of the Minister with the somewhat anomalous result that, although the notice by the head landlord to his tenants had been upheld by the Minister and no appeal had been made against that decision, the notice by the tenants to their sub-tenant was not a valid notice.

So far as the portion of the farm sub-let by the tenants to the sub-tenant, Walmesley, is concerned, no appearance was entered by Walmesley, and in due course interlocutory judgment was signed against him. The tenants have also submitted to judgment, and they have given up possession of the portion of the farm retained for their own use, *i.e.*, the remainder of the 116 acres not sub-let to either Walmesley or Barnes. The only questions for consideration concern the right of Barnes to remain in possession of his thirty-four acres and the farmhouse, and the right of his sub-tenants, Woolley and Eldridge, to remain in possession of the portions of the farmhouse which he had sub-let to them.

It is contended for the landlord that the notice to quit served by him on the tenants, having been approved by the Minister, is a valid notice to quit which puts an end to the tenancy of the whole of the property at the expiry of the notice, and thereby, by the ordinary application of common law, puts an end also to any sub-tenancies which have been created during the existence of the tenancy. It is agreed by counsel for the sub-tenants that that would certainly be the common law position, because a tenant is unable to grant any larger estate in the property than he has himself, and the landlord argues that there is no power in the Agricultural Holdings Act, 1948, or under any regulations made thereunder which enables a sub-tenant to remain in occupation of buildings, or for a sub-tenancy to exist, when the tenancy has been terminated in the proper way. By s. 26 (1) of the Act of 1948 the Minister may make regulations for certain purposes, including those mentioned in para. (e):

"for excluding the application of s. 24 (1) in relation to sub-tenancies in such cases as may be specified in the regulations, and for making such provision as appears to the Minister expedient for the purpose of safeguarding the interests of sub-tenants, including provision enabling the Minister or the Agricultural Land Tribunal, where the interest of a tenant is terminated by notice to quit, to secure that a sub-tenant will hold from the landlord on the like terms as he held from the tenant."

Under that section or the corresponding section of the Agriculture Act, 1947, the Minister has made the Agriculture (Control of Notices to Quit) Regulations, 1948,

reg. 9 (1) of which provides that in certain circumstances s. 24 (1) shall not apply to a sub-tenant, but he has nowhere, in terms, made any regulations which, in the words of s. 26 (1) (e), "... secure that a sub-tenant will hold from the landlord on the like terms as he held from the tenant," nor has he made any provision other than that contained in reg. 9 (4) protecting the position of the sub-tenant. In those circumstances counsel for the landlord argues that there is no provision, whether express or implied, in either the Agricultural Holdings Act, 1948, or any regulation made under that Act or the Act of 1947, which puts the sub-tenants in a better position than they would be in at common law, and so he submits that the landlord is entitled to possession of the whole 116 acres.

- A Counsel for the sub-tenants submits that the consent of the Minister under s. 24 to the notice by the landlord to the tenants was not a valid consent, in that it did not deal effectively with the whole of the property contained in the agreement. He says that the county agricultural executive committee considered the matter under the impression that it was considering, not only the notice to quit by the landlord to the tenants, but also the notice by the tenants to Barnes, and that it was dealing with it once and for all, not only in relation to the landlord and the tenants but also in relation to the tenants and their sub-tenant, and, therefore, when the committee considered the notice given by the tenants to Barnes, it was not in a position to re-consider the matter properly. When Barnes appealed to the Agricultural Land Tribunal and the Land Tribunal reversed the committee's decision it thereby showed its disapproval, not only of that decision, but of the original decision that the notice by the landlord to the tenants should stand. It is said that in those circumstances the decision of the Land Tribunal reversing the notice to the sub-tenant should also be effective to reverse the decision with regard to the notice to the tenants. I am asked to say that the original tenancy still exists because, by virtue of the disapproval of the Land Tribunal, the landlord's notice to the tenants must be treated as an ineffective notice. I need say no more about that contention than that the county agricultural executive committee had considered the matter and had come to a decision, which was the decision of the Minister, and would stand unless the tenants, within the prescribed time and in the prescribed manner, gave notice of appeal to the Agricultural Land Tribunal. There was no appeal and, therefore, that decision stood, and, so far as that notice was concerned, I think the Minister was *functus officio*. When the matter came up a second time for the consideration of the notice to the sub-tenant, it went before the Agricultural Land Tribunal, and the documents of the tribunal show that it was dealing only with the notice terminating the sub-tenancy of Barnes. It is abundantly clear that the decision could only deal, as it only purported to deal, with his portion of the farm. Had the Land Tribunal purported to deal with the whole of the farm, it would certainly, in my view, have been exceeding its jurisdiction. That first submission of counsel for the sub-tenants really comes back to the central question whether, the tenancy having been properly determined by a notice which had been approved by the Minister, whatever the Minister might then say or do with regard to the sub-tenancy would make any difference to its continued existence.

- G Counsel for the sub-tenants then says that the sub-tenants are entitled to the protection of the Act in the same way as the tenants, and he bases that on s. 94 (1), the definition section of the Act, which defines "tenant" as:

"the holder of land under a contract of tenancy, and includes the executors, administrators, assigns, committee of the estate, or trustee in bankruptcy of a tenant, or other person deriving title from a tenant."

Counsel submits that a sub-tenant is clearly within that definition of "tenant," as he is the holder of land under a contract of tenancy, or, alternatively, he is a "person deriving his title from a tenant," and in those circumstances he is

entitled to exactly the same protection as a tenant. That is an attractive argument, but, as has been pointed out by counsel for the landlord, the beginning of the definition section, like that of nearly every other definition section, is worded in this way:

"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say . . ."

and so on. It may well be that in certain circumstances the word "tenant" in the Agricultural Holdings Act, 1948, will include a sub-tenant, and other persons as well, but whether it does so in any particular case must depend on the context. Although a sub-tenant may have the privileges of a tenant in certain circumstances, a tenant is a tenant of an immediate landlord, and he has rights only in relation to that landlord and not in relation to some other person. If the Act is to be read in any intelligible way at all, it would not be possible under s. 24 or s. 25 to consider a sub-tenant as being in the position of a tenant in relation to the head landlord.

It is suggested also that reg. 9 (1) of the Agriculture (Control of Notices to Quit) Regulations, 1948, makes certain provisions with regard to sub-tenants on a notice to quit under s. 24, and that that, by inference, puts the sub-tenant in the position of the tenant and in some way protects his tenancy in the event of the tenant's agreement being terminated. I am satisfied that neither in the definition section in the Act nor in the regulations of 1948—nor, indeed, in any other regulation to which my attention has been drawn—is there any provision which empowers a sub-tenant to remain in possession on the proper termination of the tenancy in accordance with the ordinary provisions of the law. I am satisfied that, if such provision is to be made, either it must be made in express terms, or the implication must be so clear as to be beyond any doubt, and here I find no provision either in the statute or in any regulation made thereunder which in any way carries the matter further.

The only other submission which was made by counsel for the sub-tenants was that the notice to quit must be bad because at no time could the sub-tenant act with certainty on the notice. I take it that he means that neither the tenants nor the sub-tenant could act with certainty because the provisions of the statute and the regulations made under it made it doubtful whether at any particular time either the notice or the sub-notice would be effective and would be allowed to remain in being. That comes back to the same point. If there is no statutory provision to extend the tenancy of the sub-tenant beyond the term of the original tenancy, it seems to me that the sub-tenant cannot be in any uncertain position by reason of the possibility of being able to invoke statutory regulations which cannot in any event have the slightest effect on his tenancy.

Having regard to all those matters, I am satisfied that the tenancy was properly determined by a notice to quit given by the landlord to the tenants on Oct. 10, 1949; that that notice to quit was approved by the Minister and became a valid and enforceable notice to quit; that the tenancy thereby came to an end on Oct. 11, 1950; that in those circumstances the sub-tenancies also came to an end; and that there is no provision in the Agricultural Holdings Act, 1948, or in any statutory regulation made thereunder to extend the tenancy of a sub-tenant for any longer period than the term of the head tenancy. It follows that the landlord is entitled to judgment.

I should just say something about the position of the two sub-tenants, Woolley and Eldridge, each of whom holds a small portion of the farmhouse as sub-tenant from Barnes. It was claimed in the pleadings that they were entitled to the protection of the Rent Restrictions Acts, so that, even if the landlord was entitled to succeed against the sub-tenant Barnes he was not entitled as against these two sub-tenants to the possession of the portions of the farmhouse sub-let to them. But I think counsel for the sub-tenants now agrees that the decision of

the Court of Appeal in *Cow v. Casey* (1) makes it clear that the Rent Restrictions Acts do not apply where the premises let are a portion only of larger premises which themselves are not within the Rent Restrictions Acts. In the circumstances it is conceded by counsel that the tenancies of the sub-tenants, Woolley and Eldridge, are not protected by the Rent Restrictions Acts, and it follows, therefore, that they stand or fall with the sub-tenant, Barnes. If Barnes has still a valid or existing tenancy, they themselves have one, but if his tenancy has come to an end, theirs has also come to an end. I am satisfied that Barnes' tenancy has come to an end, and, therefore, it follows that the tenancies of the other two have come to an end as well. There must be judgment for the landlord and an order for possession against the sub-tenant, Barnes, and also against the sub-tenants, Eldridge and Woolley.

Judgment for the landlord.

Solicitors: *Withers & Co.* (for the landlord); *Thomas Eggar & Son*, agents for *Gunner Wilson & Jerome*, Newport, Isle of Wight (for the sub-tenants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

C POOLEY v. POOLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), January 21, 1952.]

Justices—Husband and wife—Maintenance order—Discharge—Petition for divorce—Application for alimony pendente lite.

Where a wife, who has in her favour a maintenance order made by a magistrate includes in a petition for divorce a claim for alimony *pendente lite*, she may apply to the magistrate to discharge his order since she cannot have two concurrent maintenance orders, and the jurisdiction of the magistrate in dealing with her application does not conflict with the jurisdiction of the Divorce Court.

AS TO DISCHARGE OF MAINTENANCE ORDER, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345; and FOR CASES, see DIGEST, Vol. 27, pp. 565, 566, Nos. 6237-6250, and Digest Supps.

Case referred to:

(1) *Bragg v. Bragg*, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest 565, 6242.

APPEAL by the wife against a decision of the Leeds stipendiary magistrate, dated Sept. 27, 1951, dismissing her application to discharge a maintenance order made in her favour on Nov. 26, 1946, on the ground of her husband's desertion. On Sept. 29, 1950, the wife had filed a petition for divorce on the same ground and in her petition she applied for alimony *pendente lite*, and she sought the discharge of the magistrate's order to avoid the existence of two concurrent orders for maintenance. The magistrate held that he had no jurisdiction in the matter because there was a petition pending in the Divorce Court.

D. H. Robson for the wife.

Stogdon for the husband.

LORD MERRIMAN, P.: In a reasoned judgment the magistrate says that he does not think that he has jurisdiction to discharge this order because the wife's petition is pending in the Divorce Court and a magistrate should not exercise any concurrent jurisdiction while a suit is so pending. He took the view that even the act of considering whether or not to discharge the order would be some infringement of the jurisdiction of the Divorce Court, albeit that it was being done for the express purpose of avoiding a conflict of jurisdiction between the two courts, and that the proper way to deal with the situation, if

the wife chose not to apply for an increase of the amount of maintenance under the recent amendment of the law effected by the Married Women (Maintenance) Act, 1949, s. 1, whereby the maximum sum was increased from £2 to £5, was to go to the Divorce Court and apply for maintenance pending suit, disclose that the order of 1946 subsisted, ask the Divorce Court to adjourn for twenty-eight days, and, if within that time the magistrate had set the order aside, then go back to the Divorce Court and proceed for the alimony. I find this line of reasoning wholly unconvincing. In my opinion, there was no answer to the wife's application to discharge the order. A wife who has taken divorce proceedings—*a fortiori*, if, as in this case, she has incorporated in her petition a claim for alimony pending suit instead of making it the subject of a separate application—is entitled to pursue her rights for maintenance in the Divorce Court, provided that she gets rid of any existing order, for she cannot have concurrent orders in her favour in two courts.

Great reliance was placed on the line of decisions beginning with *Bragg v. Bragg* (1), which decides that even after dissolution of marriage magistrates may, in a proper case, exercise their functions with reference to a pre-existing order for maintenance. In the Divorce Court a wife can obtain an order for a secured provision of maintenance. Moreover, there is no limit, within reason, to the amount of maintenance that may be awarded by the High Court, whereas there is a statutory limit in the case of a court of summary jurisdiction. So, plainly, at the time when a divorce is granted, it may be much more advantageous for a wife, merely from the financial point of view, to get provision for her maintenance through the Divorce Court. It is elementary that she is entitled to an absolutely free hand regarding maintenance, subject always to two things—to the fact that, if she decides to apply to the Divorce Court, she must get rid of an existing order in the magistrates' court, and to the right of the magistrates' court, in a proper case, to treat the mere fact of divorce itself as being sufficient to justify the magistrates in bringing the order to an end, leaving her to whatever her rights may be in the Divorce Court.

Counsel for the husband has not attempted to dispute that, but he says that a different principle is to be applied with regard to alimony pending suit. In one sense there is a difference in that the decree may never be made at all. But that is the wife's risk, and I cannot see that it is anything else but a question whether she makes her choice sooner rather than later. She is just as much entitled to ask for her alimony pending suit in the Divorce Court as she is to ask for her ultimate maintenance in the Divorce Court, and I am completely unimpressed by the difficulty which the magistrate felt—that, by giving his mind to her wish to get rid of the order in her own favour while there is a petition on the file of the Divorce Court, he must actually be exercising a conflicting jurisdiction. Even if the course which the magistrate suggests is the proper solution of the difficulty, namely, making an application to the Divorce Court, having it adjourned for a specified period, and then going back to the magistrate's court to get the order set aside, the matter is still pending in both courts. There is no escape from it unless one thing is done, namely, that she goes to the magistrate before presenting her petition. In my opinion, there is no obligation on her to do that. Underlying the whole of this case there has been a momentary forgetfulness of the fact that by getting rid of the whole order and with it the finding of desertion, she is not doing the harm which the magistrate thought she would be doing to her case. The petition alleges that the desertion, held to have begun in 1946, had continued until the presentation of the petition. Even on the view that getting rid of the order could do her harm by cancelling a subsisting finding of desertion, it could not affect the issue before the court, provided it is done after the petition is filed. It has never been hinted or suggested, within my experience, that she is obliged to get rid of the order before presenting her petition. I must not be taken to be suggesting that, even

if she did so, it would make any difference to the reality of the matter, but, for what it is worth, she would be getting rid of the advantage of being able to plead a subsisting order, and she is not obliged to do that.

A I think the whole of the suggestion that there is a conflict between the two jurisdictions in getting rid, pending suit, of the old order, is a fallacy. The truth and the reality of the matter is that the application is made to ensure there is no overlapping between the two. That cannot be said of the class of case in which this court has set its face against an overlap of the jurisdictions—cases, for example, where there is an attempt to raise a charge of adultery in the magistrates' court when the same issue is pending in the Divorce Court or there is pending in the Divorce Court a proceeding in which that same issue could properly be raised. This case does not come within any measurable distance of that sort of principle. In my opinion, the magistrate should have set this order B aside on the wife's application so that the matter might proceed under her petition, and I think that we ought to do the same. In so far as it is a matter of discretion, which I doubt since the wife herself wishes to have the order set aside, I feel no difficulty about exercising our discretion in the matter, because I think the reasons the magistrate has given for the exercise of the discretion in the way he exercised it are unsound. In my opinion, this appeal must be allowed.

C **KARMINSKI, J.:** I agree. I am not able to share the difficulty of the magistrate. In cases where a wife has obtained an order from magistrates and then petitions in the High Court for divorce, there is likely to be, at any rate for a time, a certain concurrence of jurisdiction, and in cases of desertion the only way out of this position would be for the wife to apply to the magistrates D to discharge her order before she files her petition. That step may be fraught with dangers for her—dangers which might not inevitably be fatal—because she would be weakening the evidence in her hand that the desertion had continued up to the presentation of the petition. Short of an active conflict on the financial side in a case of this kind I see no difficulty in the matter. The magistrate has suggested two alternatives which seem to me to be more likely to be causes of E two concurrent exercises of jurisdiction than the order which was sought from him, because he suggested that the wife, though she had a petition pending in the High Court, should apply to the magistrates' court for an increase in the existing order, or, alternatively, that she should apply to the registrar in the Divorce Court for alimony pending suit and then ask to have that application adjourned for a time so that she could go back to the magistrate to discharge F the existing order. The second alternative, without avoiding the possibility of concurrent jurisdiction, seems to me to be really a more roundabout way of approaching the matter than the wife has already undertaken. So far as the question of principle is concerned here, I entirely agree with LORD MERRIMAN, P., that the matter is of some interest, because the rights of a wife in the Divorce Court are not only greater than, but are also distinct from, those which she can G obtain in a court of summary jurisdiction. There is no limit to the amount which the Divorce Court can order. It is further of importance to recall that the Divorce Court can order secured payments for life, in proper cases, whereas no such provision exists in the court of summary jurisdiction.

Appeal allowed.

Solicitors: *Ludlow, Head & Walter*, agents for *Wiley, Hargrave & Co.*, Leeds (for the wife); *Louis Godlove & Co.*, Leeds (for the husband).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

JACK WINDLE, LTD. v. BRIERLEY.

[LIVERPOOL ASSIZES (Lynskey, J.), November 13, 14, 15, 16, 1951.]

Agent—Estate agent—Commission—Introduction of purchaser—Purchaser unable to raise purchase price—Agency terminated by agreement—Sale subsequently effected to same purchaser—Agent's right to commission.

The defendant instructed the plaintiffs, a firm of estate agents, to endeavour to sell his bakery business and he signed a document dated Mar. 11, 1949, appointing the plaintiffs to be his agents for that purpose. The document further provided that, in consideration of the plaintiffs' agreeing to be his agents for the said purpose: "I agree that I will not revoke this authority or determine your agency for the purpose aforesaid during the period of twelve weeks from this date. If a sale is effected of the said business and property by you at any price to which I may agree or by me or anyone else at any price whatever during the said period I will pay you a commission of two per cent. of the purchase price of the property and five per cent. of the purchase price of the valuation and effects however sold and that such commission shall be paid to you together with such expenses incurred by you relevant to this sale at your offices on the day when such sale is agreed to be completed whether the purchase is in fact completed or not." The plaintiffs introduced G., and a price was agreed on, but G. was unable to raise the necessary money, no contract was signed, and the negotiations ceased. On May 12, 1949, the defendant, through his solicitor, wrote to the plaintiffs purporting to withdraw his instructions for the sale of his property, and on May 17, 1949, the plaintiffs replied regretting that the defendant had withdrawn his property and enclosing a bill for £10 10s. for expenses. On May 18, 1949, the defendant approached G., offered to reduce the price formerly agreed on and to allow a substantial part thereof to remain outstanding on the security of a second mortgage and a promissory note. G. accepted, on May 28, 1949, a contract for the sale was entered into, and on June 1, 1949, the purchase was completed by conveyance. On the same day, the defendant paid to the plaintiffs the £10 10s. claimed by them. In an action in which the plaintiffs claimed commission on the sale, the court found that the defendant had not acted fraudulently.

HELD: although, at the time of his introduction by the plaintiffs, G. had been willing to purchase, he was not then able to do so; by the time of the final agreement between G. and the defendant the plaintiffs' agency had been terminated by an agreement *bona fide* entered into by the defendant, and their introduction of G. had ceased to be an operating factor in the sale, the effective cause of which was the provision of financial assistance by the defendant; and, therefore, the plaintiffs were not entitled to commission.

AS TO REMUNERATION OF AGENTS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 256-263, paras. 431-436; and FOR CASES, see DIGEST, Vol. 1, pp. 488-518, Nos. 1664-1801.

ACTION for payment of £310 alleged to be due to the plaintiffs, Jack Windle, Ltd., a firm of estate agents, as commission on the sale of the defendant's business and freehold premises.

The defendant desired to sell his freehold premises and the bakery business which he conducted thereon, and he signed a document, dated Mar. 11, 1949, and addressed to the plaintiffs, in the following form:

"I the undersigned Willie Brierley of 61 Bolton Street Blackpool hereby authorise you to be and appoint you to be my agent for the purpose of effecting a sale by private treaty of all that bakery business and freehold property known and nod. as 61 Bolton Street Blackpool at a price of

£11,250, or alternatively at such price as I may agree to accept. In consideration of your agreeing to be my agent for the purposes aforesaid I agree that I will not revoke this authority or determine your agency for the purpose aforesaid during the period of twelve weeks from this date. If a sale is effected of the said business and property by you at any price to which I may agree or by me or anyone else at any price whatever during the said period I will pay you a commission of two per cent. of the purchase price of the property and five per cent. of the purchase price of the valuation and effects (*sic*) however sold and that such commission shall be paid to you together with such expenses incurred by you relevant to this sale at your offices on the day when such sale is agreed to be completed whether the purchase is in fact completed or not."

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The plaintiffs introduced to the defendant, one Greatorex, as a prospective purchaser, and on Mar. 20, 1949, negotiations with regard to the price resulted in an oral agreement between the defendant and Mr. Greatorex that the latter should pay £10,300 for the premises and the business. Mr. Greatorex' offer of that sum was made (and accepted by the defendant) on the basis that Mr. Greatorex would be unable to enter into a formal contract to buy unless and until he had sold his own business premises. The plaintiffs made some attempt to sell Mr. Greatorex' premises for him, but without success, and Mr. Greatorex approached a finance company for a loan. On May 5, 1949, the company refused the loan. On May 7, 1949, Mr. Greatorex informed the defendant of the refusal, and the negotiations between them ceased. On May 12, 1949, the defendant's solicitor wrote to the plaintiffs:

"Re Brierley—61 Bolton Street, Blackpool. Mr. Brierley [the defendant] has seen me with further reference to his property and business and he has requested me to write you to withdraw the instructions for the sale of his property and business which he gave you some time ago."

On May 17, 1949, the plaintiffs replied:

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"Re Brierley—61 Bolton Street, Blackpool. We are in receipt of your letter of the twelfth instant, and we regret that the vendor has now withdrawn his property and business for sale, as we feel sure we would have been able to sell it shortly. As you are doubtless aware, it is becoming increasingly difficult to effect sales of business premises, owing to the fact that the policy of the leading building societies is now not to advance money to intending purchasers of this type of property. Enclosed please find our statement of account."

A demand for charges amounting to £10 10s. was enclosed. On May 18, 1949, the defendant approached Mr. Greatorex again and offered to reduce the price and to permit £1,500 thereof to remain unpaid on the security of a second mortgage, and £3,200 on a promissory note. On May 28, 1949, a contract for sale was signed by the defendant and Mr. Greatorex, and the transaction was completed by conveyance on June 1, 1949. On the date of the completion, June 1, 1949, the defendant's solicitors sent the plaintiffs £10 10s. in settlement of their demand. On the same day the plaintiffs received information of the sale, and later claimed payment of commission in accordance with the agreement of Mar. 11, 1949.

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Nelson, K.C., and *C. Q. Henriques* for the plaintiffs.
Wooll, K.C., and *Somerville* for the defendant.

LYNSKEY, J. (having stated the facts): The case for the plaintiffs is that there was no agreement to revoke the agency, and, in the absence of such an agreement, the agency could not be revoked; that, in fact, the ultimate purchaser was introduced by the plaintiffs, and that that introduction was the effective cause of the subsequent sale. They further say that, if they are wrong

in their contention that there was no agreement to revoke, then, if there was such an agreement, the agreement was induced by fraud on the part of the defendant.

The case really depends on the circumstances. I am satisfied that the defendant's letter of May 12, 1949, was an indication to the plaintiffs that their instructions had been withdrawn and that their letter of May 17 assented to that withdrawal. They assented on the terms that they should be paid a sum which could not be claimed under the agency document, because under it their expenses were only payable in the event of their procuring a sale, and at that date they had procured no sale. They were prepared to assent to the revocation on those terms, and those terms were in turn accepted by the defendant, and he sent a cheque in compliance with the terms. It is said that there was fraud, and the fraud alleged is as follows:

"The plaintiffs claim damages for fraudulent misrepresentation in that by letter dated May 12, 1949, the defendant through his solicitor purported to withdraw the instructions for the sale of the said business and property . . . The plaintiffs, believing (as the defendant well knew) that the defendant had decided not to sell his said business and property, offered, by letter dated May 17, 1949, to agree to terminate the said agency subject to the defendant's paying their out of pocket expenses of £10 10s. The said offer was made solely on the basis that the defendant had decided not to sell the said business and property."

When particulars were asked for, the plaintiffs said that they relied entirely on the contents of the letter of May 12. Reading that letter, even with a suspicious eye, I cannot find in it any statement or representation on behalf of the defendant that he had withdrawn his business from sale on the market. That letter is simply a withdrawal of instructions. There is no representation that he has decided to continue in the business and not sell at all. It does not seem to me that by their letter of May 17 the plaintiffs are representing that their offer to accept his cancellation of the agency was based on the fact that he was not offering his business for sale to anybody else or through anybody else. I am, therefore, satisfied here that the allegation of fraud is completely false. In those circumstances, the correspondence as from May 12 amounts to an agreement to terminate the agency authority, at any rate as from May 12.

That does not dispose of the matter because the plaintiffs say: "Well, we introduced Mr. Greatorex. When we did so the arrangement was still in being, and his introduction was the effective cause of the subsequent sale. Therefore, we are entitled to commission notwithstanding the revocation of the agency." An agent is only entitled to commission if he introduces a ready, willing, and able purchaser. It is true that the plaintiffs introduced Mr. Greatorex, but at the time of the introduction and right up to May 17, although Mr. Greatorex was a willing purchaser, he was not an able purchaser. He had not the money. I am satisfied that on May 12 negotiations for the sale had ceased and the effect of the introduction, although to some degree it remained, was really no longer an operating factor in the sale of the property thereafter. Mr. Greatorex never became an able purchaser until the defendant provided the necessary finance on unsecured terms, relying for £3,200 of the purchase price on a promissory note and leaving £1,500 on mortgage. The effective cause of the subsequent sale to Mr. Greatorex was, not the introduction, but the provision of finance by the defendant which enabled the sale to take place. I am not satisfied that the introduction was the effective cause. In those circumstances I cannot find that any effort on the part of the plaintiffs was an effective cause of this sale, and this claim fails.

Action dismissed.

Solicitors: *Scarr, Sons & Co.*, Blackpool (for the plaintiffs); *Thomas Hunter*, Blackpool (for the defendant).

[Reported by Miss M. D. CHORLTON, Barrister-at-Law.]

HARRIS v. HARRIS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.),
January 30, 1952.]

Husband and Wife—Maintenance—Discharge of order—Continued residence with husband for three months—Husband obtaining subsequent variation of order and remission of arrears under it—Husband not estopped from showing order had ceased to have effect—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (c. 51), s. 1 (4).

After obtaining, in 1943, an order for maintenance against her husband, a wife, being unable to find other accommodation, by agreement with her husband continued for seven months to live with him, she being the joint tenant of the house, paying half the rent, and sharing the downstairs rooms, but occupying a separate bedroom. On occasion she laid the tea, lit a fire and did other housework for the husband, but she did not cook his meals. In 1948 the husband obtained a remission of £42 18s. arrears on the order, and an order reducing the sum payable. On a complaint relating to further arrears,

HELD: (i) the wife had "resided" with the husband for a period of three months after the order was made in 1943, and, therefore, by virtue of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, at the end of that period the order had ceased to have effect and the wife could not recover any arrears under it.

Evans v. Evans ([1947] 2 All E.R. 656), applied.

(ii) the husband was not estopped from relying on s. 1 (4) by reason of his having applied in 1948 for a variation of the order and being then granted a remission of the arrears then owing.

FOR THE SUMMARY JURISDICTION (SEPARATION AND MAINTENANCE) ACT, 1925, s. 1 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 864.

Cases referred to:

- (1) *Evans v. Evans*, [1947] 2 All E.R. 656; [1948] 1 K.B. 175; [1948] L.J.R. 276; 112 J.P. 23; 2nd Digest Supp.
- (2) *Thomas v. Thomas*, [1948] 2 All E.R. 98; [1948] 2 K.B. 294; [1948] L.J.R. 1943; 112 J.P. 345; 2nd Digest Supp.
- (3) *Wheatley v. Wheatley*, [1949] 2 All E.R. 428; [1950] 1 K.B. 39; 113 J.P. 459; 2nd Digest Supp.

CASE STATED by Wolverhampton justices.

At a court of summary jurisdiction sitting at Wolverhampton on July 19, Aug. 2, and Aug. 16, 1951, a complaint was preferred by the collecting officer of the court on behalf of the appellant wife that the respondent husband had not made weekly payments of £1 15s., which he had been directed to make under a separation order made under s. 5 (a) and (c) of the Summary Jurisdiction (Married Women) Act, 1895, by a court of summary jurisdiction on May 27, 1943, as last varied, on the application of the husband, on Mar. 11, 1948, and that the sum of £20 13s. was in arrear under the order. At the date of the original order and for seven months thereafter the wife lived with the husband in the same house, the tenancy being in their joint names and each paying half the rent. They shared the use of the downstairs rooms, but occupied different bedrooms. On occasion the wife laid the tea and lit a fire and did other housework for the husband, but she did not cook his meals. They normally occupied the same room downstairs when not at work, but in other respects they lived separately. The wife did not leave the house at the time of the original order because she had nowhere else to go and it was mutually agreed between the parties that she should remain for a time to enable her to find other accommodation if she paid half the rent. The wife contended that the husband had approbated the original order by obtaining a varying order and a remission of £42 18s. arrears in 1948 and that he

could not now reprobate in regard thereto; that the original order had been superseded by the varying order; that the husband was estopped from showing that the original order was not still in force by his conduct in making the payments under the order and in obtaining a reduction in the payments and a remission of £42 18s. arrears; that the orders, not having been appealed against by the husband, should be enforced; and that the wife had not during the seven months "resided" with the husband within the meaning of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4). For the husband it was contended that the wife had resided with him during the seven months within the meaning of s. 1 (4), and, therefore, under that sub-section the original order had ceased to have effect and could not be revived. The justices held that the wife had resided with the husband for a period of more than three months after the making of the original order which, therefore, ceased to have effect under s. 1 (4) of the Act of 1925 and was unenforceable, and they dismissed the wife's application.

R. E. Chapman for the wife.

Syms for the husband.

LORD GODDARD, C.J.: This is a Case stated by justices of the county borough of Wolverhampton before whom the husband was summoned for arrears under a maintenance order. [His LORDSHIP stated the facts and continued:] In the opinion of the justices the conditions under which the parties were living together during the seven months after the original order was made in no way differentiated this case from *Evans v. Evans* (1), which was distinguished in *Thomas v. Thomas* (2) and followed in *Wheatley v. Wheatley* (3). Those cases held, on the construction of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4), that if a wife, having obtained a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, did not leave her husband within three months, but continued to reside in the same house, although cohabitation in the full sense of cohabitation between husband and wife was not resumed, the order automatically came to an end.

The Summary Jurisdiction (Separation and Maintenance) Act, 1925, enabled a woman for the first time to take proceedings against her husband while she was still living with him and without having to leave the house, but by s. 1 (4):

"No order made under the [Act of 1895] shall be enforceable and no liability shall accrue under any such order whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband."

Observe the difference between the two parts of the sub-section. It is, apparently, contemplated that a wife who obtains an order might not be able to leave her husband forthwith, but that she must ultimately find some separate accommodation. The Act, therefore, provides that the order is to remain in force if she resides with her husband for less than three months while, for instance, she is looking for accommodation, but she cannot enforce it and obtain maintenance from her husband during that period. If that state of affairs continues for three months the order is to come to an end. As soon as she leaves her husband within the three months she can enforce the order. The words of the sub-section are perfectly clear.

On the question whether the wife continued to reside with her husband, the cases referred to are conclusive and binding on this court. "Residing" by the wife means living in the same house as her husband, and, whether they live on good terms or on bad and whether or not they speak to each other is not material. The courts which decided these cases—this may have some slight bearing on the point of estoppel which has been raised in this case—thought there was an obvious reason for Parliament putting these words into the section. It was never

intended that the wife should get a double benefit by being able to enforce maintenance against her husband and at the same time live in his house, because the sum awarded is supposed to be for her board and lodging and if she is living in her husband's house she may be living rent free, though in the present case there seems to have been some arrangement by which the wife paid 10s. a week towards the rent. It is also undesirable from a public point of view that a wife
A should be living in the same house as her husband and at the same time insisting on his paying her maintenance under an order of the court. It might easily lead to serious assault and disturbance, or to the wife's being put out of the house summarily. The words "cease to have effect" in the Act of 1925 are different from the words in the Act of 1895, which, by s. 7 were:

B "If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

C Under the Act of 1895, if cohabitation were resumed, the husband had to apply to the court to get the order discharged. Only then would his liability under the order cease, but under s. 2 (2) of the Act of 1925 the order automatically comes to an end directly cohabitation is resumed, and under s. 1 (4) the order ceases to have effect as soon as the wife has lived in the house with her husband for three months after the making of the order.

D The justices have found here that the wife continued to live in the house with her husband, although under the conditions set out in the findings, for a period of seven months. The effect of that would be that their order automatically ceased to have effect at the end of three months. Neither party seemed to know of that provision. Both the husband and the wife went to the court, which made an order in 1948 varying the amount of the original order, but otherwise leaving it in force. We can only look on that order as an order made *per incuriam* and
E having no effect at all, because everything depends in this case on the original order which had ceased to operate because the wife had remained in the house for three months. We can only construe the words "shall cease to have effect" as meaning that the order becomes void and as though it had never been made. Counsel for the wife has argued that the husband is estopped from raising this point, but he cannot show us any authority for holding that a man is estopped
F from setting up that an Act of Parliament says that an order is to be of no effect. It is true that in some cases a person is entitled to waive the benefit of some provision in a statute which is inserted entirely for his particular benefit. The maxim is *cui libet licet renuntiare jure pro se introductio*, but we cannot take the view that public interest is altogether to be disregarded for the reasons I have given, which are fully dealt with in the cases referred to, especially *Wheatley*
G v. *Wheatley* (3).

H For these reasons we are bound to find that the justices had no jurisdiction to make this order because it was a variation of an order which under the section had come to an end. It may be, as I said in *Wheatley v. Wheatley* (3), that, if the attention of the legislature is called to this class of case, they may see fit to make an alteration in the law, because when the Act of 1925 was passed Parliament could not have anticipated the present great housing shortage and the difficulty of getting accommodation, and it is hard that an order should come to an end when the wife may be in a position of extreme difficulty in finding other accommodation. But we cannot alter the construction of statutes merely because there has been a change in circumstances. That is a matter for Parliament to deal with and not for the courts. The words of the statute here brought the order to an end, and it follows that the justices could not make the order they made and this appeal must be dismissed.

BYRNE, J.: In my opinion, this case is covered by the decision in *Evans v. Evans* (1). The result is that by virtue of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the maintenance order ceased to have effect because the wife resided with her husband for seven months after the making of the order. It follows that the justices were right in holding that arrears under the order were unenforceable. I agree that the appeal should be dismissed.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *Wainwright & Co.*, agents for *Kendrick, Williams & Feibusch*, Wolverhampton (for the wife); *Willis & Willis*, agents for *A. C. Skidmore & Co.*, Wolverhampton (for the husband).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

KUSHNER v. LAW SOCIETY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 31, 1951.]

Solicitor—Unqualified person preparing instrument—Estate agent—Lease for fourteen years determinable by tenant at end of any year—Solicitors Act, 1932 (c. 37), s. 47 (1), s. 47 (4) (b).

Landlord and Tenant—Lease—Agreement not under seal—Validity—Term of fourteen years determinable by tenant at end of any year—Law of Property Act, 1925 (c. 20), s. 52 (1), s. 52 (2) (d), s. 54 (2).

The appellant, an estate agent, prepared for reward an instrument which purported to be an agreement for a lease of certain property for a term of fourteen years commencing on Oct. 1, 1948. The document, which was not under seal, contained a term whereby the tenant could determine the lease at the end of any year. On being charged with an offence under the Solicitors Act, 1932, s. 47 (1), in that, not being a person qualified under that sub-section, he had prepared an instrument relating to personal estate, the appellant contended that no offence had been committed as (a) the instrument was an agreement under hand only, within the meaning of s. 47 (4) (b) of the Act of 1932, and (b) assuming that it was a lease and not a tenancy agreement, it was for a term which would not necessarily last for more than three years, and, therefore, under s. 52 (2) (d) and s. 54 (2) of the Law of Property Act, 1925, it was not required to be under seal.

HELD: (i) an instrument which was void at law unless it was under seal, but, in fact, was not under seal, was not an "agreement under hand only" within s. 47 (4) (b) of the Act of 1932, and, therefore, if a person who was not qualified under s. 47 (1) drew or prepared such an instrument for reward he was guilty of an offence under s. 47 (1).

(ii) the instrument prepared by the appellant did not create a tenancy for a "term not exceeding three years", within the Law of Property Act, 1925, s. 54 (2), but purported to create a lease for a term exceeding three years, notwithstanding the fact that the tenant could determine the term by notice within the three years: *Ex p. Voisey. Re Knight* (1882) (21 Ch.D. 442), distinguished; and, therefore, under s. 52 (1) of the Act of 1925, the instrument was void at law as it was not under seal, and the appellant was guilty of an offence against s. 47 (1).

AS TO CREATION OF LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 57-59, paras. 58-61; and FOR CASES, see DIGEST, Replacement, Vol. 30, pp. 458-460, Nos. 998-1016.

Cases referred to:

- (1) *Harte v. Williams*, [1934] 1 K.B. 201; 103 L.J.K.B. 108; 150 L.T. 238; Digest Supp.
- (2) *Hanau v. Ehrlich*, [1912] A.C. 39; 81 L.J.K.B. 397; 106 L.T. 1; 12 Digest, Replacement, 139, 869.
- (3) *Ex p. Voisey. Re Knight*, (1882), 21 Ch.D. 442; 52 L.J.Ch. 121; 47 L.T. 362; 30 Digest, Replacement, 459, 1006.

A

CASE STATED by County of London Quarter Sessions.

At a court of summary jurisdiction, sitting at Old Street Magistrate's Court, on informations preferred on behalf of the respondent, the Law Society, the appellant, an estate agent, was convicted of offences against the Solicitors Act, 1932, s. 47 (1), in that, not being a barrister or a duly qualified solicitor or other person specified in the sub-section, he had, on or about Sept. 27, 1948, prepared instruments relating to personal estate, *viz.*, agreements for the tenancies of two flats. The appellant appealed to quarter sessions, the appeals being heard together on May 16, 1951. The instrument referred to in the first information purported to be an agreement for the lease of a flat for a term of fourteen years. It was contended for the appellant (a) that the instrument was not an "instrument" within the meaning of s. 47 (1) of the Solicitors Act, 1932, since by s. 47 (4) (b) of the Act the expression "instrument" did not include an agreement under hand only, and the instrument prepared by him was under hand only; (b) assuming that the instrument was a lease and not a tenancy agreement, it was for a term which would not necessarily last for more than three years, in that by cl. (1) (i) thereof the landlords had the right, exercisable in certain circumstances, to determine the term on five months' notice, and, by cl. (3) (d) thereof, the tenant had the right to determine the term at the end of any year, and, therefore, having regard to s. 52 (2) (d) and s. 54 (2) of the Law of Property Act, 1925, the lease was not required to be made by deed. It was contended for the respondent that the instrument was not "an agreement under hand only", within s. 47 (4) (b) of the Act of 1932, and that the case fell within *Harte v. Williams* ([1934] 1 K.B. 201). Quarter sessions held that the instrument was an instrument within the meaning of s. 47 and dismissed the appeals.

Solley for the appellant.

Cumming-Bruce for the respondent.

LORD GODDARD, C.J.: The appellant was convicted of an offence against the Solicitors Act, 1932, s. 47 (1), which is in much the same terms as s. 44 of the Stamp Act, 1891, and s. 60 of the Finance Act, 1921. Section 47 (1) was designed to prevent the preparation of certain documents by persons who are not legally qualified. Section 47 (1) provides:

"Any person, not being a barrister, or a duly certificated solicitor . . . who, for or in expectation of any fee, gain or reward, either directly or indirectly, draws or prepares any instrument relating to real or personal estate, or any legal proceeding, shall be liable on summary conviction to a fine not exceeding £50."

Section 47 (4), provides:

"For the purposes of this section, the expression 'instrument' does not include . . . (b) an agreement under hand only . . ."

The offence consists, not in procuring the execution of a document, but in drawing or preparing it. Therefore, the offence is complete as soon as the document which is drawn or prepared comes within s. 47. It seems to me that the section must be construed as meaning that, if a person draws or prepares a document which, if it is to be a valid document, must have a seal on it at the time of execution, he commits an offence, and he commits the offence none the less although the document, when executed, does not have a seal on it. Therefore, the question

which the court always has to consider in these cases is whether the document which is drawn or prepared is a document which, for the purpose for which it is intended, would require to be a deed or whether it can be equally effective if it is under hand only.

That point does not seem to have emerged very clearly in *Harte v. Williams* (1), especially as LAWRENCE, J. (in his dissenting judgment), seems to have thought that, if the document did not have a seal when it was produced, it was an agreement under hand only and an offence had not been committed. The offence, however, lies in preparing the document, and, if it is a document which is void at law unless it is under seal, the fact that a seal is never put on it, in my opinion, makes no difference to the offence. Counsel for the appellant did not really dispute that proposition, but he contended that the document in question is of a nature which requires only to be under hand and not under seal, as it is merely an agreement and not a deed. Without going too far into the history of the matter, suffice it to say this. The Statute of Frauds, 1677, s. 3, provided, for the first time, that leases, among other things relating to estates in land, must be by deed or note in writing. By s. 1, if an interest in land was created by parol, it would have the force and effect of an interest at will only. By s. 2, leases for a term not exceeding three years were not required to be in writing. By the Law of Property Act, 1925, s. 52:

"(1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed. (2) This section does not apply to . . . (d) leases or tenancies or other assurances not required by law to be made in writing."

Therefore, those interests which the Statute of Frauds required to be in writing now have to be made by deed, but those which the Statute of Frauds did not require to be in writing need not be made by deed, and, under s. 54 (2) of the Act of 1925 (which replaces s. 2 of the Statute of Frauds), a lease for a period not exceeding three years can still be by parol.

The question which we have to determine is: Is the document which was prepared by the appellant a lease for a period exceeding three years? The document is in these terms:

"An agreement made this Sept. 27, 1948, between B. Fordyce Ltd. . . . by Sighismond Berger their duly authorised officer empowered to sign tenancy agreements under hand (hereinafter called 'the landlord') of the one part and Eric James Clarke, Esq. . . . (hereinafter called 'the tenant') of the other part whereby the landlord agrees to let and the tenant agrees to take [then the parcels are set out] for the term of fourteen years certain (determinable nevertheless as hereinafter mentioned) to commence from Oct. 1, 1948, yielding and paying therefor (a) the sum of £150 to be paid on or before the execution hereof, (b) the rent of £8 12s. 5d. to be paid in advance on the Monday of each month."

The usual tenant's covenants found in a lease of this description are set out, and then there is this provision, which was to some extent relied on by the appellant:

"In the event of the London Passenger Transport Board from whom the landlords hold the building requiring the building or any part thereof for any purposes connected with its undertaking or any other works connected therewith or with the development or improvement of its property (of which the board is to be the sole judge) and shall give notice to the landlords in that behalf the landlords shall be entitled to give to the tenant notice in writing thereof and of their desire to terminate this agreement and thereupon at the expiration of five calendar months after the service of such notice this agreement and everything herein contained shall cease and be void . . ."

That is a provision for defeasance if the superior landlords exercise rights which they possess. Then there are the landlord's covenants and a proviso:

"If the tenant shall desire to determine the term hereby granted at the end of any year thereof and shall give up to the landlord one month's previous notice in writing of such his desire and shall up to the time of such determination pay the rent and observe and perform the agreements on his part hereinbefore reserved and contained then immediately upon the expiration of such year as the case may be the present letting and everything herein contained shall cease and be void but without prejudice to the rights and remedies of either party against the other in respect of any antecedent breach or claim of agreement."

Counsel for the appellant contended that, although the term of fourteen years is the term for which the premises are stated to be let, this is not a lease for fourteen years, because the tenant has a right during the tenancy to put an end to the term. Counsel also relied on the provision that the landlord can give notice, but I do not think that that is a strong point. The notice is to be given if the superior landlords require the premises. Every tenant is liable to be disturbed by the act of the superior landlord, if there is one with a title paramount to that of the lessor, but I have never heard it suggested that that causes any uncertainty as to the term which has been granted. *Prima facie*, without considering any authorities, I should have thought it abundantly clear that this document purports to vest a term of fourteen years in the tenant, giving him a right to put an end to that term if he wishes to do so. It is immaterial whether the document is called an agreement or a lease, as it is the effect of the document and not what the parties choose to call it which matters. Counsel for the appellant contends that the tenancy created by the document is to be considered as a yearly tenancy because the tenant may determine the tenancy at the end of any year by giving a month's previous notice. It seems to me that we must apply to this document the same principle which has always been applied to the construction of s. 4 of the Statute of Frauds which provides that contracts not to be performed within a year must be in writing. The principle of law, which is now well established and was re-affirmed by the House of Lords in 1912 in *Hanau v. Ehrlich* (2), is that, if the contract is for an indefinite time but can be determined by either party at reasonable notice within the year, the statute does not apply, but, if the contract is for a definite period extending beyond the year, though it may be concluded by notice within a year, the statute does apply. The agreement now before us purports to create a lease for fourteen years with a provision that it may be determined earlier. Notwithstanding that provision, the lease is for a definite period. As it is not under seal it is invalid in law, but, if it had been under seal, it would confer a title on the tenant to remain in possession of the premises for fourteen years.

The only point that has come up for serious consideration in the present case arises because of *dicta* in certain text-books in which it is said, on the authority of *Ex p. Voisey. Re Knight* (3), that s. 1 of the Statute of Frauds (which has been replaced by s. 54 (1) of the Law of Property Act, 1925) applies only where the tenancy, if good, must of necessity last for more than three years. The facts in *Ex p. Voisey* (3) were, however, different from those in the case now before us, and I do not think that the decision in that case affects the present matter where the agreement purported to create a definite term exceeding three years. In *Ex p. Voisey* (1) the tenancy which might eventuate was to be a tenancy from month to month. If there is a tenancy from month to month, or from quarter to quarter, or from week to week, or from year to year, it may, of course, go on for an indefinite period. There are many properties in this country which have been held by the same tenants for years on what are generally called "short period" tenancies which can be determined by the landlord giving notice. The fact that a tenancy of that kind may go on for a number of years does not make

it invalid if it is not by way of deed. I think that is all that *Voisey's* case (3) decides. There is the additional fact, which counsel for the respondent pointed out to us, that the tenancy in that case came into existence only if default was made under a mortgage deed, and, therefore, it was not known when the tenancy would begin.

In my view, the document in the present case was one which, if it had been legally executed, would have vested a term of fourteen years in the tenant notwithstanding the fact that he could terminate the tenancy at an earlier date. The matter, in my opinion, is not affected by the clause whereby the landlord could terminate the tenancy if his superior landlord claimed possession of the whole premises. Accordingly, in my opinion, the document was prepared in breach of the Solicitors Act, 1932, s. 47 (1). Quarter sessions came to a right decision, and this appeal fails.

BYRNE, J.: I agree.

PARKER, J.: I also agree.

Appeal dismissed.

Solicitors: *Bernard Solley & Co.* (for the appellant); *Hempsons* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re BOUVERIE (*deceased*). BOUVERIE AND ANOTHER *v.* MARSHALL AND ANOTHER.

[CHANCERY DIVISION (Vaisey, J.), January 30, 1952.]

Will—Condition—Condition subsequent—Certainty—Name and arms clause—“Disuse.”

By his will a testator settled certain freehold estates on various persons in succession and provided that every person who should under the limitations therein become entitled as tenant for life or tenant in tail male or in tail by purchase to the possession or the receipt of the rents and profits of the settled freeholds “shall within one year after he or she shall so become entitled or being an infant shall within one year after he or she shall attain the age of twenty-one years and also the husband of every female so becoming entitled . . . shall within one year after such female shall so become entitled or marry whichever shall last happen assume the surname of Bouverie either with or without his or her own proper surname and apply for proper authority to bear the arms of Pleydell Bouverie . . . and in case such authority is obtained shall forthwith assume such arms . . . And if the person so entitled as aforesaid or in the case of a married woman her husband shall refuse or neglect within such year to assume such surname or to apply for such authority as aforesaid or shall at any time afterwards disuse such surname from any cause other than becoming a peer or peeress or becoming entitled to use and using by courtesy the title of a peer or peeress or shall at any time after obtaining such authority disuse such arms Then and in every such case immediately after the expiration of such year or such disuser if the person so entitled as aforesaid shall be a tenant for life he or she shall during the remainder of his or her life . . . hold the rents and profits of the settled freeholds in trust for the person or persons who would for the time being be entitled to the same if the person so entitled as aforesaid were dead . . . and if the person so entitled as aforesaid shall be tenant in tail” then his or her estate in tail should determine.

HELD: it was impossible to define what degree of “disuser” was intended to cause the defeasance of the interest vested in the tenant for life or tenant in tail, and, therefore, the defeasance clause was void for uncertainty.

Dictum of LORD ROMER in *Sifton v. Sifton* ([1938] 3 All E.R. 445), applied.

AS TO NAME AND ARMS CLAUSE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 789-792, paras. 1097, 1098; and FOR CASES, see DIGEST, Vol. 35, pp. 705-709, 711, 712, Nos. 55-80, 95-98.

Cases referred to:

- (1) *Re Fry*, [1945] 2 All E.R. 205; [1945] Ch. 348; 115 L.J.Ch. 3; 173 L.T. 282; 2nd Digest Supp.
- A (2) *Re Lewis' Will Trusts*, [1951] W.N. 591.
- (3) *Clavering v. Ellison*, (1859), 7 H.L. Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; 44 Digest 440, 2667.
- (4) *Sifton v. Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.
- B (5) *Clayton v. Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.

C ADJOURNED SUMMONS to determine whether, on the true construction of the will of Henry Hales Pleydell Bouverie, deceased, and in the events which had happened, the condition contained in the name and arms clause in the said will was binding on the defendant, Patricia Marshall, the tenant for life. The relevant parts of the clause are set out in the headnote.

J. H. A. Sparrow for the plaintiffs, the trustees of the deceased's will.

Graetz for the first defendant, the tenant for life.

Peter Foster for the second defendant, an infant entitled in remainder.

D VAISEY, J.: The testator in this case, Mr. Henry Hales Pleydell Bouverie, made his will on Feb. 10, 1925, and died on Dec. 12 in the same year. By cl. 8 of his will he devised all his lands, messuages and hereditaments in the county of Somerset to trustees to the use of his nephew, Mr. Philip Hales Pleydell Bouverie, and his assigns during his life, with remainder to the use of the nephew's sons successively in tail male and in tail, with remainder to the use of the nephew's daughters successively in remainder one after the other in tail male and in tail.

E The nephew survived the testator, and died on Apr. 30, 1951, leaving issue three daughters of whom the eldest, Mrs. Patricia Marshall, is the first defendant to this application. Under the provisions of cl. 9 of the will, Mrs. Marshall, having been born in the lifetime of the testator, had the tenancy in tail conferred on her by the preceding clause cut down to a life interest. She was married on Mar. 19, 1949, to her present husband, Mr. John Marshall, and she has issue a son,

F the second, (infant) defendant, who, under the substituted limitations contained in cl. 9 of the will, is now tenant in tail expectant on his mother's life interest. The estates in the county of Somerset were sold during the nephew's lifetime and are now represented partly by investments and partly by some other real property situate in Berkshire.

G The question which now arises depends on the true construction and effect of cl. 10 of the will which is to the effect that every person who under the limitations becomes entitled as tenant for life or tenant in tail male or in tail by purchase to the possession or the receipt of the rents and profits of the settled freeholds (with certain exceptions which I need not enumerate), and also the husband of any female becoming so entitled, should assume the surname and arms of Bouverie. If the person so entitled as aforesaid, or, in the case of a married

H woman, her husband, should refuse or neglect within a year to assume such surname or to apply for authority to use such arms, or should at any time afterwards disuse such surname, or should at any time after obtaining such authority disuse such arms, then and in every such case immediately after the expiration of such year or such disuser if the person so entitled as aforesaid should be a tenant for life, he or she should during the remainder of his or her life, but without prejudice to the uses estates or powers preceding or overriding his or her estate as aforesaid and to the uses and estates limited in exercise of such powers, hold

the rents and profits of the settled freeholds in trust for the person or persons who would for the time being be entitled to the same if the person so entitled as aforesaid were dead. The question is as to the validity of that "name and arms clause", as it is popularly called.

The immediate question which I have to decide is whether that condition of defeasance is binding on the first defendant or not. I have had to consider similar questions on two occasions—in *Re Fry* (1), and in *Re Lewis' Will Trusts* (2). This case is, in a way, a simpler case, because of the two points which arose in those two previous cases only one emerges here. It all depends, I think, on the certitude or otherwise of one word—"disuse." If this condition subsequent is to be operative at all, its operation must be quite certain. There must be no doubt on the question whether at any given moment of time the condition has or has not taken effect, the condition in question being the disuse of the arms and the disuse of the name. In my judgment, although the meaning of the word "disuse" is sufficiently plain in the colloquial sense, it is more than doubtful whether it is of that high degree of certitude and precision which is required in the case of a condition subsequent, *i.e.*, a condition which takes away an estate previously conferred. A
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The leading authorities on the matter are those to which I referred in *Re Lewis* (2), *i.e.*, *Clavering v. Ellison* (3), *Sifton v. Sifton* (4), and *Clayton v. Ramsden* (5). I said in *Re Lewis* (2), and I say again, that the court should lean strongly against the defeasance clause unless it is drawn with the utmost and highest degree of certitude. The way LORD ROMER put the matter in *Sifton v. Sifton* (4) was this ([1938] 3 All E.R. 445): C

"If the clause in question be in truth a condition subsequent . . . it can be of no validity unless, to use the words of LORD CRANWORTH [in *Clavering v. Ellison* (3) (7 H.L. Cas. 725)], the court—and, their Lordships venture to add, the parties concerned—can see from the beginning precisely and distinctly upon the happening of what events it is that the payments to the appellant are to cease." D

It seems to me that that observation is appropriate to the present case. Mrs. Marshall and her husband must be able, if this condition subsequent is effective, to see from the beginning precisely and distinctly on what event it is that Mrs. Marshall's estate for life is to be terminated. I am fully aware of the fact that these name and arms clauses have been used in accordance with well known precedents for a very great number of years, but, in my judgment, the cases to which I have alluded have put a very different complexion on the manner in which these conditions subsequent are approached. I am not, and I cannot, indeed, be, moved by the fact that my decision may affect a large number of other cases in which this point has not been taken. E
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Applying the test to the present case, I ask myself: Can Mrs. Marshall and her husband say precisely and exactly what they have to do or refrain from doing in order to prevent any transfer of the lady's estate under the gift over? It does not require very much ingenuity to imagine a large number of borderline cases. Of course, if the lady ceased to use the name Bouverie altogether, and never used it again, never mentioned it, and never allowed it to be used in conjunction with her own name, then that would be an obvious case. But to what extent and for what period of time has the "disuse" referred to in the clause to take effect? Would it be a breach of it if from time to time the lady, having adopted the name of Bouverie for general purposes, occasionally referred to herself by her former name of Mrs. Marshall, and occasionally used that name when giving an order in a shop in London? How often would she have to omit the use of the word "Bouverie" to bring about the forfeiture for which the clause provides? What percentage short of one hundred per cent. of the disuser of the name would amount to a disuser of it within the meaning of the clause? Those questions, in my judgment, are incapable of being answered, and, that G
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being so, it seems to me that this condition is not so framed as to satisfy the exacting requirements of the law as laid down in the highest tribunals in the cases to which I have referred. It is not a question of the position if Mrs. Marshall were to omit to use the name or to omit to use the arms on five occasions, ten occasions, or twenty occasions. That is not the criterion. In my judgment, one has to construe the very uncertain and ambiguous, and, if I may say so, slippery, word "disuse." I quoted in *Re Lewis* (2) a sentence which I obtained from the NEW ENGLISH DICTIONARY—where the statement is made by Dean Swift "... that I had disused family prayers for about five years." I daresay he had. But at what moment of time would that disuse have caused the cesser of an estate limited to Dean Swift and given over in the case of his disuse of family prayers? The answer is that nobody can tell. The whole matter is completely uncertain.

Although as counsel for the infant defendant pointed out, the word "discontinue" is probably in not much better case, I thought at one time that it was more descriptive of a single act than the word "disuse". I am, however, not at all certain that the word "discontinue" is not open to the same objection as the word "disuse", but I am not going to say anything further about that because that is not the word which is in question here. I think that "disuse" is a word which signifies in a vague manner the slipping of a custom or a tendency and is not referable to a definite act which would enable anybody, either prospectively or retrospectively, to say on what day and at what moment this estate was forfeited. In my judgment, it is not possible, either prospectively or retrospectively, to see the exact moment of time at which the disuse of the name or of the arms will occur to such an extent and to such a degree as would, on the true meaning of this will, cause the gift over to take effect. I propose to declare that the condition contained in cl. 10 of the testator's will is void for uncertainty.

Order accordingly.

Solicitors: *Ellis, Peirs & Co.* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

R. v. HOLSWORTHY JUSTICES AND ANOTHER. *Ex parte* EDWARDS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 31, 1952.]

Justices—Common assault—"Execution under the process of any court of justice"—Service of summons by county court bailiff—Jurisdiction of justices—Procedure to be followed—Offences against the Person Act, 1861 (c. 100), s. 46—County Courts Act, 1934 (c. 53), s. 31.

The applicant, a county court bailiff, laid an information under s. 42 of the Offences against the Person Act, 1861, against the respondent charging him with assault while he (the applicant) was serving a default summons on him. At the hearing it was submitted for the respondent that the jurisdiction of the justices was ousted by s. 46 of the Act of 1861 and also that s. 31 of the County Courts Act, 1934, which prescribes a penalty for assaulting officers of the county court, took the case out of s. 42. The justices decided they had no jurisdiction to hear the information. On an application for an order of *mandamus* directing them to do so,

HELD: the service of the summons was not an "execution under the process of a court of justice" within s. 46 of the Act of 1861, and, therefore, the jurisdiction of the justices under s. 42 to hear and determine the applicant's information was not ousted; the effect of s. 31 of the County Courts Act, 1934, was not by implication to take such a case as the present out of the scope of s. 42; and, accordingly, an order would be made directing the justices to hear and determine the information.

R. v. Briggs (1883) (47 J.P. 615), applied.

Per curiam: Where, on the hearing of an information charging an assault, any question arises as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or as to any execution under the process of a court, or if, under a charge under the Larceny Act, 1916, a claim of right arises, justices should not dismiss the information, but should take depositions and, if they find that a *prima facie* case is made out, should commit the defendant for trial. A

AS TO PENALTY FOR ASSAULTING COUNTY COURT BAILIFFS, see HALSBURY, Hailsham Edn., Vol. 8, p. 161, para. 247; and FOR CASES, see DIGEST, Vol. 13, p. 454, Nos. 43 and 53.

FOR THE OFFENCES AGAINST THE PERSON ACT, 1861, s. 42 and s. 46, see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 802 and p. 805, respectively; and FOR THE COUNTY COURTS ACT, 1934, s. 31, see *ibid.*, p. 31. B

Case referred to:

(1) *R. v. Briggs*, (1883), 47 J.P. 615; 13 Digest 454, 53.

MOTION for an order of *mandamus* directing the justices of the Holsworthy (Devon) petty sessional division to hear and determine an information preferred by the applicant, Leonard Arthur Edwards, a bailiff appointed under the County Courts Act, 1934, in respect of an assault on him by the respondent, Richard Cecil Barkell, contrary to s. 42 of the Offences against the Person Act, 1861. The justices declined to hear the information, holding that they had no jurisdiction by reason of s. 46 of the Act of 1861 and s. 31 of the County Courts Act, 1934. C

R. J. Parker (*J. P. Ashworth* with him) for the applicant. D

Besley for the respondent.

The justices did not appear.

LORD GODDARD, C.J.: We are asked to grant an order of *mandamus* directing the justices to hear and determine a summons under s. 42 of the Offences against the Person Act, 1861, which relates to the penalties for common assault. The evidence shows that the applicant, a county court bailiff, went to serve a default summons on the respondent, a butcher carrying on business in Holsworthy. The respondent assaulted the applicant when he attempted to serve the summons, and the applicant thereupon laid an information under s. 42 of the Offences against the Person Act, 1861. At the hearing the respondent's advocate took the point that the jurisdiction of the justices to deal with the matter was excluded by s. 46 of the Act of 1861 and also that s. 31 of the County Courts Act, 1934, deals with assaults on bailiffs, and, therefore, impliedly excludes bailiffs from the operation of s. 42. E

All these points are untenable. Section 42 deals with an assault, and if an assault has been committed, *prima facie* that section applies. Section 46 provides that the jurisdiction of the justices to hear and determine a charge of assault is ousted in F

" . . . any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice." G

Serving a summons is not an "execution under the process of any court of justice"; it is simply the commencement of process. The phrase, "execution under process" is perfectly well understood. It means here that where an execution is put in following on a process of the court and some question as to the execution arises the jurisdiction of the justices is ousted. In the present case it is impossible to say that there has either been an execution under a process or that any question arose as to an execution under a process. *R. v. Briggs* (1) is perfectly clear on the subject, and it also shows that there is nothing in the H

argument that the existence of the remedy in the County Courts Act, 1934, s. 31, has the effect of taking the case out of s. 42 of the Act of 1861.

I take this opportunity of saying, because there is a certain amount of misapprehension sometimes in courts of summary jurisdiction, that if a claim of right arises, as it may under the Larceny Act, 1916, or if a question arises with regard to the title to any lands, tenements, or hereditaments in an assault case, or a question arises as to any execution under the process of the court, it does not mean that the justices should dismiss the summons because they have not power to hear and determine it. They must act as if the offence was one only triable on indictment, take the depositions, and commit for trial if they find a *prima facie* case made out. Even if there was anything in the points submitted to the justices in this case they should not have dismissed the information, but should have sent the case for trial. The order of *mandamus* must go directing them to hear and determine the case, they having full jurisdiction to do so under s. 42 of the Act of 1861.

BYRNE, J.: I agree.

PARKER, J.: I agree.

Order for mandamus.

Solicitors: *Treasury Solicitor* (for the applicant); *Masons* (for the respondent).
[Reported by F. GUTTMAN, ESQ., *Barrister-at-Law*.]

BENNETT v. BENNETT.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), January 15, 16, 17, February 1, 1952.]

Deed—Unenforceability—Public policy—Divorce—Undertaking by wife petitioner not to take proceedings for maintenance.

Divorce—Maintenance—Undertaking in deed by wife petitioner not to take proceedings for maintenance—Covenant by husband to pay annuity for wife—Unenforceability of wife's undertaking—Matrimonial Causes Act, 1950 (c. 25), s. 19 (2) (3).

On Aug. 10, 1948, a wife presented a petition for the dissolution of her marriage in which she asked for the custody of the two sons of the marriage, maintenance of the younger son, and maintenance and a secured provision for herself. The petition was not defended. On Nov. 24, 1948, the parties, in anticipation of the decree, entered into a deed by which, *inter alia*, the husband undertook to pay two annuities, one for the wife and one for the younger son, in consideration of the wife's covenanting "(a) to accept the provisions . . . made for her and the younger son in full satisfaction of all rights and claims" included in the petition of herself and the two children for maintenance, "(b) not to proceed further with the prayer in her petition" for such reliefs, and "(c) not to institute . . . or proceed with nor to procure suggest assist or encourage . . . either in her own right or on behalf of her said two children or either of them any . . . proceedings for" such reliefs. On the same day the prayer in the petition for maintenance was dismissed by a registrar by consent. On Dec. 6, 1948, the decree nisi was granted, and on June 19, 1949, it was made absolute. In an action by the wife for payment of instalments of the annuities, DEVLIN, J., held that the wife's promise not to take proceedings for maintenance on behalf of her child was contrary to public policy, and, therefore, the deed was void and the husband's covenants to pay the annuities unenforceable. On appeal, it was conceded by the wife that her covenants relating to the child were unenforceable, but she contended that those relating to her own maintenance were not, that they were severable from those relating

to the child, and that the husband remained bound by his covenants to pay the annuities,

HELD: the whole, or main, consideration moving from the wife for the payment by the husband of her annuity was her promise not to invoke the jurisdiction of the court under s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925 (now s. 19 (2) of Matrimonial Causes Act, 1950), a promise which was contrary to public policy, and, therefore, the covenants sought to be enforced were unenforceable against the husband.

Hyman v. Hyman ([1929] A.C. 601), applied.

Per SOMERVELL, L.J.: Any application to delete, amend, or dismiss a claim in a petition for maintenance on the ground that the husband has made provision should be left to be dealt with by the judge at the hearing, and, if made to a registrar before the hearing, should be adjourned.

Per DENNING, L.J.: If the parties do not oust the jurisdiction of the Divorce Court, but preserve it by making their agreement subject to the sanction of the court, then, once it is sanctioned, it is valid: The court, however, cannot, and will not, give its sanction before decree nisi. It has itself no jurisdiction before decree nisi to deal with permanent maintenance. Its jurisdiction only arises "on" the decree. If the parties agree on a figure for maintenance, the court should be asked to make an order for that figure. If they agree on a secured provision, the court should be asked to approve the deed which contains the provision. If they agree on a lump sum in composition of maintenance, the court should be asked to dismiss an application for maintenance or to discharge the existing order, as the case may be, but it would be entitled to refuse to do so if it did not think it proper to permit the composition.

Decision of *DEVLIN, J.* ([1951] 1 All E.R. 1088), affirmed.

EDITORIAL NOTE. Section 190 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925 (relating to maintenance) and s. 193 (relating to custody of children) were repealed by the Matrimonial Causes Act, 1950, and their provisions were re-enacted respectively by s. 19 (2) and (3) and s. 26 of that Act.

AS TO CONTRACTS BETWEEN HUSBAND AND WIFE WHICH ARE CONTRARY TO PUBLIC POLICY, see *HALSBURY*, Hailsham Edn., Vol. 7, pp. 157, 158, paras. 222, 223; and FOR CASES, see *DIGEST*, Vol. 27, pp. 221-223, Nos. 1924-1933, and *Digest Supps.*

Cases referred to:

- (1) *Hyman v. Hyman*, [1929] P. 1; *affd.* H.L. [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; *Digest Supp.*
- (2) *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478; 92 L.J.K.B. 81; 127 L.T. 824; 16 *Digest* 116, 151.
- (3) *Hopkins v. Prescott*, (1847), 4 C.B. 578; 16 L.J.C.P. 259; 9 L.T.O.S. 223; 11 J.P. 680; 136 E.R. 634; 15 *Digest* 665, 7175.
- (4) *Waite v. Jones*, (1835), 1 Bing. N.C. 656; 27 *Digest* 219, 1901.
- (5) *Goldsohl v. Goldman*, [1915] 1 Ch. 292; 17 *Digest* 85, 41.
- (6) *Scott v. Scott*, [1921] P. 107; 90 L.J.P. 171; 124 L.T. 619; 27 *Digest* 510, 5486.
- (7) *Mills v. Mills*, [1940] 2 All E.R. 254; [1940] P. 124; 109 L.J.P. 86; 163 L.T. 272; 2nd *Digest Supp.*
- (8) *Fisher v. Fisher*, [1942] 1 All E.R. 438; [1942] P. 101; 111 L.J.P. 28; 166 L.T. 225; 2nd *Digest Supp.*
- (9) *Price v. Green*, (1847), 16 M. & W. 346; 16 L.J.Ex. 108; 9 L.T.O.S. 296; 153 E.R. 1222; 17 *Digest* 141, 448.
- (10) *Evans (Joseph) & Co. v. Heathcote*, [1918] 1 K.B. 418; 87 L.J.K.B. 593; 118 L.T. 556; 12 *Digest*, Replacement, 324, 2497.

- (11) *Wyatt v. Kreglinger & Fernau*, [1933] 1 K.B. 793; 102 L.J.K.B. 325; 148 L.T. 521; Digest Supp.
- (12) *Bishop v. Kitchin*, (1868), 30 L.J.Q.B. 20; 12 Digest, Replacement, 314, 2424.
- (13) *Kearney v. Whitehaven Colliery Co.*, [1893] 1 Q.B. 700; 62 L.J.M.C. 129; 68 L.T. 690; 57 J.P. 645; 12 Digest, Replacement, 330, 2553.
- A (14) *Gaisberg v. Storr*, [1949] 2 All E.R. 411; [1950] 1 K.B. 107; 2nd Digest Supp.
- (15) *Combe v. Combe*, [1951] 1 All E.R. 767; [1951] 2 K.B. 215.

APPEAL by the wife from an order of DEVLIN, J., made on Apr. 27, 1951, and reported [1951] 1 All E.R. 1088, in an action for the payment of instalments of two annuities alleged to be due under a deed.

- B The plaintiff was the former wife of the defendant from whom she had obtained a divorce. In a deed entered into by the husband and the wife in anticipation of the decree the husband had covenanted, *inter alia*, to pay the wife two annuities in consideration of her undertaking not to proceed with the prayer in her petition for alimony, maintenance, and other relief for herself and her younger son and not to take other proceedings for those reliefs. DEVLIN, J.,
- C held that it was contrary to public policy for the wife to promise not to apply to the court for maintenance for her son, and, therefore, the deed was void and the husband's covenants to pay the annuities were unenforceable. On appeal, it was conceded by the wife that so much of her covenant as related to the son was unenforceable, but it was contended that this did not make the whole agreement void, that the wife's covenant with regard to her own maintenance was not contrary to public policy, and, therefore, the husband was not
- D relieved from his obligations under the deed.

Cross, K.C., and *Fairweather* for the wife.

Sachs, K.C., and *Brodbrick* for the husband.

Cur. adv. vult.

- E Feb. 1. The following judgments were read.

- SOMERVELL, L.J.: In this case the plaintiff claims £262 10s. as instalments due under a deed. The plaintiff and the defendant were previously wife and husband respectively, having been married in 1926. On Aug. 10, 1948, the wife presented a petition for dissolution of the marriage. In the petition she claimed, *inter alia*, maintenance for a son born in 1935, and maintenance and
- F secured provision for herself. There was another son born in 1928 with whom we are not concerned. On Nov. 24, 1948, the deed sued on, to which the wife, the husband, and two trustees were parties, was signed. On the same day the registrar, on being told of the deed, dismissed the application for maintenance in the petition. On Dec. 6, 1948, the matter came on for hearing and a decree nisi was granted. The petition was not defended. The decree was made
- G absolute on June 19, 1949. The defence is, first, that the consideration, or part of the consideration, moving from the wife was an undertaking not to invoke the jurisdiction of the court in respect of maintenance for herself or for her child and this was void as being contrary to public policy: *Hyman v. Hyman* (1). Therefore, it was said, the whole deed was void. In *Hyman v. Hyman* (1) the House of Lords decided that a covenant with regard to a wife
- H not applying to the court was unenforceable. The House did not have before it the question whether the existence of this covenant voided the whole deed so that the husband could, as he seeks to do here, have repudiated liability on his covenants. They held that the jurisdiction conferred on the court to order maintenance was not only in the interest of the wife but also in that of the public.

Before the learned judge the main argument appears to have been that no part of the clause in this case was contrary to public policy. The learned

judge held that, in so far as the wife had promised not to apply to the court in respect of maintenance for her son under s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, this was contrary to public policy. He then proceeded on the basis that, if part of the consideration for a promise was contrary to public policy, the whole promise was unenforceable, and he gave judgment for the husband. Before us it was conceded by counsel for the wife that so much of the wife's covenant, which I will consider in detail later, as related to the son was unenforceable. On this basis his argument was, first, that the fact that part of the consideration was unenforceable as contrary to public policy did not in a case of this kind make the whole agreement void. Reliance was placed by way of analogy on the decision in *Czarnikow v. Roth, Schmidt & Co.* (2). In that case this court held that part of an arbitration clause which purported to preclude an application to the court for a "consultative case" was void and contrary to public policy as involving an attempt to oust the jurisdiction of the court. It seems, however, clear that the court did not regard that as making void the arbitration clause generally, still less the agreement in which it was contained. Counsel, assuming he established this, further argued that, apart from the promise with regard to the son, the promise with regard to the wife's own maintenance was, having regard to its terms, not contrary to public policy. On that basis, or, possibly, in any event, he argued that the husband was not relieved from his obligations, but that the agreement should stand, the court striking out only that part of the wife's promises which were objectionable.

Before considering the terms of the deed, I will state what seem to me to be the principles to be extracted from the cases. The area is a difficult one in that there are, undoubtedly, general observations in some cases which, if taken in their generality, appear inconsistent with other decisions. The principle applied by the learned judge—that, if part of the consideration for a promise is "illegal" as being contrary to public policy, the agreement as a whole cannot be enforced—is in accord with statements to be found in more than one reported case. For example, COLTMAN, J., in *Hopkins v. Prescott* (3) (4 C.B. 596) and TINDAL, C.J., in *Waite v. Jones* (4), so stated. In the latter case TINDAL, C.J. (1 Bing. N.C. 662) said:

" . . . a party cannot enforce a contract where the consideration is illegal, either in the whole or part."

It is to be noted that the subject-matter of the promise in the former case was in part the sale of a public office which was a misdemeanour under the Sale of Offices Act, 1809, and in the latter it was alleged that part of the consideration was for a future separation of spouses. For spouses to separate was not, of course, a criminal offence, but consideration for a future separation was regarded, like future cohabitation, as *contra bonos mores*.

I have already referred to *Czarnikow's* case (2) where a different principle was applied. In restraint of trade cases there are many decisions under which part only of the restraint has been treated as unenforceable and contrary to public policy. This has not vitiated the rest of the clause. A recent example is *Goldsoll v. Goldman* (5). There was an agreement for the sale of a business which contained a covenant by the vendor not to deal in real or imitation jewellery in the United Kingdom or in various countries abroad. The covenant was restricted by the court to the United Kingdom and dealings in imitation jewellery, the remaining provisions being unenforceable. It was held in accordance with a long series of authorities that the covenant could be severed, part being enforceable and part unenforceable as contrary to public policy. In these cases, therefore, part is held to be contrary to public policy, the remainder being enforceable. It is to be noted that the severability is one-sided. If in *Goldsoll's* case (5) the purchase price had been split up, so much for the business, so much for the covenant not to trade in the United Kingdom in (a) real jewellery,

(b) imitation jewellery, and so on, there could have been true severability. The court in effect, however, strikes out some of the promises while leaving the consideration on the other side unaffected. This would only be justified if what was struck out was subsidiary to the main purpose. In *Goldsoll's* case (5) the purchaser got the business, and what the court held to be reasonable protection against competition. What was struck out was plainly subsidiary to the main purpose. If the purchaser had notionally allocated part of the purchase price to promises held to be contrary to public policy he had to abide the consequences. In this class of case the restraint is subsidiary either to a purchase or to a contract of service. If promises in restraint of trade were the sole subject-matter, and those promises were wholly or in the main contrary to public policy, it seems to me clear that the court would treat the whole contract as void.

The cases to which we were referred seem to me to indicate that, if one of the promises is to do an act which is either in itself a criminal offence or *contra bonos mores*, the court will regard the whole contract as void. In restraint of trade cases there is nothing wrong in not trading. What is objectionable is or may be a promise for consideration not to do so. It is not necessary to decide whether this is exhaustive because I, at any rate, regard *Czarnikow's* case (2) as an authority binding on this court that in a proper case the doctrine of severability can be applied where the objectionable promise is one purporting to oust the jurisdiction of the court. It seems to me that the court clearly expressed the view that the arbitration clause remained binding, the objectionable words in one clause of it only being, in effect, struck out.

The first question, therefore, in the present appeal is whether the whole or main consideration moving from the wife was a promise or promises purporting to oust the jurisdiction of the court. Under the deed the husband was to convey to the wife a house to be held by her on trust for herself during her life and on her death for the husband. The deed acknowledged the gift by the husband to the wife of the furniture and effects in the house formerly the husband's property. The husband covenanted to pay to the wife during her life such a sum as after deduction of income tax would leave £750. The husband covenanted with the wife and the trustees to pay a secured annuity to the trustees of such sum as after deduction of income tax would leave £300 while her son was alive and under the age of eighteen years. There were provisions as to how this should be dealt with during the wife's life and should she die while the son was under eighteen. If the proceedings for dissolution of the marriage did not result in a decree absolute, the husband had power to revoke. There were other subsidiary provisions, apart from the wife's covenants, which need not be referred to. The wife's covenants are contained in cl. 10 which reads as follows:

"Mrs. Bennett hereby covenants with Mr. Bennett: (a) To accept the provisions hereby made for her and the younger son in full satisfaction of all rights and claims of Mrs. Bennett and her said two children or any of them against Mr. Bennett in respect of alimony pending suit maintenance of her two children or either of them maintenance of herself or secured provision for herself or any like relief whether under s. 190 of the Supreme Court of Judicature [(Consolidation)] Act, 1925, or s. 10 of the Matrimonial Causes Act, 1937, or otherwise howsoever. (b) Not to proceed further with the prayer in her said petition that Mr. Bennett do pay to Mrs. Bennett alimony pending suit maintenance of the younger son maintenance and a secured provision and to consent to such prayer being dismissed. (c) Not to institute enter present or proceed with nor to procure suggest assist or encourage directly or indirectly either in her own right or on behalf of her said two children or either of them any petition summons or other proceedings for or in respect of any such alimony pending suit maintenance

of her said two children or either of them maintenance of herself or secured provision for herself or any like relief. (d) Out of her own moneys (including the first annuity and the second annuity) during her life to provide and pay for the maintenance and education of the younger son during his infancy and to keep him at Felstead School until he attains the age of eighteen years. (e) At all times to save harmless and keep indemnified Mr. Bennett from and against all actions proceedings claims demands damages costs charges and expenses arising during Mrs. Bennett's life in respect of or in connection with all or any of the matters or things mentioned or referred to in this clause."

The references to alimony pending suit can for present purposes be disregarded. It is also conceded that the clause is objectionable in so far as it deals with applications for maintenance for the son.

What, then, is the effect of the promise not to proceed further with the prayer in her petition for maintenance and secured provision for herself and to consent to such prayer being dismissed? If there be any ambiguity in these words, and I will indicate the possible ambiguity later, that ambiguity was resolved by what was done, plainly by agreement, on the same day, namely, the application to the registrar resulting in his order reciting that the husband had made provision by deed and ordering that the application for maintenance should be dismissed. It was admitted by counsel for the wife that, so far as he knew, such an application before decree was unusual. With counsel's consent we made inquiries which confirmed this. What, then, was its purpose and effect? An application for maintenance for a wife has, under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1), to be made "on any decree for divorce or nullity of marriage." The construction of the similar words in s. 1 (1) of the Matrimonial Causes Act, 1907, came before the court in *Scott v. Scott* (6). It was decided that the words "on any decree for dissolution of marriage" meant at the same time as the decree or within a reasonable time after the decree having regard to all the circumstances of the case. The order takes effect on the decree being made absolute and the word "decree" in the statute might, therefore, be read as meaning decree absolute. It seems, however, clear to me that when LORD STERNDALE, M.R., used the words "at the same time as the decree" he had in mind the hearing when the judge decides to grant a decree nisi. SCRUTTON, L.J., says ([1921] P. 126), that the matters to be considered are matters which should be in the mind of the judge at the time when he is making the decree for the dissolution of the marriage. This clearly refers to the judge who hears the case and not to the judge who under the procedure then in force made the decree absolute. No one has, so far as I know, ever suggested that the judge at the hearing, if an application is before him, cannot deal with it though his order will only come into effect if and when the decree is made absolute. It is academic to consider whether this results from construing the word "decree" in s. 190 (1) as meaning or including decree nisi or whether the court in *Scott v. Scott* (6) were construing the words, which might be read as indicating a moment of time, viz., on this view, the making of the decree absolute as relating back to the hearing as well as forward to a reasonable time after. Though an application can, of course, be filed or embodied in a petition and preliminary steps taken before the hearing, can it be dealt with, apart from preliminary matters, until the judge has decided to grant a decree nisi? It seems to me plain that the words "at the same time as the decree" cannot mean before the hearing. Until that time there can be no jurisdiction to deal with such an application. Now, if the words in the deed had meant that at the time for making the application on or subsequent to the hearing the deed was to be submitted to the court and the judge asked, with the wife's consent, to dismiss the application for maintenance, that clearly would not be an ouster of jurisdiction *quoad* that matter. It would, of course, have been a matter for the learned judge. He would not, in my view, be bound

to take this course. He could have refused to dismiss the application and made an order for a nominal sum as is done on occasions. I find it difficult to believe that, if the deed had been submitted to the court, cl. 10 would have survived in its present form. If this is a possible meaning of the words, it was clearly not their intended meaning in this deed. The learned registrar could not, for reasons which I have given, dismiss on merits or for good cause an application which could not at that date be made. He must, I think, have treated the application as in substance, though not in form, an application to amend. A petitioner need not in her petition ask for maintenance, and on this basis the effect of the order was that the petition went forward as so amended, namely, as one containing no claim for maintenance. In so far as it purported to dismiss an application it was a nullity. We do not, of course, know how the matter was put to the learned registrar. The issues involved are very much clearer now than they would have been then. I think, however, that any application to delete, amend, or dismiss a claim for maintenance on the ground that the husband had made provision should be left to be dealt with by the judge at the hearing, and, if made to a registrar before the hearing, should be adjourned.

We were asked to regard what was done as in accordance with what was suggested by GODDARD, L.J., in *Mills v. Mills* (7). That case was, however, dealing with a quite different position. GODDARD, L.J., was considering an application after decree when jurisdiction would exist, unless in respect of an application under s. 190 (1) a reasonable time had been allowed to elapse. He was considering the form of order to be made when the court was prepared to sanction payment of a lump sum. He said ([1940] 2 All E.R. 262):

“ . . . the right procedure is for an application to be made for maintenance, and then for the court to be moved that the application be dismissed on terms which have been agreed between the parties.”

The court would have had full information as to the agreement between the parties. What was said there might have been applicable in the present case if at the hearing, after submitting the deed to the court, the parties had asked for an order in the terms suggested. If the words used by GODDARD, L.J., are read as suggesting that the court would be bound to accede to the wife's “ consent ” on being informed that the parties had agreed, I would respectfully disagree, but I do not think the learned lord justice intended any such implication. In other words, it seems to me that the wife was promising to make no application to the court under s. 190 (1) as well as under s. 193 (1). The procedure before the registrar was intended to preclude her from making any such application. As I have said, it was not disputed before us that the promise by the wife not to make, as she can from time to time, application under s. 193 (1) for maintenance for the child was unenforceable as contrary to public policy. The main argument was that she could on her own behalf consent to a once-for-all settlement, and that, so far, at any rate, as money was concerned, that was the main matter. I am not assuming that she could not have so consented at the proper time and in the proper way. The point here is that the consideration moving from her was a promise not to exercise her right to apply to the court.

I have come to the conclusion, for the reasons I have given, that the promises contained in paras. (a) to (c) were promises which purported to oust the jurisdiction of the court over the whole field of maintenance. Was it the main consideration? The indemnity in cl. 10 (e) is consequential on the undertaking to accept the provisions in full satisfaction and cannot be regarded as any, or any appreciable, degree of further consideration. Clause 10 (d) is, I think, some further consideration. The wife is, as I read it, undertaking that the boy shall remain at Felstead even though the total cost of his upkeep exceeded the amount of the second annuity. I am, however, clear that the main consideration moving from the wife in accepting this quantification of

her rights was her promise not to invoke the jurisdiction of the court. I, therefore, think the covenants sought to be enforced in the present proceedings are void and unenforceable. I have limited my conclusion in this way because that is the only point before us. If the husband sought later, as he may not, to reclaim the furniture or the house, there may be an agreement on the terms of the deed that these items, particularly the furniture, are unaffected by this judgment. This point, if it be a point, was not argued before us.

I have left to this stage an argument which counsel for the wife based on certain observations in *Hyman v. Hyman* (1) because I have, I think, given them full force in the above reasoning. In *Hyman v. Hyman* (1), as I have said, the question was whether a covenant by a wife in a separation deed not to apply to the court was enforceable when, owing to an alteration of the law, she became entitled to sue for divorce. The first question was whether the covenant on its terms applied to these altered circumstances. The majority of the Court of Appeal held that it did so and was unenforceable. The House of Lords did not have to decide whether this voided the whole deed. The question whether it did was, however, referred to by counsel in argument, at any rate in the Court of Appeal. Counsel for the wife in the present case drew our attention to various passages which proceed, I think, clearly on the basis that the husband remained bound. Both LORD HAILSHAM, L.C. ([1929] A.C. 609), and LORD ATKIN (*ibid.*, 629), use words which suggest that the husband would remain bound and that any future application by the wife could only be for an additional sum. The passages referred to above indicate what I have accepted, namely, that in this area the unenforceability or "illegality" is not of the kind which, however small a part of the consideration it may be, necessarily voids the whole agreement. I do not think it would be right to regard these observations as a final authority on a point which was not before the House. The doctrine of severability being applicable might well have prevented the whole agreement being regarded as void. The main subject of the agreement was the separation. The possibility of divorce was remote and seemed to depend on a change in the law. It might well, in these circumstances, be held to be subsidiary and "severable." In any case separation deeds raise different issues.

Counsel for the wife referred to the possible difficulty in which the wife might be in in applying for maintenance or secured provision for herself. I hope I shall not be going beyond what is proper in stating what, I think, the position would be having regard to our decision if and when she applies. She would, for reasons which I have given, be in the position of having made no application under s. 190 (1) of the Act of 1925, or its successor, s. 19 (2) of the Matrimonial Causes Act, 1950. The question would, therefore, be whether the application was in a reasonable time. The court in *Fisher v. Fisher* (8) allowed an application by a wife seven years after a decree, the wife having in the interval relied on a continuance of payments of alimony and an undertaking by her former husband to settle certain property on her. Negotiations broke down and it was, as I have said, held that she ought to be given leave to apply. It would seem to me that the wife has both with regard to time and other circumstances a stronger case here to have her application entertained. Counsel for the husband said, while agreeing that it was a matter for the court, that his client would not resist any application to the court to quantify his liability. The appeal, therefore, in my opinion, should be dismissed.

DENNING, L.J.: In this case the only question to my mind is whether the wife can sue on the deed by action at law or whether her proper remedy is by application to the Divorce Court. I would not subscribe to a decision which deprived her of any remedy. When husband and wife are separated or divorced, it is often found that they have entered into a deed whereby the husband covenants to pay his wife an annuity and she in turn covenants not to apply

to the courts for maintenance. When that happens there is nothing wrong in the husband's covenant to pay the annuity, at any rate, not when it is taken by itself. But there may be something wrong, or at any rate invalid, in the wife's covenant not to apply to the courts. She has a statutory right to apply to the courts for maintenance, and a covenant by which she renounces that right may be unenforceable against her as being contrary to public policy. A good instance is *Hyman v. Hyman* (1). The question then arises: What is the effect of this on the deed as a whole?, and, in particular: What is the effect on the husband's covenant to pay the annuity?

In solving this problem, a useful analogy may be drawn from covenants in unreasonable restraint of trade. Such covenants offend public policy just as the covenants of a wife may do. They are not "illegal", in the sense that a contract to do a prohibited or immoral act is illegal. They are not "unenforceable", in the sense that a contract within the Statute of Frauds is unenforceable for want of writing. These covenants lie somewhere in between. They are invalid and unenforceable. The law does not punish them. It simply takes no notice of them. They are void, not illegal. That is how they were described by the full Court of Exchequer Chamber in *Price v. Green* (9) (16 M. & W. 353), and by the Court of Appeal in *Joseph Evans & Co. v. Heathcote* (10) ([1918] 1 K.B. 426, 431, 436). The presence of a void covenant of this kind does not render the deed totally ineffective. That has been well shown by PROFESSOR CHESHIRE and Mr. FIFOOT in their book on THE LAW OF CONTRACT, 2nd ed., pp. 242, 243. The party who is entitled to the benefit of the void covenant, or rather who would have been entitled to the benefit of it if it had been valid, can sue on the other covenants of the deed which are in his favour, and he can even sue on the void covenant if he can sever the good from the bad: *Goldsoll v. Goldman* (5); even to the extent of getting full liquidated damages for a breach of the good part: *Price v. Green* (9). So, also, the other party, that is, the party who gave the void covenant and is not bound by its restraints, can himself sue on the covenants in his favour, save only when his void covenant forms the whole, or substantially the whole, consideration for the deed: *Wyatt v. Kreglinger & Fernau* (11) ([1933] 1 K.B. 808). If the void covenant goes only to part of the consideration, so that it can be ignored and yet leave the rest of the deed a reasonable arrangement between the parties, then the deed stands and can be enforced in every respect save in regard to the void covenant. That seems to me to be the explanation of *Bishop v. Kitchen* (12), *Kearney v. Whitehaven Colliery Co.* (13), and *Czarnikow v. Roth, Schmidt & Co.* (2) ([1922] 2 K.B. 490).

If the cases on wife's covenants are examined, it will be found that they depend on the same distinction.

(i) *Separation agreements*.—Once parties are separated, a separation agreement (by which the husband covenants to pay his wife an annuity and she covenants to live separately and apart from him) is perfectly lawful, so long as the agreement is made because of the separation and not with a view to divorce. Sometimes in such a deed there will be found a covenant by the wife not to apply to the court for further maintenance, and that covenant, in some contingencies, is not enforceable against her. For instance, the covenant is not enforceable against her in the event of a subsequent divorce: *Hyman v. Hyman* (1); and it may not be enforceable against her if circumstances so change that the husband can be said to be guilty of "wilful neglect to provide reasonable maintenance" for her, though I would not wish to express a concluded opinion on that point. Nevertheless, those contingencies at the time of the deed usually are somewhat remote, and they can be ignored without affecting the reasonableness of the deed as a whole. They do not go to the whole of the consideration for the annuity. The substantial consideration for it is the agreement to live separate and that has been performed. The wife can, therefore, sue by action at law on the deed, notwithstanding the unenforceability of that particular covenant. That is, I think, implicit in the speeches in the House of Lords in

Hyman v. Hyman (1), particularly in the speech of LORD ATKIN ([1929] A.C. 629), where he speaks of statutory maintenance as a "supplement" to the annuity granted by the deed.

(ii) *Agreements for permanent maintenance on a divorce*.—An award of permanent maintenance on a divorce is peculiarly a matter for the Divorce Court, and the jurisdiction of that court in regard to it cannot be ousted by the private agreement of the parties. The reason lies in public policy. First, it is in the public interest that the wife and children of a divorced husband should not be left dependent on public assistance or on charity when he has the means to support them. They should, therefore, be able to come to the Divorce Court for maintenance, notwithstanding any agreement to the contrary: *Hyman v. Hyman* (1). Secondly, when maintenance is awarded by the Divorce Court, it is not fixed irrevocably at a named figure. It can be varied thereafter, upwards or downwards, according to the circumstances prevailing at the time, and, if the husband is unable to pay and arrears accumulate, it is in the discretion of the Divorce Court whether to enforce payment of the arrears or not. These beneficent controls would be lost if the parties could, by agreement, without the intervention of the court, fix maintenance permanently at an unalterable figure. Any private agreement of the parties which purports to make maintenance a debt enforceable at law must of necessity impliedly oust the jurisdiction of the Divorce Court to fix it, vary it or discharge it, and it is, by reason of that implication, invalid, for the ouster goes to the whole consideration. There is no consideration moving from the wife except an implied promise to accept the named figure and not to ask for more, and that is invalid, because it impliedly takes away the jurisdiction of the court to give her more. If her promise does not bind her, then his should not bind him: *Gaisberg v. Storr* (14); *Combe v. Combe* (15). Sometimes there may be an implied promise by her to prosecute the divorce proceedings, but that would be worse, for it would be collusion. In the present case, however, the ouster is not merely by implication. It is expressed in cl. 10 of the deed. That clause is invalid. It forms the whole, or substantially the whole, consideration for the husband's promise to pay the annuities. His promise is, therefore, invalid.

(iii) *The sanction of the court*.—If the parties do not oust the jurisdiction of the Divorce Court, but preserve it by making their agreement subject to the sanction of the court, then, once it is sanctioned, it is valid. The court, however, cannot, and will not, give its sanction before decree nisi. It has itself no jurisdiction before decree nisi to deal with permanent maintenance. Its jurisdiction only arises "on" the decree. Its sanction should, I think, be obtained in this way. If the parties agree on a figure for maintenance, the court should be asked to make an order for that figure. If they agree on a secured provision, the court should be asked to approve the deed which contains the provision. If they agree on a lump sum in composition of maintenance, the court should be asked to dismiss an application for maintenance or to discharge the existing order, as the case may be: *Mills v. Mills* (7) ([1940] 2 All E.R. 261, 262); but it would, I think, be entitled to refuse to do so if it did not think it proper to permit the composition. In the present case the parties seem to have sought to apply *Mills v. Mills* (7), but they made the mistake that they sought to apply it before decree nisi. That was quite wrong because the court had no jurisdiction before decree nisi to sanction the agreement and did not in fact do so. The agreement was recited in the consent order made by the registrar, and it was, no doubt, mentioned to the judge who heard the petition. Those circumstances go far to negative any collusion, but they do not validate the deed. They do not amount to that sanction by the court which is required to validate it. The proper way of doing it would be to ask the judge to approve the deed as a secured provision for the wife, on the ground that it secures to her an annual sum of money by way of covenant under seal. That was never done. This does not mean that the wife will go destitute. She can still apply to the Divorce

Court for maintenance. The consent order dismissing her previous application is no bar, because it was made before the case came on for hearing and there was no adjudication on the merits. At that stage it was no more than an amendment of the petition striking out her claim for maintenance. No adjudication could take place until the decree. Once the consent order is seen to be no obstacle the case is one in which the Divorce Court would, I think, readily grant her leave to apply for maintenance, notwithstanding that three years have elapsed since the making of the decree. She has a reasonable excuse for not applying earlier because she was relying on an agreement which has turned out to be invalid.

In conclusion I would say this. The avoidance of the wife's covenants in cl. 10 makes the covenant to pay the annuities ineffective, but I do not wish to suggest that it vitiates the provisions of the deed relating to the house and furniture. They are severable. When the Divorce Court comes to award maintenance it will no doubt take those benefits into account, and it will also take into account the figures stated in the deed. It may be that the wife will be no worse off. I do not know. At any rate, that is her proper remedy and not this. I agree, therefore, that this appeal should be dismissed.

ROMER, L.J.: I agree.

Appeal dismissed.

Solicitors: *J. B. de Fonblanque* (for the wife); *Aukin, Courts & Co.* (for the husband).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

MOWE v. PERRATON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.), February 7, 1952.]

Street Traffic—Taking motor vehicle without owner's consent—Driver using employer's van for own purposes—Road Traffic Act, 1930 (c. 43), s. 28 (1).

A van driver, on finishing work, disobeying his instructions to take the van to the garage, without the consent of the owners, his employers, or other lawful authority, drove the van to his house and loaded a radiogram on it with the intention of taking it to the house of a relative to which he was driving when he was stopped by the police.

HELD: as the driver was in lawful possession of the van before he took it for the unauthorised purpose, he was not guilty of the offence of taking and driving away a motor vehicle without the consent of the owner or other lawful authority under s. 28 (1) of the Road Traffic Act, 1930.

FOR THE ROAD TRAFFIC ACT, 1930, s. 28 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 598.

CASE STATED by West Kent Quarter Sessions.

At a court of summary jurisdiction sitting at Bromley, Kent, on Apr. 28, 1951, on a charge preferred by the appellant, a police officer, the respondent was convicted of having taken and driven away a motor vehicle, a Commer goods motor van, without the consent of the owner or other lawful authority, contrary to s. 28 (1) of the Road Traffic Act, 1930. The respondent appealed to West Kent Quarter Sessions before which court it was proved or admitted that he was a van driver employed by the Road Haulage Executive and that he was subject to the orders of the Royal Army Service Corps, Woolwich Arsenal, to whom the van was on hire. On Apr. 18, 1951, without the owner's consent or other lawful authority, he used the van to take a radiogram from his house to that of a relative. He contended that the word "take" was used in s. 28 (1) of the Road Traffic Act, 1930, in its ordinary sense and should not be given the

technical meaning of "take" in the definitions in s. 1 of the Larceny Act, 1916, and that he had not "taken" the van within the meaning of s. 28 (1) because he had never relinquished control of it between finishing work and driving it to his home. The appellant contended that the word "take" in s. 23 (1) bore the same meaning as in the definition of larceny at common law; that, as a servant, the respondent had custody, and not possession, of the van while using it under the orders of the hirers; and that, when driving to his home instead of to the garage, he "took" the van within the meaning of s. 28 (1). Quarter sessions held that the respondent had not taken and driven away the van without the consent of the owner or other lawful authority and allowed the appeal, and the appellant appealed.

Buzzard for the appellant.

J. H. Gower for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the appeal committee of the West Kent Quarter Sessions, before whom the respondent was charged with an offence against s. 28 (1) of the Road Traffic Act, 1930, in that he

"did take and drive away a motor vehicle . . . without the consent of the owner or other lawful authority."

The respondent was the driver of a lorry which belonged to the Road Haulage Executive and was under hire to the Royal Army Service Corps at Woolwich Arsenal. He had standing instructions that, on finishing work at the arsenal, he should drive the van back to the garage at Woolwich Dock. He did something which, as a servant of his employer, he ought not to have done. Instead of driving to the garage when he had finished work, he drove his van to his house, picked up a radiogram, and set out with the intention of taking it in the van to the house of a relative before driving the van to the garage. His journey was not an authorised journey, and I am far from saying that it is not to be strongly deprecated, because, if an accident had happened, in all probability it would not have been covered by the policy of insurance and he might have committed the offence of driving an uninsured van, but it seems to me wrong to say that what he did was taking and driving away a motor vehicle without the consent of the owner within s. 28 (1) of the Road Traffic Act, 1930. That section is intended to deal with the case of people who take motor cars which do not belong to them, drive them away, and then abandon them, because it is difficult to say that they intended to deprive the owner permanently of the possession, but here the respondent had taken and driven the motor vehicle as part of his work. What he did was unauthorised, but that does not make the taking or the driving away a criminal offence under s. 28 (1). I think it is only necessary to state the facts to show that quarter sessions came to a right decision, and this appeal fails.

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *Solicitor for the Metropolitan Police* (for the prosecutor); *Francis W. Beech & Taylor, Eltham* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

and Distinguished. Receased). THE PUBLIC TRUSTEE v. BELL AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), February 5, 1952.]

Trust and Trustee—Power of advancement—Trusts arising on exercise of special power of appointment—Power conferred by testamentary instrument—Death of testator before Jan. 1, 1926—Power exercised after Jan. 1, 1926—Trustee Act, 1925 (c. 19), s. 32 (3).

The testator made his will in 1912, and, by a codicil made on Aug. 2, 1925, he gave to the tenant for life of a trust fund a special power of appointment over the fund. On Sept. 1, 1925, the testator died. The power conferred by the codicil was exercised by a deed of appointment dated Sept. 27, 1951.

HELD: the trusts under the deed of appointment were "constituted", within the meaning of the Trustee Act, 1925, s. 32 (3), not by the deed, but by the codicil which created the power under which the deed was executed; the codicil came into operation on the testator's death which occurred before the commencement of the Act (Jan. 1, 1926); and, therefore, under s. 32 (3), the power of advancement conferred on trustees by s. 32 (1) did not apply to the trusts of the deed.

FOR THE TRUSTEE ACT, 1925, s. 32, see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 99.

Cases referred to:

- (1) *Re Dickinson's Settlements*, [1939] Ch. 27; 108 L.J.Ch. 40; 159 L.T. 614; Digest Supp.
- (2) *Re De La Bere's Marriage Settlement Trusts*, [1941] 2 All E.R. 533; [1941] Ch. 443; 110 L.J.Ch. 194; 165 L.T. 393; 2nd Digest Supp.
- (3) *Muir v. Muir*, [1943] A.C. 468; 112 L.J.P.C. 39.
- (4) *Re Dowie's Will Trusts*, [1949] 1 All E.R. 968; [1949] Ch. 547; [1949] L.J.R. 1340; 2nd Digest Supp.
- (5) *Re Darby*, (1943), 59 T.L.R. 418; 2nd Digest Supp.
- (6) *Re Taylor's Will Trusts*, (1950), 66 (pt. 2) T.L.R. 507; 2nd Digest Supp.
- (7) *Re Illingworth*, [1909] 2 Ch. 297; 78 L.J.Ch. 701; 101 L.T. 104; 37 Digest 426, 343.

ADJOURNED SUMMONS to determine whether the statutory power of advancement conferred on trustees by the Trustee Act, 1925, s. 32 (1), applied to trusts created by a deed of appointment, dated Sept. 27, 1951, and executed by the first defendant, Mrs. Kathleen Florence Bell, in exercise of a special power of appointment given to her by a codicil to the will of the testator, Richard Hamilton Batty, notwithstanding that he died before Jan. 1, 1926, the date of the commencement of the Act.

E. I. Goulding for the plaintiff, the trustee.

T. A. C. Burgess for the defendants (the appointor and the appointees).

VAISEY, J.: This summons raises the question whether or not the statutory power of advancement conferred on trustees by the Trustee Act, 1925, s. 32 (1), applies to the trusts created by a deed of appointment executed in 1951 pursuant to a special power of appointment conferred by the testamentary disposition of a testator who died before Jan. 1, 1926. The decision seems to me to rest almost entirely on the meaning which ought to be attributed to s. 32 (3), which is in these words:

"This section does not apply to trusts constituted or created before the commencement of this Act."

The "commencement" of the Act is defined in s. 71 (2) as being Jan. 1, 1926. The will in the present case was dated July 25, 1912; the codicil, under which

the power of appointment was exercised, was dated Aug. 2, 1925; and the testator died on Sept. 1, 1925. Therefore, the will, the codicil and the death of the testator all occurred before the Trustee Act, 1925, commenced, but the deed of appointment which, from one point of view, was the origin of these trusts, was dated Sept. 27, 1951. By that deed the appointor, who was the tenant for life of the trust fund, appointed a part of the fund equally between her two children.

A similar question has arisen under s. 31 of the Act of 1925 which deals with maintenance. Section 31 (5), which corresponds to s. 32 (3), is in these words:

"This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act."

In *Re Dickinson's Settlements* (1), a decision of CROSSMAN, J., the headnote is: B

"Where a power of appointment is exercised, the document exercising the power and not the document creating the power is for the purpose of [s. 31 of the Act of 1925] the instrument under which the appointed interest arises, as a new interest is created by the appointment."

In a sense in the present case the origin of the trusts by virtue of which the power of advancement is said to arise is the deed of appointment, and not the testamentary disposition which conferred the power of appointment, but I think that a distinction has to be drawn between the expressions "trusts constituted" and "trusts created" in s. 32 (3). In my judgment, in the present case the trusts were constituted by the testator's will, i.e., they originated by reason of the constitution of the original trusts as contained in the codicil of August, 1925. No doubt, they were created in one sense when the power of appointment was exercised, but it must be noted that the language of s. 32 (3) differs very materially from that of s. 31 (5). Section 32 (3) refers to trusts "constituted or created before the commencement of [the] Act", and not to "the instrument . . . under which the interest arises." C

In *Re De La Bere's Marriage Settlement Trusts* (2) SIMONDS, J., held that the "instrument under which certain property was acquired", for the purpose of an after-acquired property clause, was the deed of appointment and not the original instrument which created the power of appointment. Referring to cases on which CROSSMAN, J., relied for his decision in *Re Dickinson's Settlements* (1), SIMONDS, J., said ([1941] 2 All E.R. 535): E

" . . . those cases are examples of a principle which seems to be perfectly clear—namely, that, where one has an instrument creating a power and an instrument exercising that power, the interest created by the exercise of the power arises under the latter instrument, for in fact there never was such an interest until the power was exercised so as to create it." F

In my judgment, however, that decision throws very little light on the present problem. G

In *Muir v. Muir* (3) a question arose under the Trusts (Scotland) Act, 1921, s. 9, which regulates what is known in England as the rule against perpetuities. It was held by the House of Lords that certain provisions, which were alleged to infringe the statutory prohibition against perpetuities, were "constituted", within the meaning of the Act, by the original trust disposition and the settlement conferring the power under which they were in fact created, and, accordingly, certain persons, to whom life interests had been given in exercise of the power, became entitled to the fee of the shares held for them, that being the result, according to Scottish legislation, of an attempt to give a life interest which transgressed the permissible period. It seems to me that that case throws a good deal of light on the problem which I have to decide, though, no doubt, the cases on the subject of perpetuity stand on a somewhat different footing from H

cases such as the present, which depend on the meaning of a sub-section of a statute.

A I do not think that the decision of ROXBURGH, J., in *Re Dowie's Will Trusts* (4) helps me very much, but it certainly contains nothing which is contrary to the principles and views which I hold to be applicable in the present case. *Re Darby* (5) and *Re Taylor's Will Trusts* (6) deal with the question whether the relevant date under s. 32 (3) of the Act of 1925 is the death of the testator or the date at which the testamentary instrument is executed, but they seem to me to have little to do with the present problem because, except where there are special circumstances, as in *Re Illingworth* (7), it is well settled that a will is ambulatory and inchoate during the lifetime of the testator and comes into operation only at his death. In *Re Darby* (5) and in *Re Taylor's Will Trusts* (6) B it was held that the date on which a trust in a will was constituted or created was not the date of the execution of the instrument, but the date when the instrument became an operative instrument by virtue of the death of the testator.

C I think it must be noticed that s. 32 (1) is a revolutionary provision in that it has a confiscatory effect since it enables half of the property held contingently on an infant attaining the age of twenty-one to be applied for his advancement, *i.e.*, it gives half of the capital to a beneficiary who, under the terms of the instrument creating the trust, is only entitled to that capital contingently. In my judgment, it may well be that the difference between the language of s. 31 (5) and s. 33 (2), on the one hand, and that of s. 32 (3), on the other hand, may be referable to a distinction between the three sub-sections. It seems to me that, if the legislature intended the section to apply to interests which arise under the constitution of D a testamentary instrument which came into operation, by reason of the testator's death, before the commencement of the Trustee Act, 1925, words of a much stronger character would have been employed. For these reasons, though with a certain amount of hesitation, because the point is not an easy one, I propose to declare that the statutory power of advancement conferred on the trustees by s. 32 (1) of the Trustee Act, 1925, does not apply to the trusts under the deed of appointment of Sept. 27, 1951, executed in exercise of the special E power of appointment, by reason of the fact that the testamentary instrument which created the power came into operation before and not after the commencement of the Act.

Order accordingly.

Solicitors: *Peacock & Goddard*, agents for *Haines & Sumner*, Gloucester (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. BELL & NICOLSON, LTD.

[CHANCERY DIVISION (Donovan, J., sitting as a judge of the Division), January 15, 16, 1952.]

Profits Tax—Distribution—Capital profits dividend—Finance Act, 1947 (c. 35), s. 36 (1).

A
A capital profits dividend is a distribution for profits tax purposes within the meaning of s. 36 (1) of the Finance Act, 1947.

Lamson Paragon Supply Co., Ltd. v. Inland Revenue Comrs. (1951) (44 R. & I.T. 520), applied.

FOR THE FINANCE ACT, 1947, s. 36 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 780. B

Case referred to:

(1) *Lamson Paragon Supply Co., Ltd. v. Inland Revenue Comrs.*, (1951), 44 R. & I.T. 520; [1951] 2 T.L.R. 723.

CASE STATED by General Commissioners of Income Tax.

C
The taxpayers, a limited company, paid a dividend out of capital profits for the chargeable accounting period ended Dec. 31, 1947. In that period their trading profits assessable to income tax and profits tax exceeded the amount of their distributions, even if the capital profits dividend were reckoned as a distribution. The company claimed non-distribution relief from profits tax, under s. 30 (2) of the Finance Act, 1947, on the difference between its profits chargeable to profits tax and the amount of its net relevant distributions to proprietors, excluding the capital profits dividend. The Commissioners of Inland Revenue allowed non-distribution relief on the basis that the capital profits dividend should be treated as a distribution, thus reducing the amount subject to relief. The company appealed to the general commissioners, who allowed the appeal. D

E
The Crown appealed.

Heyworth Talbot, K.C., and *Sir Reginald Hills* for the Crown.

Cyril King, K.C., and *F. N. Bucher* for the taxpayers.

Cur. adv. vult.

Jan. 16. DONOVAN, J., read the following judgment. This case raises a short, but important, point of construction on certain sections of the Finance Act, 1947, dealing with profits tax. F

The facts are that on Feb. 18, 1947, this company paid a dividend of £5,625 to its shareholders out of profits which arose, not from any trade or business, but from the realisation of certain investments. This profit was, therefore, not liable to income tax or profits tax in the hands of the company, nor was it susceptible of deduction of income tax at source when distributed to the shareholders. G
The Commissioners of Inland Revenue treated the dividend as among the distributions which had to be taken into account in considering what amount of relief from profits tax was due to the company in respect of undistributed profits, of which it had some during the relevant chargeable accounting period, namely, the year ending Dec. 31, 1947. The effect of so taking this dividend into account is to diminish that relief and thus to increase the amount of profits tax H
payable for the period. The company objected to the commissioners' action on the ground that, since the dividend of £5,625 was paid otherwise than out of trading or business profits, it could not be reckoned as a distribution of profits for profits tax purposes, and succeeded in establishing that contention before the general commissioners.

The point so raised is purely one of construction of the relevant statutory provisions, beginning, conveniently, with s. 36 of the Finance Act, 1947. That

section defines the meaning of distribution for the purposes of profits tax, and, so far as is here relevant, enacts by sub-s. (1) as follows:

“Subject to the provisions of the next succeeding sub-section, wherever (a) any amount is distributed directly or indirectly by way of dividend or cash bonus to any person . . . there shall be deemed for the purposes of the last preceding section to be a distribution to that person of that amount . . .”

(The next succeeding sub-section, subject to which this enactment has to be read, contains nothing material for the purposes of this case.)

Here one is dealing with a dividend of £5,625 paid by the company on Feb. 18, 1947, and, despite its capital origin, being clearly “an amount distributed directly by way of dividend”, and, therefore, by s. 36 (1) (a) *prima facie* deemed to be a “distribution” for the purposes of s. 35 of the Act. Going to s. 35, one finds it dealing with something called “the gross relevant distributions to proprietors”, among which it includes distributions to the members of a body corporate, with certain exceptions not here material. So, the £5,625 in the present case must *prima facie* be treated as being among the “gross relevant distributions”. Then one looks at s. 34 of the same Act, defining what are “net relevant distributions”. They are to be, normally, a proportion of the gross relevant distributions, though in some cases they may be equal to the latter or even more. The section contains nothing, however, which on the face of things excludes the £5,625 here in question from the net relevant distributions.

Section 30 of the same Act, by sub-s. (1) prescribes the rate of profits tax. In sub-s. (2) it is provided that, if the net relevant distributions to proprietors for any chargeable accounting period are less than the profits for that period chargeable to profits tax, then the rate of profits tax chargeable on the difference shall be reduced. In other words, the undistributed profit is to bear profits tax at a lower rate. This relief is called in the Act the relief for non-distribution.

If, therefore, one treats the £5,625 as part of the net relevant distributions, the amount of relief for non-distribution is correspondingly reduced. But how is one to avoid doing so on the language of the statutory provisions I have read? On the literal construction of that language there is no escape from such a result, and, accordingly, it is argued that I must have regard to some implied limitation which prevents the Crown from reckoning this dividend as a distribution. Such a limitation, it is suggested, is to be found in the circumstance that profits from trades or businesses are alone subject to profits tax, and distributions of such profits should, therefore, it is argued, alone be taken into account in assessing the tax, even though the distribution may merely be the measure of liability. This argument would have more force than it has if the effect of taking a distribution of capital profits into account were to impose profits tax on an amount more than the business or trading profits earned by a concern. But such is not the effect. In the present case I am told that whether one takes this dividend into account as a distribution or not, the net relevant distributions would be less than the full trading profits in the chargeable accounting period in question liable to profits tax. The issue merely affects the amount of relief for non-distribution.

But the same argument would be open in a case coming within sub-s. (3) of s. 30 of the Act, and since the meaning of “distribution” must be the same in both sub-sections, I should deal with it. Sub-section (3) is concerned with the case where, using non-technical language, the distributions are greater than the trading profits for the chargeable accounting period. It is said that, if you reckon dividends of capital profits among the distributions, you will, under sub-s. (3), be taxing these profits to profits tax, whereas only business or trading profits are liable to the tax. I agree that you will, and I also think that such a result follows quite plainly from the language of s. 30 (3) (as amended by the Finance (No. 2) Act, 1947, s. 7 (2)), which says this:

“Subject to the provisions of this Part of this Act, if, in the case of a

trade or business, the net relevant distributions to proprietors . . . for any chargeable accounting period are greater than the profits thereof for that period chargeable to the profits tax, there shall be charged for that period, in addition to the other profits tax, if any, chargeable therefor, profits tax at the rate of fifteen per cent. on the amount of the difference."

That means, as plainly as words can express it, that there is to be an additional profits tax on the net relevant distributions so far as they are in excess of the profits chargeable to the "other" profits tax, that is, in excess of trading or business profits. There is no exception in favour of net relevant distributions being capital dividends. Again, if that provision stood alone, the argument that you should so construe the word "distribution" as to exclude distributions of non-trading and non-business profits would have weight. But then comes the proviso to s. 30 (3), which reads thus:

"Provided that the amount on which tax is chargeable under this subsection for any chargeable accounting period shall not, when added to the total of the amounts on which tax is charged thereunder for previous chargeable accounting periods, exceed the total of the differences in respect of which reductions have been made under sub-s. (2) of this section for previous chargeable accounting periods."

The effect of that is that an amount equal to the aggregate of the trading or business profits in current and preceding chargeable accounting periods is alone charged to profits tax. Nothing above this aggregate is taxed.

In these circumstances I see no reason for not giving the statutory definition of "distribution" its natural meaning, or for reading into the language of the relevant sections the limitation for which the taxpayers here contend. After all, it was an obvious contingency against which the legislature had to provide, that someone might try to get the best of both worlds by distributing capital instead of trading or business profits and at the same time secure the non-distribution relief for an equivalent amount of trading or business profits. Furthermore, the legislature had in other cases enacted that capital might be used, in effect, as a measure for taxing income in cases where otherwise tax on income might be avoided: see, for example, s. 21 (3) of the Finance Act, 1936, and s. 40 of the Finance Act, 1938.

The conclusion at which I have arrived is the same as that reached by HARMAN, J., in *Lamson Paragon Supply Co., Ltd. v. Inland Revenue Comrs.* (1). There at a somewhat late stage in the proceedings the company raised the point that a dividend out of capital profits was not a distribution for profits tax purposes. There were other points in the case as well. If one reads the report in that case it rather looks at first sight as though the Crown were arguing that no additional profits tax was imposed by s. 30 (3) of the Finance Act, 1947, but that all that it did was to cancel a relief previously given. Such an argument would give the go-by altogether to the words in s. 30 (3): "There shall be charged . . . in addition to the other profits tax . . . profits tax" at such and such a rate. The financial effect of the provision is, of course, to cancel reliefs previously accorded, but that is another matter. In the circumstances it is not surprising to find counsel for the Crown in the present case disclaiming the argument that no charge to tax is imposed by s. 30 (3); he suggests that all the Crown was saying in the *Lamson Paragon* case (1) was that, while the form of s. 30 (3) is to impose an additional tax, the effect in money is simply to cancel reliefs from profits tax previously accorded. This was in answer to an argument by counsel for the taxpayers in that case that there was an additional tax imposed by s. 30 (3), and it ought not to be imposed on profits other than those arising from the trade or business. What the Crown successfully replied was in effect this: True, it is expressed as an additional tax, but really the effect is only to cancel previous reliefs, so that the argument of counsel for the taxpayers had not the weight it otherwise might have. This is really an expression, in different language, of the

same reason which leads me in the present case to reject the invitation to impose a limitation on the language of the statute, that reason being that the amount of profits tax which the taxpayers are asked to pay is restricted to a maximum of tax on a sum equal to his business or trading profits. I, therefore, allow the appeal with costs.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Burton, Yeates & Hart* (for the taxpayer company).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

THOMPSTONE v. SIMPSON.

[NEWCASTLE-UPON-TYNE ASSIZES (Hallett, J.), January 17, 18, 1952.]

Rent Restriction—"Dwelling-house let together with land other than the site of the dwelling-house"—*Garage business and dwelling-house*—*Premises divisible into separate entities*—*Dominant purpose of letting the carrying on of business*—*Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (3).*

In 1927 a landlord acquired certain premises consisting of business accommodation on the ground floor and living accommodation on the first and second floors. Access to the living accommodation was gained by a separate entrance, but there was also an internal means of access between the two parts of the premises. The landlord employed the tenant as his manager and granted to him the use of the living accommodation rent free as part of the terms of his service. In 1942 the tenant took over the landlord's business, and, by a lease dated Dec. 29, 1942, the landlord let the whole of the premises to him. In 1949 the landlord gave the tenant notice to quit, but the tenant remained in possession as a statutory tenant, HALLETT, J., found as a fact that the business part and the living part of the premises were divisible into two separate entities and that the dominant purpose of the lease was for the carrying on of a business and not the provision of a dwelling-house.

HELD: on the true construction of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, the dwelling-house was "let together with land other than the site of the dwelling-house" and, therefore, the Rent Acts did not apply to the premises.

Pender v. Reid (1948 S.C. 381), applied.

EDITORIAL NOTE. In *Pender v. Reid* (*supra*) the tenant carried on business as a coal merchant in premises consisting of a dwelling-house where the tenant lived and an adjacent coal yard, garage and workshop used exclusively for the tenant's business. It was argued for the tenant that the premises were protected by the Rent Acts as "land . . . let together with a dwelling-house" within the meaning of s. 3 (3) of the Act of 1939. The Second Division of the Court of Session, however, held that the mere presence of a dwelling-house in a composite letting was not enough to bring the whole premises within the Rent Acts, and, since it had been found that the letting was a business rather than a domestic one, the dwelling-house must be considered as one "let together with land other than the site of the dwelling-house", and, therefore, not protected.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1078.

Cases referred to:

- (1) *Pender v. Reid*, 1948 S.C. 381; 2nd Digest Supp.
- (2) *Vickery v. Martin*, [1944] 2 All E.R. 167; [1944] K.B. 679; 113 L.J.K.B. 552; 171 L.T. 89; 2nd Digest Supp.
- (3) *Hartell v. Blackler*, [1920] 2 K.B. 161; 89 L.J.K.B. 838; 123 L.T. 171; 31 Digest, Replacement, 506, 6321.

- (4) *Davies v. Bristow. Penrhos College v. Butler*, [1920] 3 K.B. 428; 90 L.J.K.B. 164; 123 L.T. 655; 31 Digest, Replacement, 510, 6349.
- (5) *Clarke v. Grant*, [1949] 1 All E.R. 768; [1950] 1 K.B. 104; [1949] L.J.R. 1450; 2nd Digest Supp.
- (6) *Marcroft Wagons, Ltd. v. Smith*, [1951] 2 All E.R. 271; [1951] 2 K.B. 496.

ACTION by the landlord for possession of a dwelling-house and business premises let to the tenant under a lease dated Dec. 29, 1942.

For the tenant it was contended that he was entitled to protection under s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939. The landlord contended that the dwelling-house was let together with land other than the site of the dwelling-house within the meaning of that sub-section, and, therefore, that it was outside the protection of the Rent Acts.

Waller for the landlord.

J. Charlesworth for the tenant.

HALLETT, J.: The landlord was the owner of premises in Main Street, Ponteland, which, by a lease dated Dec. 29, 1942, he demised to the tenant. He now claims an order for possession of the premises. In 1927 the landlord acquired the premises which consisted of business accommodation on the ground floor and living accommodation on the first and second floors. Before the landlord acquired it, the building belonged to a co-operative society which used the ground floor for their business purposes and allowed their manager to occupy the living accommodation. The landlord employed the tenant as his manager in a garage business which he carried on on the ground floor and he gave him the use of the living accommodation, rent free, as part of the terms of his service. In 1942 the landlord's business was not doing well, and, at his suggestion, the tenant agreed to take it over. In pursuance of that arrangement the lease to which I have referred was entered into. The demise was

" . . . as from Apr. 6, 1942, until such date as . . . the present emergency . . . shall be declared determined or the period of three years from Apr. 6, 1942, whichever period shall be the shorter . . . "

Both sides have agreed that the emergency was determined at some date later than three years from Apr. 6, 1942, *i.e.*, later than Apr. 6, 1945. The clause continued:

" . . . and thereafter until the said term shall be determined by one calendar month's notice in writing given by either party to the other."

The tenant continued in occupation after Apr. 6, 1945, but difficulties arose between the parties and on Oct. 31, 1949, the landlord served on the tenant a notice to quit at the end of one calendar month from Nov. 1, 1949.

Assuming that the contractual tenancy had come to an end at the date of action brought, is the tenant protected from eviction by reason of the provisions of the Rent Acts? That involves a consideration of whether the decision of the Scottish courts in *Pender v. Reid* (1) was correct. The facts are not exactly the same, but counsel for the tenant agrees that, if that decision was correct, his contention that these premises were protected by the Rent Acts is likely to fail. In *Pender v. Reid* (1) it was held that, since the dominant purpose of the let was the carrying on of the business of a coal merchant and not the provision of a dwelling-house, the dwelling-house being merely an adjunct of the business part of the premises, the tenancy was not protected by the Rent Acts. Using the same language, I hold here that the dominant purpose of this let was for the carrying on of the business by a garage proprietor and not the provision of a dwelling-house, the dwelling-house being merely an adjunct of that part of the premises used for the business. Where the business part of the premises and the living part of the premises are all one entity, the position is different from cases where the two parts can be treated as separate entities. In the present case I

find that the two parts of these premises can be regarded as separate entities, one reason being that there is a separate entrance giving access to the living part of the premises.

The tenant relied on s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, which provides:

“ . . . the application of the [Rent Acts], by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes; and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall . . . be treated as part of the dwelling-house; but, save as aforesaid, the [Rent Acts] shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house.”

That sub-section can be regarded as containing three phrases, to use the expression which LORD MACKAY in *Pender v. Reid* (1) considered to be convenient. The first phrase says that a dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes. The Rent Acts were primarily intended—apart from a short period when they also applied to business premises—to protect tenants from being evicted from dwelling-houses, and, because that which was protected was a dwelling-house, there was a risk that it might be argued that premises which were partly used for business, trade or professional purposes could not be regarded as dwelling-houses, and, therefore, were outside the protection of the Acts. Accordingly, s. 12 (2) (ii) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided:

“ . . . the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes.”

When the Act of 1939 came into force, bringing within the protection of the Acts houses which previously had been outside it, we find those words repeated in substance in s. 3 (3). In *Vickery v. Martin* (2) the premises in question to a substantial extent were used for business purposes, viz., the business of taking in lodgers. The proprietress of the business, acting as her own manageress, used for herself, from time to time, part of the accommodation as a living room and a bedroom. Counsel for the landlord in that case sought to argue that because of the business use of a substantial part of the premises the premises as a whole lost their protection as a dwelling-house, and he contended that s. 3 (3) must be construed as if it read: “shall not be excluded by reason only that a non-substantial part of the premises is used as a shop or office or for business, trade, or professional purposes.” The Court of Appeal refused to accept that construction.

If counsel for the landlord in the present case were arguing that this was not a dwelling-house because a substantial part of it was used for another purpose, my view, in the light of that decision and the construction I put on the sub-section, would be that it would fail, but his case, as did the decision of the court in *Pender v. Reid* (1), rests on the last phrase of the sub-section, viz., that the premises consist of a dwelling-house let together with land other than the site of the dwelling-house. I recognise that the point is far from clear and that objections can be raised to whatever view one takes of the true construction of the sub-section, but I am impressed by the contrast between the wording of the other two phrases in the sub-section: “any land or premises let together with a dwelling-house shall . . . be treated as part of the dwelling-house” and “but . . . the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house.” One of the difficulties is that the last part of the sub-section refers to

letting "together with land", not "together with land or premises." But, although there is that difficulty, it is not sufficient, in conjunction with the other difficulties, to prevent my coming to the conclusion—although I do so with some doubt and hesitation—that the view taken by the Scottish court was correct. Finding, as I do, that the facts here are similar to those on which the court in *Pender v. Reid* (1) held that the premises in that case were not protected, I come to the same conclusion and I hold that these premises were not premises to which the Rent Restrictions Acts applied, and that, therefore, the tenant's claim that he was protected by those Acts fails. Accordingly, there will be an order for possession.

Order accordingly.

Solicitors: *Wilkinson & Marshall*, Newcastle-upon-Tyne (for the plaintiff);
C. D. Foster & Magee, Newcastle-upon-Tyne (for the defendant).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

JONES v. PROTHERO.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.),
 February 8, 1952.]

Street Traffic—Accident—Duty to report—"Driver"—Vehicle stationary at time of accident—Road Traffic Act, 1930 (c. 43), s. 22 (2).

The appellant stopped his motor vehicle on the near-side of a public road, switched off the engine, and remained in his seat talking to his passenger for some ten minutes. He then opened the driver's door on the off-side of the vehicle, and, in doing so, he struck a pedal cyclist who was passing. He failed to report the accident, and, on being charged under s. 22 (2) of the Road Traffic Act, 1930, with so failing, he contended that, as he had stopped the engine of the vehicle for a substantial time before the accident happened, he was not the "driver" within the meaning of the sub-section at the time of the accident.

HELD: for the purpose of s. 22 (2) the "driver" of a vehicle was the person who took it out on the road and he remained the driver until he finished his journey, and, therefore, the appellant was guilty of an offence under s. 22 (2).

FOR THE ROAD TRAFFIC ACT, 1930, s. 22 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 595.

Cases referred to:

- (1) *Shears v. Matthews*, [1948] 2 All E.R. 1064; 113 J.P. 36; 2nd Digest Supp.
- (2) *Watson v. Lowe*, [1950] 1 All E.R. 100; 114 J.P. 85; 2nd Digest Supp.

CASE STATED by Carmarthen justices.

On Oct. 3, 1951, at a court of summary jurisdiction sitting at Llanelly, the appellant was convicted on an information preferred by the respondent, an officer of police, charging the appellant for that, owing to the presence on a road of a motor car of which he was the driver, an accident occurred whereby injury was caused to one William Davies, and the appellant, not having given his name and address to any person requiring him so to do, unlawfully failed to report the accident at a police station or to a police constable, contrary to s. 22 (2) of the Road Traffic Act, 1930. It was contended for the appellant, *inter alia*, that he was not a driver within the meaning of the section.

Scott Henderson, Q.C., and *Skelhorn* for the appellant.

Elson Rees for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Carmarthen sitting at Llanelly, before whom the appellant was charged with an offence under s. 22 (2) of the Road Traffic Act, 1930, which provides:

"If in the case of [an accident owing to the presence of a motor vehicle on a road whereby damage or injury is caused] the driver of the motor vehicle for any reason does not give his name and address to any . . . person [having reasonable grounds for requiring them], he shall report the accident at a police station or to a police constable as soon as reasonably practicable, and in any case within twenty-four hours of the occurrence thereof."

The appellant had been driving his motor car along a road when he applied his brakes, stopped on his near-side, switched off his engine, and sat talking business with a passenger in the car for some ten minutes. He then opened the driver's door on the off-side of the car to get out, and, in doing so, he struck a pedal cyclist.

The present case is distinguishable from *Shears v. Matthews* (1), to which we have been referred, because all that was decided in that case was that the respondent had been summoned under the wrong part of s. 78 of the Highway Act, 1835. In the present case it is argued that if a man has stopped for something more than a mere moment the engine of a car which he has been driving he may be in charge of the vehicle, but in law he is not the driver. To give any such narrow meaning as that to the word "driver" would nullify the whole of s. 22. For the purposes of that section the "driver" is the person who takes out the vehicle, and he remains the driver until he finishes his journey. There was ample evidence here on which the justices could find that the appellant was the driver of the car—which, after all, is a question of fact—and this appeal must be dismissed with costs.

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *A. J. A. Hanhart*, agent for *W. Davies & Jenkins*, Llanelly (for the appellant); *R. I. Lewis & Co.*, agents for *Leslie Williams*, Llanelly (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

BLANKLEY v. GODLEY AND ANOTHER.

[NOTTINGHAM ASSIZES (Byrne, J.), December 3, 4, 1951.]

Air Traffic—Damage caused by aircraft “taking off”—Aircraft about to “taxi” to “take off” position—Air Navigation Act, 1920 (c. 80), s. 9 (1).

ACTION for damages.

On June 12, 1949, the plaintiff's motor car was stationary on a runway of an airfield at Saltby, Lincolnshire, when it was struck and damaged by an Auster aircraft in motion on the ground which was piloted by the first defendant and owned by the second defendant, J. D. H. Radford. The plaintiff claimed £122 6s. 5d. in respect of the damage done to his car, alleging that the first defendant was negligent in his control of the aircraft and that the second defendant was liable under s. 9 (1) of the Air Navigation Act, 1920, which provides that “where material damage or loss is caused by an aircraft in flight, taking off, or landing . . . damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered.” As against the second defendant, the plaintiff alleged that, at the time of the collision, the aircraft was taking off, and evidence was given that the accident occurred on a “cross-wind” runway while the pilot was about to turn his aircraft round to taxi back to the “duty runway” where he would commence his take-off run. A flying instructor gave evidence that “taxi-ing” started when the brakes of the aircraft were released until the pilot came to the “take-off” position and halted at an angle of 45° to the wind. He then did his “take-off drill” and turned into the wind when the “take-off” commenced.

Cases referred to:

- (1) *Dunn v. Campbell*, (1920), 4 Lloyd L.R. 36.
- (2) *Cubitt & Terry v. Gower*, (1933), 77 Sol. Jo. 732; Digest Supp.

H. G. Talbot for the plaintiff.*Vaughan, K.C.*, and *D. C. Thompson* for the first defendant.*A. J. Flint* for the second defendant.

BYRNE, J., held that the plaintiff had not been negligent, that the first defendant was entirely to blame, and that the second defendant was not liable under s. 9 (1) of the Air Navigation Act, 1920, since the aircraft was not “taking-off” at the time of the accident.

Judgment accordingly.

EDITORIAL NOTE. In SHAWCROSS AND BEAUMONT ON AIR LAW, 2nd ed., p. 435, the following passage appears: “From the decision in the case of *Dunn v. Campbell* (4 Lloyd L.R. 36), it would seem that taking off commences when the pilot starts to taxi across the aerodrome towards the position from which the actual take-off is made, and is not restricted to the start of that run from that position (at which there is usually a halt)”. The present decision would seem to confine the definition of “taking off” to the period after the pilot has come to the take-off position.

The Air Navigation Act, 1920, has now been repealed by the Civil Aviation Act, 1949, s. 9 (1) of the Act of 1920, being reproduced in s. 40 (2) of the later Act.

Solicitors: *Joynson-Hicks & Co.*, London (for the plaintiff); *Ingram & Co.*, Leicester (for the first defendant); *Barlow, Lyde & Gilbert*, London (for the second defendant).

[Reported by D. C. THOMPSON, ESQ., Barrister-at-Law.]

BERTHELEMY v. NEALE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), February 5, 1952.]

Landlord and Tenant—Shop—Renewal of tenancy—Occupation “wholly or mainly for purposes of retail trade or business”—Nine-tenths of products sold wholesale—Whole premises used from time to time for production for retail sale—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 10 (1) (a), s. 20 (1).

The tenant applied under s. 10 (1) of the Leasehold Property (Temporary Provisions) Act, 1951, for the renewal of the lease of premises where he carried on a number of business activities. About ninety per cent. of the articles which he produced were sold direct to the trade and only about ten per cent. by retail, but work on articles sold by retail was done in any part of the premises,

HELD: the test whether premises were a “shop” within the meaning of the Leasehold Property (Temporary Provisions) Act, 1951, s. 20 (1), was to determine how much of the business done thereon was retail business and not how much of the space comprised in the premises was used from time to time in the production of articles for retail sale, and, therefore, the tenant’s premises were not occupied wholly or mainly for the purposes of a retail trade or business.

Per SIR RAYMOND EVERSHERD, M.R.: The relative incomes gained by the different activities conducted on the premises is a most important (and, possibly, in some cases the most important) element for consideration, but it is not necessarily exhaustive.

FOR THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951, s. 10 (2) and s. 20, see HALSBURY’S STATUTES, Second Edn., Interim Service 1951, p. 137 and p. 147, respectively.

APPEAL by the tenant from an order of His Honour JUDGE DONE sitting at Clerkenwell County Court, dated Sept. 26, 1951, refusing to grant a new tenancy for shop premises under s. 10 (1) of the Leasehold Property (Temporary Provisions) Act, 1951.

M. Gore for the tenant.

S. N. Bernstein for the landlord.

SIR RAYMOND EVERSHERD, M.R.: In his application, the tenant claimed the benefit of the Leasehold Property (Temporary Provisions) Act, 1951. He could claim that benefit only if he brought himself within s. 10 (2) of the Act which provides:

“This section applies to a tenancy the subject of which (a) consists of a shop . . .”

By s. 20 (1) of the Act

“‘Shop’ means premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business.”

It was necessary, therefore, for the tenant to show that the premises of which he was the tenant were a shop as so defined. The county court judge thought they were not, and, in my judgment, he was quite right in that opinion.

The tenant carried on a number of activities, some, I imagine, of a not unskilful character. They included glasswork—for example, re-silvering, smoothing, and scaling thermometer scales and cutting handbag mirrors. The products of those activities, as the judge found, were overwhelmingly sold by the applicant to trade customers. They were not sold retail. Indeed, the only articles sold by the tenant retail were some handbag mirrors. The judge found that, if regard was had to the turnover, the retail business amounted to a very small percentage of the total business done. Without closer examination of the actual language of the section, it would appear plain that the tenant’s occupation of the premises was mainly for business other than retail. The argument for the tenant, however,

was that, properly construed, the words, "occupied wholly or mainly for the purposes of a retail trade or business", must be given effect to by considering the amount of space which was occupied for retail trade. It was said that, regarded, as counsel for the tenant said, "spacially", every square or cubic foot of the premises could be said to be occupied for retail trade, since any activity done in that cubic foot might result in a retail sale, or, put negatively, that it could not be said of any cubic foot that it was not occupied for retail trade.

I cannot accept the premise on which that argument rests. I observe that the definition which I have read starts by defining "shop" as meaning "premises occupied wholly for business purposes." It then goes on to restrict that first definition by the words "and so occupied wholly or mainly for the purposes of a retail trade or business." As a plain matter of English, I entertain no doubt in my mind that by the second half of that definition the question is posed: For what purposes are these premises being occupied? Are they being occupied wholly or mainly for the purposes of a retail trade? In other words, the three words "wholly or mainly" qualify those words which immediately precede and follow them. They refer to the purposes of the occupation. Counsel for the tenant said that s. 10 (2) (b), which contains similar language in regard to living accommodation, supports his argument. I think that the same considerations apply to s. 10 (2) (b) as apply to this definition.

Counsel for the tenant said that the judge appeared to have decided the question solely by reference to the income which these two activities produced, and that such a view results in absurdity. Consider, it was argued, the case of a tobacconist's retail shop which in some small corner contains a telephone. In addition to carrying on the tobacconist's trade the tenant of the shop profitably employs the telephone for the purpose of a commission agent's business, the profits of which are two or three times the profits gained from selling tobacco to the public. It was said that the conclusion of the judge, if applied to those facts, would produce the extravagant result that the shop would be held to be occupied for the purpose of a commission agent's business and not wholly or mainly for that of a retail trade or business. I do not think that any such conclusion follows from the judge's judgment. I think, if I have posed the question correctly and have correctly stated the test, the answer in any case is to be supplied by the tribunal of fact on common-sense lines. No doubt, the relative incomes gained by the different activities conducted on the premises is a most important (and, possibly, in some cases the most important) element for consideration, but it is not necessarily exhaustive.

In the present case I am satisfied on the facts as found that, if the test is applied, the inevitable answer is that the premises here in question were not occupied wholly or mainly for the purposes of a retail trade or business. The judge said:

"Can it be said that the premises are occupied 'wholly or mainly for the purposes of retail trade or business'? The advocate for the applicant says that the whole of the premises are employed for retail trade or business. The other reading of the definition is that the emphasis in the definition is not on how much of the premises is employed, but how much of the business is a retail business . . . I prefer the second construction."

So do I. I think that the judge's conclusion was correct and that the appeal fails.

JENKINS, L.J.: I agree.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Rance & Co.* (for the tenant); *Stanley S. Levene* (for the landlord).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re COUCHMAN'S WILL TRUSTS. COUCHMAN AND
ANOTHER v. ECCLES AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), February 5, 1952.]

National Health Service—"Hospital"—"Institution for the reception and treatment of persons"—Clinic "... maintained in connection with any such institution"—Clinic maintained for treatment of out-patients—Not confined to ex-patients of any particular hospital—*National Health Service Act, 1946* (c. 81), s. 79 (1).

By his will, dated May 22, 1939, the testator, who died on Jan. 9, 1941, directed his trustees to pay the income of his residuary estate to his wife during her life and after her death he gave a legacy of £100 and a share of the residue to the Leominster Orthopaedic Clinic. The clinic was set up under a scheme formed by certain persons after the 1914-18 war to alleviate the suffering of soldiers and sailors who were invalided to their homes in Herefordshire after treatment in Oswestry and other hospitals and who required further medical treatment as out-patients. A committee, formed under the scheme, conducted the clinic, which was housed in a hut belonging to an orthopaedic hospital. A small annual sum was paid to the hospital for the use of the hut, patients connected with the hospital were treated at the clinic, and the services of nurses and surgeons were obtained from the hospital, but patients other than those connected with the hospital were treated at the clinic. After the *National Health Service Act, 1946*, came into operation on July 5, 1948, the Minister of Health approved a scheme under which the orthopaedic hospital was formed into a special hospital group and the clinic was treated as being included in that group. At their final meeting, the committee which had managed the clinic purported to dispose of the funds which they had in hand in connection with the clinic. The testator's wife died on June 8, 1949. On a summons by the trustees of the testator's will to determine the destination of the funds representing the gifts to the clinic under the will, the management committee of the hospital claimed to be entitled to them under s. 60 (1) (b) of the Act of 1946.

HELD: "reception", in the definition of "hospital" in s. 79 (1) of the Act of 1946, meant taking a person into a building and keeping him there, and did not refer to the treatment of an out-patient, and so the clinic was not an "institution for the reception and treatment of persons" within the meaning of the first part of the definition; as the clinic was maintained for the purpose of treating persons coming from any hospital, it was not a clinic "maintained in connection with" the orthopaedic hospital, or with any particular hospital, within the meaning of the second part of the definition; and, therefore, the clinic did not come within the definition of "hospital" in the sub-section and was not included in the terms of the Act of 1946, and the management committee of the hospital were not entitled, under s. 60 (1) (b), to the funds representing the gifts to the clinic under the testator's will.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 6 (1), s. 60 (1), and s. 79 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 15, pp. 339, 391, and 403.

ADJOURNED SUMMONS by the trustees of the will of Herbert Arthur Couchman to determine the destination of a legacy and share of residue given by the will to the Leominster Orthopaedic Clinic.

The clinic was founded after the war of 1914-18 for the after-care of disabled soldiers and sailors of the county of Hereford who had returned to their homes, but needed further medical treatment as out-patients. Under a scheme, approved by the Minister of Health after the *National Health Service Act, 1946*, had come

into effect on July 5, 1948, the clinic was included in a hospital group containing the Robert Jones and Agnes Hunt Orthopaedic Hospital. The management committee of that hospital claimed to be entitled, under s. 60 (1) (b) of the Act of 1946, to the funds representing the bequests to the clinic under the testator's will. The funds were also claimed by the Herefordshire branch of the British Red Cross Society.

J. A. Armstrong for the plaintiffs, the trustees.

Hesketh for the first defendant, a director of the Herefordshire branch of the British Red Cross Society.

F. E. Skone James for the second defendants, the Robert Jones and Agnes Hunt Orthopaedic Hospital Management Committee.

Dennis B. Buckley for the Attorney-General.

DANCKWERTS, J.: The testator made his will on May 22, 1939, and directed his trustees to pay the income of his residuary estate to his wife during her life. After the death of his wife, he gave a large number of legacies, including one of £100 to the Leominster Orthopaedic Clinic, and then he directed his trustees to stand possessed of his residuary estate on trust to divide the same in equal shares between four bodies, of whom the clinic was one. The residue thus left amounted to about £5,000, and, therefore, the amount with which I am concerned is the legacy of £100 and the sum of some £1,250. The testator died on Jan. 9, 1941, and his widow died on June 8, 1949, which was after the appointed day, *i.e.*, July 5, 1948, when the National Health Service Act, 1946, came into operation for the present purposes.

The facts as regards the Leominster Orthopaedic Clinic are, briefly, as follows. After the war of 1914 to 1918 a certain number of persons, being disturbed at the suffering of soldiers and sailors who were invalided to their homes in the county of Hereford and in many cases required further medical treatment, founded the clinic for the after-care of patients in the county who had been treated at Oswestry and other hospitals, and a committee was set up to conduct the clinic. It is alleged that the clinic was, first, affiliated to the Herefordshire branch of the British Red Cross Society, but was taken over in 1927 and became a unit of that branch. However that may be, the committee which was formed carried on for many years work of the kind intended in a hut which belonged to the Robert Jones and Agnes Hunt Orthopaedic Hospital, paying a small annual sum for the use of the hut and dealing with a substantial number of patients every year. When the National Health Service Act came into operation a scheme was prepared, and approved by the Minister of Health, under which the Robert Jones and Agnes Hunt Orthopaedic Hospital was formed into a special hospital group and the Leominster Orthopaedic Clinic was treated as being included in that group. Thereafter, the committee held a final meeting and purported to dispose of the small amount of funds which they had in their hands.

The question now is how the legacy and share of residue bequeathed by the testator's will should be dealt with. The first defendant, Herbert Ballantyne Eccles, claims to be entitled to the funds representing the bequest as director for and on behalf of the Herefordshire branch of the British Red Cross Society. So far as that claim is concerned, I have come to the conclusion that the gift is not to the branch of the Red Cross Society. It is, in my view, a bequest for a charitable purpose which is described in the will as the "Leominster Orthopaedic Clinic." The next claim is by the Robert Jones and Agnes Hunt Orthopaedic Hospital Management Committee who claim to be entitled by virtue of the provisions of the National Health Service Act, 1946, in particular, those of s. 60 (1) (b). It is, in effect, claimed by that body that either the clinic was a hospital for the purposes of the Act or that it was a clinic maintained in connection with the hospital which they now represent, and, therefore, included in

the term "hospital" under the Act, and that the funds are payable to the present management committee.

Section 6 (1) of the Act provides:

"Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister [of Health] by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital . . ."

By s. 60 (1):

"Where property, other than property transferred to the Minister or to the board of governors of a teaching hospital or to a hospital management committee under s. 6 or s. 7 of this Act, is held on trust immediately before the appointed day, and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which s. 6 of this Act applies, the trust instrument shall be construed as authorising or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purpose of making payments, whether of capital or income . . . (b) in the case of [a hospital other than one designated as a teaching hospital or included in a group of hospitals so designated] to the regional hospital board for the area in which the hospital is situated or to the hospital management committee for the hospital or for the group of hospitals in which it is comprised."

It is claimed, therefore, that these funds pass as being held on trust for the purposes of the Robert Jones and Agnes Hunt Orthopaedic Hospital, that being a hospital to which s. 6 applies. Section 79 (1) defines "hospital" as:

". . . any institution for the reception and treatment of persons suffering from illness or mental defectiveness, any maternity home, and any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation, and includes clinics, dispensaries and out-patient departments maintained in connection with any such institution or home as aforesaid, and 'hospital accommodation' shall be construed accordingly."

"Hospital accommodation" is mentioned in s. 3 (1), which provides that "hospital accommodation" is one of the services which are to be provided by the Minister of Health.

The first contention on behalf of the hospital management committee was that the clinic was a hospital within the meaning of the definition in s. 79 (1). Was it an "institution for the reception and treatment of persons suffering from illness"? I think that, presumably, "institution" means something which is set up. Possibly the clinic was something which was set up. Was it "for the reception and treatment of persons suffering from illness"? Plainly it was for the purposes of treatment of persons suffering from illness. But what about "reception"? It is said, on behalf of the management committee, that "reception" means merely that a person shall be received at a given point and there treated. On the other hand, it was argued that "reception" means taking people into a building and keeping them there, as is done in the ordinary sense of the word "hospital." On the whole I think the latter is the appropriate meaning to be applied to this definition. It is not satisfied merely by something like treatment at a dispensary or clinic or out-patients' department. It is to

be observed that those outside activities are added to the definition of "hospital" under a later part of the definition in s. 79 (1). Accordingly, I conclude that this particular institution, if that be the correct term to apply to it, is not one "for the reception and treatment of persons suffering from illness."

It was then contended by counsel for the management committee that this is a clinic "maintained in connection with" the orthopaedic hospital. It appears to me that, though it dealt with patients connected with that hospital, though the services of nurses and surgeons were obtained from the hospital, and though the hut was the property of the hospital, it was not a clinic which was maintained in connection with the hospital. It was, in my opinion, maintained for the purpose of dealing with people who needed subsequent treatment, and it would have dealt with persons coming from any hospital—a hospital, perhaps, in another county—or with persons who were not connected with any hospital. The clinic was maintained to deal with persons in a particular way, but was not, as it seems to me, maintained in connection with any particular hospital. Accordingly, in my opinion, it does not come within the definition of "hospital" contained in s. 79 (1) of the Act. The conclusion, therefore, to which I come is that it is not included in the terms of the National Health Service Act, 1946.

The funds representing the bequest under the will of the testator are held on trust for a particular purpose denoted in the will and that purpose may still be carried out, though by a different body, i.e., it may be carried out by the management committee of the orthopaedic hospital. The bequest, however, is not a gift to that committee. The funds are subject to a charitable trust which will not fail even if the original purpose has come to an end by a disbandment of the committee which was formed to run the clinic. It seems to me, therefore, that there is a charitable trust which remains to be carried out by means of a scheme. Whether it is correct to call it a *cy-près* application, or simply a scheme for the carrying out of the original purpose, does not much matter in this case. It has been suggested by counsel for the Attorney-General that the appropriate scheme would be to direct payment of the funds to the Robert Jones and Agnes Hunt Orthopaedic Hospital Management Committee on trust to apply those funds for the purpose of the Leominster Orthopaedic Clinic.

Order accordingly.

Solicitors: *May, May & Deacon*, agents for *Lloyd & Son*, Leominster (for the plaintiffs); *Edwin Coe & Calder Woods*, agents for *David Allen & Carver*, Hereford (for the first defendant); *Sharpe, Pritchard & Co.*, agents for *T. H. Waterhouse*, Edgbaston, Birmingham (for the second defendant); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

LATIMER v. A.E.C., LTD.

[QUEEN'S BENCH DIVISION (Pilcher, J.), February 4, 5, 8, 1952.]

*Factory—Floor—Maintenance—Floor slippery from flood water and oil—Factories Act, 1937 (c. 67), s. 25 (1).**Safe System of Work—Factory flooded in exceptional storm—Water mixed with oil—Floor rendered dangerously slippery—No want of care by occupiers—Accident through workman slipping—Liability of occupiers.*

Owing to a downpour of rain of unprecedented character and through no want of reasonable care on the part of the occupiers a factory was flooded and oil from a cooling mixture pumped to machines through channels in the floor mixed with the water. As the water receded, the floor, which was level and structurally perfect, was left in a wet and oily and slippery state and could not be entirely cleared at once. In the course of his duty a workman slipped on a floor and was injured.

HELD: (i) the occupiers were not in breach of their duty to see that the floor was "properly maintained" under s. 25 (1) of the Factories Act, 1937, since "maintained", as defined in s. 152 (1), meant maintained in good repair and not free from danger through slipperiness.

(ii) the occupiers had failed to provide a safe system of work in permitting the workman to work in the factory when they knew it to be in a potentially dangerous condition, although through no fault of theirs, and, therefore, they were liable to the workman at common law.

FOR THE FACTORIES ACT, 1937, s. 25 (1), and s. 152 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 1017, 1116.

Cases referred to:

- (1) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest 95, 633.
- (2) *Paris v. Stepney Borough Council*, [1951] 1 All E.R. 42.
- (3) *Daborn v. Bath Tramways Motor Co., Ltd. & Trevor Smithey*, [1946] 2 All E.R. 333; 2nd Digest Supp.

ACTION for damages for negligence and breach of statutory duty.

The plaintiff was a horizontal milling machine operator employed by the defendants at their factory at Southall. As a result of a localised and unprecedented heavy fall of rain on Aug. 31, 1951, with which neither the works drain nor the main sewer of the local authority into which it flowed was sufficient to cope, the defendants' factory was flooded. An oily liquid called "mystic" or "suds", which was pumped along channels covered with iron lids in the floor to machines for which it was used as a cooling agent, escaped and mixed with the flood water, leaving the floor slippery as the water receded. While working on the night shift the plaintiff went from the general machine room for about thirty yards along a gangway to fetch a new batch of components on which to work. The components required were stored in a metal barrel, and the plaintiff took a hand trolley, similar to those used by railway porters, to transport the barrel to the machine room. He lifted the handles of the trolley so that its forward metal lip rested on the floor and could be pushed under the base of the barrel, and then put his right foot against the trolley and pushed with his left foot to bring down the handles of the trolley so that he could wheel it. In doing so he slipped on the slippery floor and his ankle was crushed by the barrel which rolled off the trolley. The plaintiff contended that the defendants were guilty of a breach of the duties imposed on them by s. 25 (1) of the Factories Act, 1937, to see that all floors and gangways were properly maintained and, by s. 26 (1), to provide a safe means of access to his place of work, and that they had failed in their common law duty to exercise reasonable care to make their factory safe for the plaintiff, in particular, in allowing him to work at the factory when it was in a potentially dangerous state. The defendants

denied that they were in breach of their statutory duties or that they had been guilty of negligence, and they submitted that it was not desirable to have to stop all work at the factory because some not precisely ascertained portion of it might be in a dangerous condition without any fault on their part.

Jukes for the plaintiff.

Marven Everett for the defendants.

Cur. adv. vult. A

Feb. 8. **PILCHER, J.**, read a judgment in which he stated the facts, found as a fact that neither the defendants' failure to provide a surface water drainage system sufficient to cope with the rain which fell, nor the wet, oily and slippery condition of the gangway was due to any lack of reasonable care on their part, and continued: In this state of affairs three main submissions were advanced on behalf of the plaintiff. It was contended, in the first place, that the defendants were guilty of a breach of the absolute duty imposed on them by s. 25 (1) of the Factories Act, 1937, which provides:

"All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained."

It was submitted that the passage or gangway in which the plaintiff sustained his accident was not properly maintained in that it was slippery, and, therefore, dangerous. I am satisfied that this argument cannot succeed. The marginal note to s. 25 is: "Construction and maintenance of floors, passages and stairs." The words "construction" and "maintenance" are in apposition, and I am satisfied that in its context the natural meaning of the word "maintained" is "maintained in a good state of repair." It is not suggested that the floor on which the plaintiff slipped was in any way uneven or out of repair. It is, moreover, to be observed that the definition of the word "maintained" in s. 152 (1) of the Act is as follows:

" 'Maintained' means maintained in an efficient state, in efficient working order, and in good repair."

While the words "in an efficient state" and "in efficient working order" are more appropriate to machines than to floors, I am satisfied that the floor of the gangway in question, which was level and structurally perfect, had been properly "maintained" within the meaning of this word in s. 25 (1), although at the material time its surface was wet and oily.

The second point taken on behalf of the plaintiff was that the defendants were in breach of s. 26 (1) of the Factories Act, in that they had not, so far as was reasonably practicable, provided and maintained a safe means of access to the place at which the plaintiff had to work. This point was not argued with any real enthusiasm by counsel for the plaintiff for the very good reason that, on the facts, it was reasonably clear that the plaintiff was actually doing his allotted work at the place where he sustained the accident and that no question arose on the safety or otherwise of the means of access to his work.

The third point taken on behalf of the plaintiff was more formidable, namely, that the defendants had failed in their common law duty to exercise reasonable care to make their factory safe for the plaintiff who was their servant. As I have already said, I am satisfied on the facts that the concrete surface of the floor on which the plaintiff slipped became wet and oily through no fault of the defendants, that the defendants could not, by the exercise of reasonable care, have dried and cleaned the oil off all the working floor space, and that they had no particular reason to select the area of floor on which the plaintiff slipped for special attention. Both the defendants' responsible officers and the plaintiff knew that such portions of the floor of these extensive premises as had not been cleaned off with sawdust were, in varying degrees, wet, oily and slippery, and thus potentially dangerous to men working on them.

While counsel for the plaintiff did not accept the position that the defendants had exercised all reasonable care in the respects which I have mentioned, he submitted that, even on the facts as I have found them, the defendants could not escape liability to the plaintiff inasmuch as they had permitted him to work in premises which they knew to be potentially dangerous. He contended, with some force, that in such a state of affairs the defendants should, immediately it became apparent to them that the premises were potentially dangerous and could not be rendered safe for some time, have sent the night shift, including the plaintiff, home, allowing only such men to enter the premises as were prepared to volunteer to carry on with cleaning up. He submitted that, if this had been done, the volunteers would have been not only "*scientes*" but also "*volentes*" in regard to any danger which might exist, and, if any of them had sustained an accident due to the dangerous condition of the premises, the defence of *volenti non fit injuria* would have been open to the defendants. He further submitted—and I have no doubt the submission was correct—that the plaintiff, while undoubtedly "*sciens*," cannot, in the circumstances of the case and having regard to the relationship of master and servant which existed between himself and the defendants, be regarded as having been "*volens*" when he incurred the risk which led to his accident. In support of his argument counsel submitted that the situation which faced the defendants on the evening in question was no different from that which faces any employer who permits his servant to use a machine which is, to his knowledge, potentially dangerous owing to a defect which no care and skill on his part can remedy until, let it be supposed, a spare part not immediately available is procured and fitted. In such a case it is clear that the employer will be liable if he causes or permits the servant to use the machine and the servant is injured by an accident due to its known defective condition. It is difficult to see why the same situation should not obtain in regard to employers' premises if they are in a dangerous condition. As soon as the employer is made aware that his premises are potentially dangerous and that the dangerous condition cannot be immediately remedied by care and skill on his part, a proper regard for the safety of servants who would normally work in such dangerous premises would seem to require that some action should be taken by him. If the only course open to the employer consistent with due regard to his servants' safety is to shut his premises, then I am satisfied that he is not entitled to escape liability for a servant who is injured by the dangerous condition of the premises by saying: "These premises were rendered dangerous through no fault of mine. I knew they were dangerous, but at the time you were injured the danger could not have been removed by any care and skill on my part." While knowledge by the injured party that the premises are dangerous, or a warning of unusual danger, will serve to defeat a claim by an invitee against the occupier of premises, it has been well established since *Smith v. Baker & Sons* (1) that such considerations do not avail an employer against his own servant.

It was submitted by counsel for the defendants that each case must be considered on its own facts. While he did not, of course, dispute the proposition that an employer who causes or permits his servant to use a defective and potentially dangerous machine cannot escape liability by showing that no care or skill on his part could have remedied the dangerous condition of the machine, he submitted that, with regard to premises rendered potentially dangerous, the matter was one of degree and that the common law must be made to accord with common sense. In effect, he contended that the defendants' factory was not very dangerous, and he pointed to the fact that no one but the plaintiff sustained any injury. He also stressed the general undesirability of having to stop all work in a large factory merely because some portion of it, not precisely ascertained, might be in a somewhat dangerous condition without any fault on the employers' part. In support of his argument he quoted a passage from the speech of LORD NORMAND in the recent and well-known case of *Paris v.*

Stepney Borough Council (2) ([1951] 1 All E.R. 42). That was a case in which the appellant was employed as a fitter in the garage of the respondent borough council. To the knowledge of the respondents he had the use of only one eye. While he was using a hammer to remove a bolt on a vehicle, a chip of metal flew off and entered his good eye, so injuring it that he became totally blind. The respondents did not provide goggles for the appellant to wear, and there was evidence that it was not the ordinary practice for employers to supply goggles to men employed in garages on the maintenance and repair of vehicles. The House of Lords had to consider whether an employer was or was not responsible for taking special precautions in the case of a man who incurred no special risk of accident, but who, if an accident did occur, incurred a special risk of injury. The passage in LORD NORMAND's speech to which counsel for the defendants called attention is as follows (*ibid.*, 49):

"The court's task of deciding what precautions a reasonable and prudent man would take in the circumstances of a particular case may not be easy. Nevertheless, the judgment of the reasonable and prudent man should be allowed its common everyday scope, and it should not be restrained from considering the foreseeable consequences of an accident and their seriousness for the person to whom the duty of care is owed. Such a restriction, if it might sometimes simplify the task of the judge or jury, would be an undue and artificial simplification of the problem to be solved. If the courts were now to take the narrow view proposed by the respondents the cleavage between the legal conception of the precautions which a reasonable and prudent man would take and the precautions which reasonable and prudent men do in fact take would lessen the respect which the administration of justice ought to command. To guard against possible misunderstanding it may be well to add here that the seriousness of the injury or damage risked and the likelihood of its being in fact caused may not be the only relevant factors. For example, ASQUITH, L.J., in *Daborn v. Bath Tramways Motor Co., Ltd. & Trevor Smithey* (3), pointed out that it is sometimes necessary to take account of the consequence of not assuming a risk."

On this passage in LORD NORMAND's speech counsel for the defendants argued that it would, in all the circumstances, have been unreasonable to expect the defendants to suspend all operations in their factory merely because some portion of the working floor space was rendered temporarily and inevitably dangerous. While I have some sympathy with the defendants I am not satisfied that counsel's argument is sound. Nor do I think that it derives any real support from the passage I have quoted from LORD NORMAND's speech. The plaintiff in the present case was not a man to whom, owing to his physical condition, the defendants owed any special duty of care. I have only to consider whether I am satisfied that the defendants acted with due regard to the safety of the plaintiff when they permitted him to work in premises which they knew to be potentially dangerous through no fault of their own. I am not so satisfied, and I think that in all the circumstances of the case the defendants, in permitting the plaintiff to do his ordinary work in a part of the factory where the floor was slippery, and, therefore, dangerous, took the risk that he might sustain an injury and are thus liable for the injury which the plaintiff in fact sustained owing to the dangerous condition of the premises. No doubt, they were faced with a difficult situation, and I do not shrink from the conclusion that the defendants' duty in the particular circumstances, if they desired to escape liability for accidents due to the slippery condition of the floor, may have been to send away all men who were not prepared to volunteer for cleaning work—and when I use the word "volunteer", I mean volunteer on such terms as would enable the defendants to rely, in the case of accident, on the defence of *volenti non fit injuria*. I, therefore, conclude that the defendants are liable to the plaintiff in respect of the accident which occurred and the consequent injuries which he sustained.

HIS LORDSHIP assessed the damages, including special damage, at £550 and gave judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiff); *Carpenters* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

SIMPSON v. PEAT.

B

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones, Byrne, Parker and McNair, JJ.), February 1, 12, 1952.]

Street Traffic—Careless driving—Error of judgment—Road Traffic Act, 1930 (c. 43), s. 12 (1).

C

While driving a motor car at a reasonable speed along a road a driver turning into a side turning on his right collided with a motor cycle coming in the opposite direction. On a charge preferred against him under s. 12 (1) of the Road Traffic Act, 1930, of having driven the car on a road without due care and attention, the justices held that, as what he had done was the result of an error of judgment, he could not in law be guilty of having driven without due care and attention, and they dismissed the information.

D

HELD: if the driver was not exercising that degree of care and attention which a reasonably prudent driver would have exercised in the circumstances, he was guilty of the offence charged irrespective of whether or not he was committing an error of judgment, and the justices ought to have convicted.

R. v. Howell (1938) (160 L.T. 16), explained.

FOR THE ROAD TRAFFIC ACT, 1930, s. 12 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 588.

E

Cases referred to:

(1) *R. v. Howell*, (1938), 160 L.T. 16; 103 J.P. 9; Digest Supp.

(2) *Tidy v. Battman*, [1934] 1 K.B. 319; 103 L.J.K.B. 158; 150 L.T. 90; Digest Supp.

CASE STATED by Essex justices.

F

At a court of summary jurisdiction sitting at Stansted on Aug. 11, 1951, an information was preferred by the appellant, a superintendent of the Essex constabulary, charging the respondent with having on July 9, 1951, driven a motor car on a road at Stansted without due care and attention contrary to s. 12 (1) of the Road Traffic Act, 1930. The justices were of opinion that the respondent should be convicted, but held that, as what he had done had been to commit an error of judgment, he could not in law be guilty of having driven a motor vehicle without due care and attention and they dismissed the information. The appellant appealed.

G

Milton for the appellant.

Southall for the respondent.

H

Cur. adv. vult.

Feb. 12. LORD GODDARD, C.J., read the following judgment of the court. This is a Special Case stated by justices of the county of Essex before whom the respondent was charged with having driven a motor car on a road without due care and attention, contrary to s. 12 (1) of the Road Traffic Act, 1930. The facts found by the magistrates show that the respondent was driving at a reasonable speed on the Cambridge Road at Stansted in the direction of Cambridge and was approaching a side turning to his right called Chapel Hill. At the same

time a motor cyclist was driving in the opposite direction, also at a reasonable speed, and was approaching Chapel Hill, which was, of course, on his near side. The justices then find that, as the two vehicles approached, the respondent drove his vehicle to the right with the intention of entering Chapel Hill, thus crossing the path of the oncoming motor cyclist with the result that a collision took place. Having heard the evidence and arguments, the justices were of opinion that the respondent should be convicted, which can only mean that they were then satisfied that he was driving without due care and attention. In announcing their decision and in the course of passing sentence the chairman expressed the opinion of the bench that the respondent had committed an error of judgment in thinking that he had left room for the motor bicycle to get through when, in fact, he had not done so. Thereupon it was contended on behalf of the respondent that, as the bench found he had committed an error of judgment, he could not in law be guilty of the offence charged, and there was cited in support of this contention a passage in *STONE'S JUSTICES' MANUAL*, 83rd ed., p. 2062, which refers to *R. v. Howell* (1). The magistrates further considered the case and state their final decision in these words:

"(i) That the respondent had committed an error of judgment in driving in the manner set out in para. 4c of this Case; (ii) and that, as what the respondent had done was to commit an error of judgment, he could not in law be guilty of the offence of driving a motor car without due care and attention, and we accordingly held that the respondent was not guilty of the offence charged in the information and we dismissed the same."

If the true effect of *Howell's* case (1) is what the justices thought it was, and it is only fair to them to say that they did not see the full report, it is obvious that this case raises a question of great importance and would be cited constantly when charges of this nature were preferred. Accordingly, it was thought right, when it first came to be heard, to have it re-argued before a full court of five judges. *Howell's* case (1) is twice referred to in *STONE'S JUSTICES' MANUAL*, 83rd ed., vol. 2, each time in relation to the offence of dangerous driving, contrary to s. 11 (1) of the Act. At p. 2062, note (i), it is stated as authority for the proposition that:

"If the driving, although dangerous in its consequences, was due to a 'mere' error of judgment, the defendant is entitled to be acquitted."

At p. 2160, note (k), the quotation is:

"He is entitled to be acquitted if the dangerous driving was a 'mere' error of judgment."

The former is, perhaps, the more accurate citation of the two, but when the case is properly understood it will be seen that it laid down no principle of law, but turned entirely on what the Court of Criminal Appeal thought a jury had meant to find by their verdict. It was a case where manslaughter was charged, and, as is well known, on such a charge a jury can convict also of the offence of dangerous driving created by s. 11 (1). The jury acquitted of manslaughter and from the discussion that then took place between the foreman and the learned judge the Court of Criminal Appeal thought that what the jury meant by using the expression "mere error of judgment" was that, though a dangerous situation had, in fact, arisen, they were not prepared to hold that this was due to dangerous driving by the defendant, and, accordingly, they quashed the conviction. It is by no means impossible, and, indeed, it must on occasions happen, that a situation of danger arises in which a motorist is involved, but it cannot be said that he caused it by driving dangerously. That is what the court thought the jury meant. They were certainly not laying down that an error of judgment could not amount to carelessness.

The expression "error of judgment" is not a term of art. It is, in fact, one of the vaguest possible description. It can, colloquially, be used to describe

either a negligent act or one which, though mistaken, is not negligent. When one is considering s. 12, the marginal note of which is "careless driving", it is, in our opinion, clear that a driver may not be using due care and attention although his lack of care may be due to something which could be described as an error of judgment. If he is driving without due care and attention it is immaterial what caused him to do so. The question for the justices is: Was the defendant exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances? If he was not, they should convict. If, on the other hand, the circumstances show that his conduct was not inconsistent with that of a reasonably prudent driver, the case has not been proved. The justices here thought that *Howell's* case (1) obliged them as a matter of law to dismiss the summons, but the question whether a man is driving carelessly, to use a compendious expression, raises only a question of fact.

It has often been pointed out that it is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has, no doubt, properly been applied in deciding other cases on other sets of facts: see, for instance, *Tidy v. Battman* (2), and for this purpose there can be no distinction between civil and criminal matters. We think it would be better if reference to *Howell's* case (1) were omitted from the books, not because we dissent from the decision, but because the case laid down no principle of law and should not be regarded as doing so. It is, in our opinion, undesirable to complicate these cases, which raise only simple questions of fact, by such loose and vague expressions as "error of judgment". Whether the charge is under s. 11 (1) or s. 12 (1), the offence can be committed although no accident takes place. Equally, because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention. But if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own. In an endeavour to avert a collision he swerves to his right—it is shown that had he swerved to the left the accident would not have happened. That is being wise after the event, and, if the driver was, in fact, exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted, even though another, and, perhaps, more highly skilled, driver would have acted differently.

Here, on the facts stated, the court is of opinion that the magistrates' first decision was clearly right. The defendant was turning to his off side in a main road cutting across the line of traffic coming from the opposite direction. It was not found that the motor cyclist was driving too fast or that the respondent was confronted with a sudden emergency. It is not even found that he gave a signal, but in any case it was for him to take care that he could execute the manoeuvre in safety. To use the words of the justices in their finding he thought he had left room for traffic coming in the opposite direction to get through when in fact he had not done so. In those circumstances there was no reason in law why he should not have been convicted and the case must go back to the justices with a direction to convict.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Arthur Morgan*, Chelmsford (for the appellant); *Gedge, Fiske & Co.*, agents for *A. E. Floyd & Co.*, Great Dunmow, Essex (for the respondent).

[*Reported by F. A. AMES, ESQ., Barrister-at-Law.*]

JEFFERY *v.* JOHNSON.

[COURT OF APPEAL (Somervell, Denning, L.J.J., and Roxburgh, J.), February 11, 1952.]

Bastardy—Evidence—Corroboration—Proof by complainant of handwriting of letter alleged to be written by putative father—Bastardy Laws Amendment Act, 1872 (c. 65), s. 4.

At the hearing of a summons in bastardy proceedings the complainant, having given evidence that the respondent was the father of the child, sought to rely, as the corroboration of her evidence required by the Bastardy Laws Amendment Act, 1872, s. 4, on a letter which she swore was in the handwriting of the respondent and which, if it had been written by him, constituted an admission by him of his paternity. A

Held: the complainant was a competent witness to prove that the letter was in the handwriting of the respondent, and, if her evidence were accepted, the statements contained in it became corroboration in a material particular, within s. 4, of her evidence that the respondent was the father of the child. B

Johnson v. Pritchard (1933) (97 J.P. Jo. 754), overruled.

AS TO EVIDENCE IN AFFILIATION PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 589, 590, paras. 812, 813; and FOR CASES, see DIGEST, Vol. 3, pp. 394-398, Nos. 317-330. C

Cases referred to:

- (1) *Johnson v. Pritchard*, (1933), 97 J.P. Jo. 754; 176 L.T. Jo. 389; Digest Supp.
- (2) *Moore v. Hewitt*, [1947] 2 All E.R. 270; [1947] K.B. 831; [1947] L.J.R. 1276; 177 L.T. 576; 111 J.P. 483; 2nd Digest Supp. D
- (3) *Forget v. Baxter*, [1900] A.C. 467; 69 L.J.P.C. 101; 82 L.T. 510; 42 Digest 794, 32.

APPEAL of the complainant from an order of the Divisional Court dated Oct. 11, 1951.

Before the justices the complainant, having given evidence alleging that the respondent was the father of her child, sought to rely as corroboration of her evidence, on a letter which she swore was in his handwriting. The justices held that the letter did not constitute corroborative evidence within s. 4 of the Bastardy Laws Amendment Act, 1872. On appeal the Divisional Court upheld their decision, and the complainant appealed to the Court of Appeal. E

Hemming for the complainant.

F. L. Clark for the respondent. F

SOMERVELL, L.J.: On Aug. 21, 1950, the complainant, Christine Mary Jeffery, gave birth to a child the father of which, she alleged, was the respondent, James Johnson. On Apr. 23, 1951, she took out a summons under the Bastardy Laws Amendment Act, 1872, s. 3 of which provides that the mother of a bastard child may apply to a justice of the peace for a summons to be served on the putative father. Section 4 provides: G

"After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode . . . the justices . . . shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child . . . " H

In the present proceedings the complainant gave evidence that for some six months covering the material dates she and the respondent lived at Bodmin

as man and wife, that she became pregnant in December, 1949, that the respondent left her in March, 1950, and went to live at Tenby from where, she said, he sent her various sums of money. She put in, and sought to rely on, a letter which she swore was in his handwriting. She had been asking for money during her pregnancy, and in the letter it was stated:

A "By your letter you think I have to send you money. No, I haven't got to yet. This is done just to help you out. As soon as you get the kid you will work and I will send maintenance."

B That letter, if it is accepted as coming from the respondent, to my mind, plainly indicates that he was recognising himself as the father of the child. The question is whether the letter can be relied on as corroboration of the complainant's evidence in some material particular. Before the justices the respondent was represented by a solicitor who submitted that he had no case to answer. The justices dismissed the summons, but, at the complainant's request agreed to state a Case.

In STONE'S JUSTICES' MANUAL, 65th ed., which was the edition current in 1933, there appeared at p. 409 this note:

C "While, as a matter of prudence, it is desirable that the handwriting should be proved by other testimony than that of the woman, we are of opinion that her evidence alone, if credible, is sufficient for the purpose, and that letters, when thus proved may furnish the corroboration required by the statute."

D In 1933 *Johnson v. Pritchard* (1) came before the justices and there was an appeal to the Divisional Court. That case was similar to the present in that there was no evidence other than that of the complainant and letters alleged to be written by the respondent, were relied on by her as corroboration. The justices accepted the letters as corroboration, but the Divisional Court held, disapproving of the passage in STONE'S JUSTICES' MANUAL which I have read, that a complainant in bastardy proceedings cannot corroborate herself by saying that a letter produced by her was written to her by the alleged father.

E In *Moore v. Hewitt* (2) the same point emerged, and LORD GODDARD, C.J., after citing the passage from STONE'S JUSTICES' MANUAL, said ([1947] 2 All E.R. 273):

F "I hope that *Johnson v. Pritchard* (1) may be considered in a higher court. Sitting in this court, I think I am bound by it, although the court has not got the advantage of any report which shows the reasoning leading to the decision. The difficulty which I feel in accepting the case is that the statute does not require the whole of the complainant's evidence to be corroborated. If the whole of the complainant's evidence had to be corroborated, it would mean that in a great many cases the case could be proved without calling the complainant herself. The complainant's evidence in G *Johnson v. Pritchard* (1) seems to have been, first, that the respondent was the father of the child, and, secondly, that two letters which she had received were in the respondent's handwriting. If those letters were admissible on her evidence, the statements in the letters, being written by the respondent himself, were at once evidence against him. While the production of those letters did not corroborate the evidence of the complainant that he wrote them, they corroborated the complainant's evidence that he was the father of the child. That was a material particular, and, therefore, it seems to me H that the production of the letters afforded corroboration of the complainant's story in a material particular."

I find the same difficulty about *Johnson v. Pritchard* (1), as was found by LORD GODDARD, C.J. As he says, it is the statements in letters written by the man which are evidence against him and the only question is: Can the mother herself be a competent witness as to his handwriting? I cannot see why she

should not be. In the present case it appeared clearly from her primary evidence that she was alleging that the respondent was the father of her child. Then she produces a letter and swears that it is in his handwriting. If that evidence is accepted, the statements in the letter become the material corroboration. In my opinion, I think she should be regarded as a competent witness as to the handwriting and that *Johnson v. Pritchard* (1) was wrongly decided. I would add that I agree with what was suggested in the note in *STONE'S JUSTICES' MANUAL*, 65th ed., that such evidence should be carefully scrutinised. There may be cases where the justices should not be satisfied, in the absence of some independent evidence, or, as is suggested, the calling of the alleged father, who is a compellable witness, but, as a matter of law, it seems to me open to them to accept the mother's identification of the handwriting and there may be many cases where they may be satisfied beyond any reasonable doubt by her evidence. It is a matter which is within their discretion, and they should consider in every case whether it is right to accept the complainant's evidence or whether independent evidence of the handwriting should be required.

Counsel for the respondent raised a subsidiary and different point. He pointed out that the provisions of s. 6 of the Bastardy Act, 1845, which is still operative with regard to appeals to quarter sessions, uses the words

" . . . corroborated in some material particular by other testimony to the satisfaction of the said justices . . . "

He said that "testimony" primarily means oral evidence, and referred us to LUSHINGTON'S LAW OF AFFILIATION AND BASTARDY, 7th ed., p. 97, where the learned editor expresses this view and cites a case in the Privy Council, *Forget v. Baxter* (3), in support. But in that case in which an article of the Civil Code of Quebec was being construed, it is plain that the word "testimony" meant oral testimony. If the word "evidence" had been used in that article it equally plainly would have meant oral evidence. Counsel said that in s. 3 of the Poor Law Amendment Act, 1844, which has now been replaced by s. 4 of the Act of 1872, the word now changed to "evidence" was "testimony". I think the words in their context in those two sections mean the same thing and what, as LORD GODDARD, C.J., said, is plainly evidence, namely, the statements in the letter, once proof of the handwriting had been accepted, would equally be testimony if the matter came on appeal before quarter sessions. For those reasons I think this appeal should be allowed.

DENNING, L.J.: The evidence of the mother can be divided into two parts. First, the part in which she proves orally that the man was the father. Secondly, the part in which she proves the handwriting of the letter. It is the first part, her evidence as to paternity, which needs corroboration. That corroboration is afforded by the contents of the letter. She does not prove the contents of the letter. She only proves the handwriting to be that of the man. Once the handwriting is proved, the contents prove themselves, rather in the nature of evidence like an exhibit which, once it is properly identified, proves itself. Her evidence as to paternity is, therefore, corroborated by other evidence, namely, the contents of the letter. I agree that the appeal should be allowed.

ROXBURGH, J.: I agree for the reasons given by SOMERVELL. L.J.

Appeal allowed.

Solicitors: *G. Howard & Co.*, agents for *V. Meyrick Price*, Tenby (for the complainant); *Rowley, Ashworth & Co.*, agents for *Nash, Howett, Cocks & Clapp*, Plymouth (for the respondent).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

CASEY v. CASEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), January 23, 1952.]

Divorce—Desertion—Termination—Offer by deserting husband to resume cohabitation—Wife asked to return to look after children.

On Sept. 20, 1951, the husband constructively deserted the wife by refusing, without any reasonable cause, to allow her to enter the house. A fortnight later he asked her to return to him as he wanted her to look after the children, but he said that he would not sleep with her and would not take her out. The parties were both in early middle age and there was no physical or moral impediment why they should not live together as man and wife in the full sense of the words.

HELD: in the circumstances the offer was not a genuine offer to resume cohabitation which the wife was bound to accept.

AS TO WHAT CONSTITUTES DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 835, para. 1338; and FOR CASES, see DIGEST, Vol. 27, pp. 307-309, Nos. 2840-2867, and pp. 312, 313, Nos. 2901-2910.

APPEAL by the wife against the dismissal, on Oct. 26, 1951, by Preston justices of a summons taken out by her alleging desertion and wilful neglect to provide reasonable maintenance by her husband. The justices held that the husband had made an offer to resume cohabitation which the wife had unjustifiably refused.

A. C. Goodall (*E. L. Gardner* with him) for the wife.

E. Rawdon Smith for the husband.

LORD MERRIMAN, P.: This is a wife's appeal from the dismissal by justices of charges of desertion and wilful neglect to provide reasonable maintenance as from Sept. 20, 1951, brought by her against her husband.

It is clear that this has been an uneasy marriage for some time, the separation which occurred on Sept. 20, 1951, being the fourth since 1948. On Sept. 20, 1951, the wife went to a neighbour's house. The husband objected to her friendship with this neighbour, so, when the wife came back after a few minutes, he shut her out of the house and said: "You stay there until I get your bag", or words to that effect. The wife returned to the neighbour's house and stayed there. The justices have found, in effect, that the husband's conduct on this occasion may have amounted to desertion. They do not find positively that it did, but they assume that it may have. They say: "However that may be, there has been an offer by the husband to take the wife back which ought to have been accepted, and, therefore, the wife has no case, either for desertion or wilful neglect to maintain." I am bound to say that I think that a matter of comparatively minor importance has been treated as the most decisive factor, and a matter of considerable importance has been dealt with as one of very little weight. It is, of course, impossible to object to the use of words such as "making a genuine offer", and "being bound to accept a genuine offer", or "not being bound to accept an offer because it is not genuine", because these phrases have been hallowed by the highest authority over and over again. Nevertheless, it is often appropriate to test these words by what is, I think, a simpler phrase which touches more nearly the essence of the matter: "Was the one spouse or the other ready and willing to resume cohabitation, whatever, in the circumstances of the particular case, may be the appropriate meaning of 'cohabitation'?" It is that aspect of the matter which has been pushed into the background, and the only thing which has been put in the foreground is whether or not the husband was entitled to insist, as unquestionably he did insist, that, if his wife came back to live with him, she should cease the association with this neighbour to which he objected.

The matter comes to a head when one reads the first three paragraphs of the justices' reasons. They say that they were of opinion that

"while the husband, in turning the wife from home on Sept. 20, may have been guilty of conduct amounting to desertion, his subsequent request for her to return, made prior to the proceedings and repeated again in court, terminated any desertion there might be. We considered the husband's attitude towards his wife, and, while this left much to be desired, having regard to the past history of the case, it was unquestionably his insistence that the wife should give up an association which had been a constant source of friction which led to the present trouble, and, in our view, this was not unreasonable. We think that the offer that the husband made, taking all things into consideration, ought to have been accepted."

The occasion to which they refer was when the husband met the wife in the street on Oct. 5, 1951, and made some suggestion about her coming back. She said: "On what terms?" and the matter on which he principally insisted was that he would be "the boss" in future. The wife's evidence about it is this:

"I met him in the street and he asked me if I would come home. I asked him the terms. He said: 'What terms?' I said: 'Do you take me out, as [the probation officer] suggested?' He said: 'No'. I said: 'What are the conditions?' He said: 'I am the boss'. I said: 'You take me out?' He said: 'No. I do not want you. I only want you to come and look after the children'."

He made it plain that among the things in which he was insisting on being the boss was forbidding her to go to the neighbour's house, and the magistrates say that his insistence about that was not unreasonable. I will assume that that is so, but the far larger question is whether he ever offered to resume cohabitation at all.

The husband was subjected to a severe cross-examination, in the course of which it was made plain beyond the slightest doubt that what he was saying was: "I neither meant, nor do I intend now, that she should come back and live with me as my wife. I will not sleep with her. I will not take her out. All I really want her for is to come back because it is her place to look after the children". The care of the children was, of course, a very important thing, but to be a nurse to the children is not the whole of married life, and, in pushing into the background and dismissing as of secondary importance what is the fundamental question in the case, the justices have seriously misdirected themselves. It is clear that that has been the husband's attitude throughout, and I think the justices are right in assuming that he deserted the wife on Sept. 20. But neither then, nor when they met to talk it over, nor in his attitude in court, nor by the things he said over and over again in the witness-box, did he exhibit any intention whatever to resume cohabitation in the only sense in which that word can be used in this case, namely, treating the woman as his wife in the full sense of the word. This is not a case where there is any sort of physical impediment or any moral reason for refusing to live with her as man and wife. He is in the forties and she in the thirties, and they have a young family. It would need very strong evidence of some overriding reason or obstacle to persuade me that in those circumstances a reconciliation which did not involve readiness and willingness to cohabit in the ordinary sense of the word is a reconciliation which this wife is bound to accept. I think the justices have been misled, by exaggerating the importance of the very minor matter of the wife's association with the neighbour, into ignoring the fundamental point. That being so, I think this appeal must be allowed. I do not think that anything is to be gained by a fresh hearing, because I think the facts are perfectly plain and that the wife's summons should be merely remitted to the magistrates on the question of the appropriate amount, with which we are not able to deal unless we can do so by consent.

KARMINSKI, J.: I agree.

Appeal allowed.

Solicitors: *R. Norton Ellen*, agent for *Dorothy Heaton, Pape & Co.*, Preston (for the wife); *Gregory, Rowcliffe & Co.*, agents for *William Preston & Co.*, Preston (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

med. C.A. [1952] 2 All E.R. 9. **LENS AND AREA RENT TRIBUNAL.**

Ex parte PICKAVANCE.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.),
February 12, 1952.]

Rent Control—Security of tenure—Power to extend period—Notice to quit given more than three months after decision of tribunal—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 5—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 11 (1).

On Sept. 8, 1950, a rent tribunal gave a decision, making no reduction of rent and giving no direction as to security of tenure, on a tenant's reference of his contract of tenancy of a furnished house to the tribunal, under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949. On Dec. 9 the landlady served a notice to quit on the tenant who applied to the tribunal for an extension of the period of security of tenure. The tribunal made an order under s. 11 (1) of the Act of 1949 extending the security and made further orders granting extensions thereafter.

HELD: section 11 (1) of the Act of 1949, being required by s. 11 (5) to be construed as one with the Act of 1946, applied only where s. 5 of the Act of 1946 applied, i.e., where "a notice to quit . . . [was] served by the lessor on the lessee . . . before the decision of the tribunal . . . or within three months thereafter", and, therefore, the notice to quit having been served more than three months after the decision of the tribunal, the tribunal had no power to grant any extension of security of tenure under s. 11 (1).

FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1089; and FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 11 (1), see *ibid.*, p. 1107.

Case referred to:

- (1) *R. v. Folkestone and Area Rent Tribunal. Ex p. Sharkey*, [1951] 2 All E.R. 921; [1952] 1 K.B. 54; 116 J.P. 1.

MOTIONS for certiorari and mandamus.

The applicant, Miss Pickavance, was the landlord of a furnished house, the tenancy of which had been referred by the tenant, William John Leyland, to a rent tribunal, which refused to reduce the rent and initially gave no direction as to security of tenure. She contended that, a notice to quit having been given by her to the tenant more than three months after the decision of the tribunal, the tribunal had no power thereafter to give any direction granting the tenant security of tenure, and a decision deferring the date on which the notice to quit should take effect should be quashed.

J. C. D. Harington for the applicant.

J. P. Ashworth for the rent tribunal.

LORD GODDARD, C.J.: Counsel for the applicant moves for an order of certiorari directed to the St. Helens Rent Tribunal to bring up and quash a decision dated Oct. 16, 1951, whereby it directed that a certain notice to quit served by the applicant on her tenant

"shall not take effect until Dec. 11, 1951, being the end of a period not exceeding three months from the date at which the notice to quit would have effect apart from this direction."

This case raises yet another point under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949, which, for this purpose, have to be read together. On Aug. 1, 1950, the tenant referred the contract of tenancy, which had lasted a considerable time, to the tribunal. The tribunal made no reduction in rent and gave no direction about security of

tenure, and no notice to quit had been served by the landlord on the tenant. The decision of the tribunal was given on Sept. 8, 1950. On Dec. 9, 1950, a notice to quit was served for Dec. 18. The tenant then applied to the tribunal for an extension of security of tenure, and an order was made, which has been followed by a succession of such orders. It is now said, rightly, in the opinion of this court, that the tribunal never had any jurisdiction to grant this extension.

Section 5 of the Furnished Houses (Rent Control) Act, 1946, provides:

"If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for re-consideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months."

So far, especially in the light of the decision in a case to which I shall refer in a few moments, there is not much difficulty. To get this extension of three months the contract must have been referred to the tribunal and a notice to quit must have been given after the reference by the tenant and before the decision of the tribunal or within three months of the decision. If that has been done, the notice will not take effect before the expiration of the said three months, i.e., before the expiration of three months from the decision of the tribunal. Section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, provides:

"Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period."

In *R. v. Folkestone and Area Rent Tribunal. Ex p. Sharkey* (1) this court pointed out that the object of that provision was to prevent retaliation by the landlord on his tenant because the tenant had referred the tenancy to a tribunal. We also decided that s. 11 (1) did not give a new power to the tribunal, but only extended the power given by s. 5 of the Act of 1946. Section 5 only applies where a notice to quit has been served after a reference and before a decision or within three months after it. Otherwise it does not give the tenant a right to apply for an extension of the tenancy. Therefore, before s. 11 (1) can take effect exactly the same circumstances must be shown to exist as are specified in s. 5, because the two sections have to be read together. As pointed out in the course of the argument by PARKER, J., the words were not intended, or, at any rate, are not apt, to give a tenant of a furnished house the protection given by the Rent Restrictions Acts to a tenant of an unfurnished house. They give him only this limited protection in certain circumstances dominated by the fact that they are designed to prevent retaliation by a landlord by serving a notice to quit in consequence of the tenant having referred the matter to the tribunal.

The opening words of s. 11 (1): "Where a contract to which the Act of 1946 applies has been referred to a tribunal . . ." mean where the circumstances have arisen which were contemplated by s. 5. Then,

". . . the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period."

In this case the tribunal not having, on Sept. 8, given any security of tenure, the landlord waited, and, on Dec. 9, the day after the three months had expired, she served a notice to quit. It does not seem to me that that notice to quit is caught by s. 5 of the Act of 1946 on any reading of it, because, although served after a reference to a tribunal, it was not served within three months of the

decision of the tribunal. That state of affairs is not dealt with by the Act of 1946, and it seems that s. 11 (1) can have no application either. If s. 5 and s. 11 (1) have to be read together and if the conditions precedent giving the tribunal power do not exist under s. 5, I cannot see where they arise under s. 11 (1). Moreover, if the tenancy had been for a fixed period of, e.g., six months or so many weeks, at the end of which the tenancy was to determine, although during the currency of that agreement the tenant might have gone to the tribunal and asked for a reduction of rent, there would have been no necessity to give a notice to quit by the landlord. The tenancy would have terminated at the end of the fixed period and the tenant could not then have asked for an extension. Parliament has not provided that the tenant can go to a tribunal and ask for an extension of time in every case. We have to decide whether the conditions precedent which are laid down by the combined reading of s. 5 and s. 11 (1) have been fulfilled, and, as they have not been fulfilled, the order was made without jurisdiction and certiorari must go.

JONES, J.: I am of the same opinion.

PARKER, J.: I agree. By s. 5 of the Act of 1946, before security of tenure is granted to a tenant, a notice to quit has to be served after the contract has been referred to the tribunal and either before the decision was given or within three months thereafter. In the present case the reference to the tribunal was on Aug. 1, 1950. Its decision was given on Sept. 8, 1950, and the notice to quit was not served until Dec. 9, 1950, i.e., just outside the three months from the time when the tribunal gave its decision. Were it not, therefore, for s. 11 (1) of the Act of 1949 the landlord was perfectly within her rights in giving a notice to quit after the expiry of that three months when the parties were relegated to their ordinary common law rights.

It is said, however, that by reason of s. 11 (1) of the Act of 1949 the tribunal has jurisdiction to grant an extension of security of tenure whenever a notice to quit has been served, provided only that it has been served after the contract has been referred to the tribunal. The words in s. 11 (1) cited in support of this contention are as follows:

“Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period.”

It is urged before us on behalf of the tribunal that the notice to quit there referred to, provided it has been served after the contract has been referred to the tribunal, may afford jurisdiction, and reliance is placed on the words “at any time when a notice to quit has been served”. I do not feel that one can get very much help from the words “at any time”. The section does not provide, “when at any time a notice is served and application has been made”. The words “at any time” refer only to the period during which the application can be made, viz., the period between the service of a notice and its expiry. Therefore, the question comes to a very short point—whether the words “when a notice to quit has been served” are perfectly general, referring to any point of time in the future, or whether they refer to a notice to quit served within the limits of time specified in s. 5 of the Act of 1946. In deciding which is the true construction of those words it is relevant to bear in mind s. 11 (5), which provides that s. 11 is to be construed as one with the Act of 1946. As was said by this court in *R. v. Folkestone and Area Rent Tribunal. Ex p. Sharkey* (1), the object of s. 5 of the Act of 1946 was to prevent retaliation by the landlord, and the power in s. 11 (1) is a power to extend security of tenure, i.e., as I read it, to extend the security of tenure afforded by s. 5 of the Act of 1946. If, therefore, in the circumstances

of a case, the Act of 1946 provides no security of tenure, there is nothing for s. 11 (1) to operate on and to extend. It seems to me that within its context, bearing those considerations in mind, the words "when a notice to quit has been served" in s. 11 (1) must mean when a notice to quit has been served within the three months of time specified by s. 5 of the Act of 1946. For these reasons I agree with the judgment my Lord has delivered.

Order of certiorari.

Solicitors: *Neve, Beck & Co.*, agents for *Joseph Davies & Son*, St. Helens (for the landlord); *Solicitor, Ministry of Health* (for the rent tribunal).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

NOTE.

Re KNAPP'S SETTLEMENT. COWAN AND OTHERS *v.* KNAPP AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), February 13, 1952.]

Settlement—Lost settlement—Implication of provisions.

ADJOURNED SUMMONS for an order that the plaintiffs or other persons for the time being appointed to act as trustees of a settlement affecting certain funds might be at liberty to hold and deal with such funds, or the property from time to time representing the same, on the footing that: (i) the said funds were held on trust to pay the income thereof to the defendant, Lilian Wingate Knapp, during her life; (ii) subject thereto, the said funds were held on trust for the defendants, Rachel Elizabeth Grylls and Sylvia Lilian Wingate Knapp, absolutely in equal shares; and (iii) the statutory power of appointing new or additional trustees applied to the said settlement and no person was nominated thereby for the purpose of appointing new or additional trustees.

On the marriage on July 21, 1906, of Kempster Kenmure Knapp (hereafter called "General Knapp") and Lilian Wingate Cowan a settlement was executed. The settlement was lost, and no copy or memorandum of its provisions existed or could be found save a brief note in the handwriting of General Knapp in the following terms:

"The marriage settlement was in possession of one of the trustees, H. F. Eve, Esq. (of Messrs. Howse & Eve, 2 Howard Street, London, W.C.2), the other being E. G. Cowan, Esq. (now living at 52 Eresby House, Rutland Gate, London, S.W.7). I understand that during the period of blitz in London during the war of 1939-45, this document was destroyed by enemy action. It provided for the equal division of the amount (£1,200 ?) between surviving children of the marriage, or their offspring in this case (1) Rachel Elizabeth Grylls, daughter, (2) Daughter of John Knapp, son, killed in Burma 13.3.45, viz. Sylvia L. W. Knapp."

The amount, "£1,200", and the mark of interrogation were written in pencil.

There were three children of the marriage—a son who died in infancy, a daughter (Rachel Elizabeth), and a son (John), who attained the age of twenty-one years and married, but was killed in action on Mar. 13, 1945. The daughter, Rachel, married and had two children. John Knapp was survived by his one child, Sylvia Lilian Wingate Knapp. On Apr. 12, 1948, General Knapp died.

Case referred to:

- (1) *Re Trusts Affecting Scheduled Investments*, (1943), 87 Sol. Jo. 66; 2nd Digest Supp.

E. I. Goulding for the plaintiffs, personal representatives of the last surviving trustee of the settlement.

M. J. Fox for the first and second defendants, *Lilian Wingate Knapp*, the surviving spouse, and *Rachel Elizabeth Grylls*.

G. C. D. S. Dunbar for the third, fourth and fifth defendants, the administrators of the estate of the deceased son, *John Knapp*.

J. H. A. Sparrow for the sixth, seventh and eighth defendants, grandchildren.

DANCKWERTS, J., said that among the ordinary trusts in an English marriage settlement one would expect there to be a trust for the husband and wife during their joint lives and for the survivor during his or her life, and, subject thereto, the trust fund would usually be held on trust for the issue of the marriage, including issue more remote than children, as the surviving spouse should appoint, and, in default of appointment, on trust for such of the children who attained the age of twenty-one years (or married in the case of females) in equal shares. There was in this case, however, no evidence that there was any power of appointment. It was possible, therefore, that there was some other provision made for the event of the death of children during their parents' lifetime, and for the issue of children. **HIS LORDSHIP** was at first attracted by the idea that he should conclude that the settlement contained the ordinary trusts of an English marriage settlement. There was some support for the alternative view which **HIS LORDSHIP** had mentioned in the terms of General Knapp's memorandum. General Knapp there referred to "surviving children of the marriage, or their offspring", and named a daughter and granddaughter. That could be taken to indicate that the class to take the capital were children of the marriage who survived the survivor of General and Mrs. Knapp, and there might have been a provision that if any child of the marriage died in the lifetime of the parents, or the survivor, their offspring should be substituted for them. Normally the condition of attaining twenty-one or marrying would not be applied to a substitutionary class. **HIS LORDSHIP**, therefore, concluded that the trusts of the marriage settlement were for the husband and wife for life as respects the funds which they each provided, and to the survivor for life, and after the death of the surviving spouse, for such of the children of the marriage who should survive that event, with a substitutionary gift in favour of the children of any child who predeceased the survivor of the parents. That would give to the defendant, *Sylvia Lilian Wingate Knapp*, a vested interest, as she was the only surviving child of the son, *John Knapp*, who was killed in 1945.

HIS LORDSHIP had been referred to *Re Trusts Affecting Scheduled Investments* (1) where **UTHWATT, J.**, made an order permitting trustees to act on the footing that the trusts of a missing settlement were in a certain form. He proposed to follow that decision and to make an order in the present case declaring that the trustees were at liberty to hold and deal with the trust funds which were in their names, on the footing that the said funds were held on trust to pay the income thereof to the defendant, *Lilian Wingate Knapp*, during her life and that, subject to that life interest, the funds were held on trust for the defendant, *Rachel Elizabeth Grylls*, if she should survive Mrs. Knapp, and the defendant, *Sylvia Lilian Wingate Knapp*, in equal shares, and that, in the event of Mrs. *Rachel Elizabeth Grylls* not surviving Mrs. Knapp, the half share to which she would have otherwise attained would be held on trust for Mrs. *Grylls'* children in equal shares. The statutory power of appointing new trustees would apply.

Order accordingly.

Solicitors: *Ellis, Peirs & Co.* (for all parties).

[Reported by *R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

SIDNEY TRADING CO., LTD. v. FINSBURY BOROUGH COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.), February 13, 1952.]

Rent Restriction—Rent—Total of rent and rates paid by tenant—Agreement under Poor Rate Assessment and Collection Act, 1869, s. 3, by landlords with rating authority to be liable for rates—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (7)—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 2 (1).

On Dec. 22, 1950, the landlords, as a condition of the grant of the tenancy of a flat, required the payment of a premium of £41. The rateable value of the flat was £8, and the rent payable under the tenancy agreement was £5 4s. for a year. By cl. 3 of the agreement the tenant agreed to pay to the landlord for transmission to the appropriate authorities all existing or future general and water rates. The general rate was 19s. 6d. in the £ at all material times. On Jan. 18, 1951, the landlords entered into an agreement with the rating authority under s. 3 of the Poor Rate Assessment and Collection Act, 1869, whereby they made themselves liable for the general rates assessed on the flat as from Oct. 1, 1950. The landlords having been convicted by a court of summary jurisdiction under the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1), of having required the payment of a premium as a condition of the grant of a tenancy to which the Rent Restrictions Acts applied,

HELD: "rent" for the purpose of s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was the total monetary consideration which the tenant had agreed to pay to the landlords for the grant of the tenancy; the total monetary consideration which the tenant in the present case had agreed to pay for the tenancy was £5 4s. plus an amount for rates which brought the total amount payable in respect of the tenancy to more than two-thirds of the rateable value thereof; the effect of the agreement of Jan. 18, 1951, was not that the landlords received the amount of the rates from the tenant merely for transmission to the appropriate authority; and, therefore, the "rent" payable in respect of the tenancy was not less than two-thirds of the rateable value thereof, the Rent Acts applied to the tenancy, and the landlords were rightly convicted.

Property Holding Co., Ltd. v. Clark ([1948] 1 All E.R. 165) and *Alliance Property Co., Ltd. v. Shaffer* ([1949] 1 All E.R. 312), applied.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (7), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1014.

Cases referred to:

- (1) *Property Holding Co., Ltd. v. Clark*, [1948] 1 All E.R. 165; [1948] 1 K.B. 630; [1948] L.J.R. 1066; 2nd Digest Supp.
- (2) *Alliance Property Co., Ltd. v. Shaffer*, [1949] 1 All E.R. 312; [1949] 1 K.B. 367; [1949] L.J.R. 998; 2nd Digest Supp.
- (3) *Philips v. Long*, (1946), 63 T.L.R. 127; 2nd Digest Supp.

CASE STATED by a metropolitan magistrate.

On Sept. 3, 1951, at a court of summary jurisdiction sitting at Old Street magistrate's court, on an information preferred by the respondent council, the appellants, the landlords, were convicted of having required a premium on the grant of the tenancy of a flat No. 112, Bartholomew Buildings, Seward Street, Finsbury, which, it was alleged, was subject to the control of the Rent Acts, contrary to s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949. For the landlords it was contended that the rent of £5 4s. per annum was less than two-thirds of the rateable value of the flat, and so, by s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the Rent Acts did not

apply to the tenancy, and, therefore, it was not an offence under s. 2 (1) of the Act of 1949 to require a premium. For the council it was contended that the amount of rates payable by the tenant to the landlords under the terms of the tenancy agreement must be added to the rent of £5 4s. and that the true rent so ascertained exceeded two-thirds of the rateable value.

Heathcote-Williams, Q.C., and *B. Finlay* for the landlords.

Widgery for the council.

LORD GODDARD, C.J.: This is a Case stated by the learned metropolitan magistrate sitting at Old Street, before whom the landlords, Sidney Trading Co., Ltd., were summoned for a breach of the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1), in that they required the payment of a premium as a condition of the grant of a tenancy of a flat which was alleged to be subject to the Rent Restrictions Acts. The learned magistrate held that the offence had been committed and the question for determination is whether the flat was within the Rent Acts.

Section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides:

"Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . ."

That provision was, no doubt, meant to deal with the case where a person let a house at a purely nominal rent. In the present case, on Dec. 22, 1950, an agreement was entered into by which the flat was let for a year at a rent of £5 4s., payment being required of a premium of £41. If there had been nothing more than that, it may be that the flat would have been outside the Rent Acts, because the rateable value was £8 and £5 4s. is less than two-thirds of £8. Clause 3 of the agreement, however, contained the following provision:

"The tenant agrees to pay to the landlord for transmission to the appropriate authorities all existing or future general and water rates."

The question is whether or not the money that has to be paid to the landlords for rates is part of the "rent" for the purposes of s. 12 (7). On Jan. 18, 1951, the landlords entered into an agreement with the local authority, under the Poor Rate Assessment and Collection Act, 1869, s. 3, whereby they made themselves liable to the authority for the rates in respect of the flat and were to be allowed a commission of ten per cent. for doing so. That agreement was retrospective in the sense that they agreed to pay the rates from Oct. 1, 1950. After that agreement was entered into any money paid by the tenant to the landlords which represented rates would be paid by the landlords to the local authority, not as agents for the tenant, but on their own behalf under the agreement.

Property Holding Co., Ltd. v. Clark (1), and *Alliance Property Co., Ltd. v. Shaffer* (2), seem to me to lay down clearly that the test for deciding what is "rent" for the purpose of the Rent Restrictions Acts, is to ask: What is the total monetary payment to be made by the tenant to the landlord? One has not to regard the rent from the common law point of view of something issuing out of the land for which a distress could issue. To quote from the words of *EVERSHED, L.J.*, in *Property Holding Co., Ltd. v. Clark* (1) ([1948] 1 All E.R. 173):

"... the question in each case is to determine what in substance is the subject-matter of the tenancy granted to the tenant by the contract. Prima facie the rent is the monetary compensation payable by the tenant in consideration for the grant, however it be described or allocated."

If a flat is let at a rent of, say, £100 a year inclusive of rates, that £100 is "rent" although some part of it represents what the landlord has to pay to the local

authority for rates. So, here, in substance the monetary consideration which the tenant agreed to pay for this tenancy—leaving the premium out of the question—is the £5 4s. plus a certain sum for rates. It seems to me on the authority of the two cases which I have mentioned that it matters not whether the payment is for rates, for service, or for the use of furniture. If there is a sum of money which the tenant agrees to pay as a consideration for the tenancy, it is for this purpose a rent. Therefore, in my opinion, the landlords are receiving here a rent of more than two-thirds of the rateable value. A

It has been strongly urged that, as the agreement between the landlords and the local authority was made after the date of the agreement with the tenant, the court should ignore the former agreement and only have regard to cl. 3 of the tenant's agreement. Whatever weight might have attached to that argument if the agreement had not been made retrospective, I do not stop to consider, because any sums of money which the landlords received from the tenant after they had made this retrospective agreement could not be transmitted to the local authority. The tenant was not the rated person. His obligation to pay rates could only have arisen if the landlords had failed to pay, when he could have been made to pay under s. 12 of the Poor Rate Assessment and Collection Act, 1869, and then would have had a right to recover the amount of the rates from his landlords. The position the landlords created by their own action was that, as from Oct. 1, they were paying the rates as principals and not as agents for their tenant, and they could not be heard to say that they were in any way receiving the money from the tenant for transmission to the local authority. They were receiving a sum of money which the tenant had agreed to pay them. What they did with that money thereafter was a matter for themselves. They were not to transmit any sum of money the tenant paid them for rates, because they had to pay the rates themselves out of their own pocket. B C D

For these reasons I think that the reasoning in *Property Holding Co., Ltd. v. Clark* (1) and *Alliance Property Co., Ltd. v. Shaffer* (2) applies. Consequently, this was a rent-controlled flat, an offence was committed in taking a premium, and the decision of the learned magistrate was right. E

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *M. & H. Shanson* (for the landlords); *John E. Fishwick*, town clerk (for the council).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

**HAVILAND AND OTHERS v. LONG AND ANOTHER.
DUNN TRUST, LTD., Third Party.**

[COURT OF APPEAL (Somervell, Denning, L.J.J., and Roxburgh, J.), February 12, 1952.]

A *Landlord and Tenant—Repair—Breach of covenant—Measure of damages—Determination of lease—Repairs borne by new tenant—Landlord and Tenant Act, 1927 (c. 36), s. 18 (1).*

By a lease, dated Oct. 1, 1929, the landlords let premises for a term of eighteen years from Mar. 25, 1931, the tenant covenanting to maintain and deliver up the premises in good and tenantable repair. On Jan. 14, 1949, the landlords granted a new lease commencing on the date of the expiry of the old lease. The new tenants agreed to pay a full economic rent and covenanted, if the premises were not left in repair, to put them in repair, the landlords agreeing to pay to the new tenants any money received for dilapidations under the covenant in the lease of 1929. On a claim by the landlords against the tenant under the lease of 1929 for damages for breach of the covenant to repair,

C **HELD:** the fact that the landlords and their new tenants had agreed on the manner of meeting the cost of repair did not go in diminution of the damage to the reversion at the end of the lease of 1929 under s. 18 (1) of the Landlord and Tenant Act, 1927, for which the tenant under that lease remained responsible under the covenant.

D **AS TO DAMAGES FOR BREACH OF A COVENANT TO REPAIR,** see HALSBURY, Hailsham Edn., Vol. 20, pp. 219-222, paras. 239-242; and FOR CASES, see DIGEST, Replacement, Vol. 31, pp. 373-375, Nos. 5035-5052.

Case referred to:

E (1) *Hanson v. Newman*, [1934] Ch. 298; 103 L.J.Ch. 124; 150 L.T. 345; 31 Digest, Replacement, 373, 5039.

APPEAL by the tenants from an order of LLOYD-JACOB, J., dated Oct. 16, 1951, in a claim by the landlords for damages for breach of a covenant to repair.

The tenants, who were trustees of the original tenant, contended that, as, at the date of the expiration of the lease, the landlords had entered into an agreement with new tenants that they (the new tenants) should carry out the repairs, the landlords had lost their right to recover under the covenant. LLOYD-JACOB, J., held that the landlords' rights against the tenants under the original lease were unaffected by the agreement with the new tenants, and awarded the landlords £1,170 damages.

G *Salmon, Q.C.*, and *Salkeld-Green* for the tenants under the first lease.
C. H. Duveen for the third parties (sub-tenants).
Sachs, Q.C., and *D. C. Bain* for the landlords.

SOMERVELL, L.J.: This is an appeal from a decision of LLOYD-JACOB, J. The landlords' claim was under a lease which was made on Oct. 1, 1929, to begin on Mar. 25, 1931, for eighteen years and, therefore, expired on Mar. 25, 1949. **H** It was a full repairing lease, and when it expired the tenants were in breach of the covenant to repair. The cost of putting the premises into the condition which the covenant required was agreed between the parties to be £1,170. On Jan. 14, 1949, some two months before the lease came to an end, the landlords granted a lease to Messrs. Wyser & Bryant, Ltd., for a period of fourteen years beginning on the day of the expiry of the old lease. The rent under the new lease was £1,900 a year and represented the rent properly payable for the premises on the basis that they were in good condition, i.e., that the repairs as required

by the covenant had been carried out.

Clause 4 (5) (a) of the new lease provides that, assuming that when the new lease started the house would not be in good repair, the new tenants were to put the premises into repair within a certain period. The clause goes on to provide that

" . . . the tenants shall on the completion of such works as aforesaid be entitled to claim payment from the landlords of any money recovered by the landlords from the trustees of the late Sydney Herbert Long [the original lessee] for dilapidations as mentioned in cl. 6 hereof less the fees of the landlords' surveyors."

Clause 6 provides:

" The landlords hereby agree to pay to the tenants on the completion to the satisfaction of the surveyors of the decorative and other repairs referred to in cl. 4 (5) (a) hereof any money received by them by way of dilapidations from the trustees of the will of the late Sydney Herbert Long who are the present tenants less the amount of the surveyors' fees for preparing the specification of dilapidations and settling the amount payable in respect thereof and the landlords will take all necessary steps to recover such money and will notify the tenants of the amount proposed to be accepted in settlement of the claim before releasing the said trustees from their liability in respect thereof."

Section 18 (1) of the Landlord and Tenant Act, 1927, provides:

" Damages for a breach of a covenant . . . to leave . . . premises in repair at the termination of a lease . . . shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid . . . "

The present is not the type of case for the purpose of which the law was altered by that enactment. This building is still required for use in substantially the same form, and the repairs which the tenant failed to do have to be done to put it in the state in which it is now required for use. Section 18 (1) was introduced to meet, primarily, a case where a building was going to be pulled down or turned to some different purpose so that the repairs were not required and the sum which the landlords would recover under the covenant would not be expended in whole or in part on the repairs covered by the covenant.

Section 18 (1), however, may have produced a result which was not intended. The learned judge decided that the tenants were liable on their covenant and gave judgment for the landlords for £1,170. It is from that decision that the tenants appeal. Counsel for the tenants contend that by Mar. 25, 1949, when the lease had come to an end, it mattered not financially to the landlords whether the repairs were done or not. It was the new tenants who had to do them, and, although the landlords had undertaken to take all necessary steps to recover the cost of repairs by this method of dealing with their rights, which existed contingently or conditionally on Jan. 14 when the new agreement was made, they had lost their rights, and, therefore, the cost of repairs would fall, not on the old tenants, but on the new tenants who would be unable to obtain any advantage under cl. 4 (5) (a).

I find that argument difficult to follow. When the landlords entered into the new lease, they had, conditionally, their rights. If the old tenants had put the whole building in repair, *cadit quaestio*. The rent of £1,900 would then have been the agreed rent without the new tenants having to spend any money on repairs. But if it was not put in repair, the landlords plainly had conditionally a right to recover. The damage to the reversion would be measured by the cost of the repairs, because it was everybody's intention to go on using the

building as it was before and it was economic to do so. I cannot see why that right should be lost because it is made a term in a bargain. It is obvious that, if the landlords had not had this right—suppose, for example the landlords had abandoned their right to enforce the repairing covenant—the terms of the new lease would have been different. The new tenants would never have agreed to pay the economic rent for a repaired building and do the repairs themselves unless they had been satisfied that, quoad those repairs which were covered by the old lease, they would get, through the landlords, a sum, however it was quantified, representing the old tenants' liability. I cannot understand how it could be said that because a man has bargained with a right he loses it. The position is summarised in a paragraph in the learned judge's judgment, in which he says:

- A
B “In my judgment, it is the fact that [the repairs] require to be done and not the circumstances in which the landlord and his new tenant agree on the manner of meeting the charge which is the governing consideration.”

That sentence, I think, is the answer to the appeal here, which, for the reasons given by the learned judge—with all of which I agree—must be dismissed.

- C DENNING, L.J.: I agree with all that my Lord has said. The measure of damage is the amount by which the market value of the reversion at the end of the lease was diminished by the want of repair. That depends on whether the repairs are going to be done or not. In cases where they have been or are going to be done the cost of repair is usually the measure of damage. The fact that the landlord has an undertaking from a new tenant to do the repairs does not go in diminution of damages. It is *res inter alios acta*. I agree that the appeal should be dismissed.

ROXBURGH, J.: I agree. The argument for the tenants is in defiance of the passage from the judgment of LAWRENCE, L.J. ([1934] Ch. 305) in *Hanson v. Newman* (1), cited by the learned judge, where the learned lord justice said:

- E “A reversion may not be a reversion in possession (i.e., it may not be immediate) by reason of the freeholder having granted a reversionary lease, and in that case the reversionary lease is to be disregarded in assessing the damages [under s. 18 (1)].”

- F In the present case the argument can only stand on the footing that the court does look at the reversionary lease and consider the arrangements which have been made in it with regard to the benefit of the covenant, and that is just what *Hanson v. Newman* (1) shows must not be done. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rodgers, Gilbert & Horsley* (for the tenants); *Forsythe, Kerman & Phillips* (for the third party); *Janson, Cobb, Pearson & Co.* (for the landlords).
[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

R. v. DURHAM QUARTER SESSIONS. *Ex parte* VIRGO.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.), February 14, 1952.]

Quarter Sessions—Appeal to—Jurisdiction to entertain question of what plea should have been entered at trial—Plea of Guilty accompanied by statement indicating innocence—Remission of case to court of summary jurisdiction—Summary Jurisdiction Act, 1879 (c. 49), s. 31 (1) (as substituted by Summary Jurisdiction (Appeals) Act, 1933 (c. 38), s. 1). **A**

Charged before a court of summary jurisdiction with having stolen a motor cycle and electing to be dealt with summarily, a defendant pleaded Guilty. After a statement by the solicitor for the prosecution of facts which he did not dispute, the defendant said: "It was a mistake, I thought it was my mate's cycle. My mate said, 'Take it home'. My mate's bike is identical." He did not, however, ask the court to alter his plea, and he was convicted and sentenced. He appealed against the conviction to quarter sessions, who sent the case back to the court of summary jurisdiction under s. 31 (1) (vii) of the Summary Jurisdiction Act, 1879 (as substituted by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933), with an expression of opinion that a plea of Not Guilty should have been entered. **B**

HELD: quarter sessions were entitled to entertain the question whether or not the defendant's plea amounted to a plea of Guilty or Not Guilty: *dictum* of LORD GODDARD, C.J., in *R. v. West Kent Quarter Sessions. Ex p. Files* ([1951] 2 All E.R. 732), corrected; in the circumstances the court of summary jurisdiction ought to have entered a plea of Not Guilty; and quarter sessions were right in treating the conviction as a nullity and in remitting the case to the court of summary jurisdiction with an expression of their opinion. **C**

R. v. Ingleson ([1915] 1 K.B. 512), applied. **D**

AS TO RIGHT OF APPEAL TO QUARTER SESSIONS IN CRIMINAL CASES, see HALSBURY, 1951 Supplement, Vol. 21 (Magistrates), para. 1226.

FOR THE SUMMARY JURISDICTION (APPEALS) ACT, 1933, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 966. **E**

Cases referred to:

- (1) *R. v. West Kent Quarter Sessions. Ex p. Files*, [1951] 2 All E.R. 728; 115 J.P. 522.
- (2) *R. v. Graham Campbell. Ex p. Ahmed Hamid Moussa*, [1921] 2 K.B. 473; 90 L.J.K.B. 818; *sub nom. R. v. Campbell. Ex p. Moussa*, 125 L.T. 310; 85 J.P. 189; 33 Digest 391, 1021. **F**
- (3) *R. v. Ingleson*, [1915] 1 K.B. 512; 84 L.J.K.B. 280; 112 L.T. 313; 14 Digest 256, 2568.

MOTIONS for orders of certiorari and prohibition.

On July 30, 1951, the defendant, one Bruce, was convicted by a court of summary jurisdiction sitting at South Shields of having stolen a motor cycle. He appealed against conviction to quarter sessions for the county palatine of Durham, who heard the appeal on Sept. 24, 1951. For the prosecutor, a police constable, it was contended that, as the defendant had pleaded Guilty before the court of summary jurisdiction, quarter sessions had no jurisdiction to entertain the appeal in so far as it purported to be an appeal against conviction. The defendant contended that his plea, when considered with a statement he made to the court of summary jurisdiction, did not amount to a plea of Guilty. Quarter sessions remitted the case to the court of summary jurisdiction with an expression of their opinion that the statement made by the defendant should have been interpreted and accepted as a plea of Not Guilty. The prosecutor now moved for orders of certiorari to quash the decision and of prohibition to prohibit quarter sessions from entertaining an appeal against conviction. **G**

H

Michael Hughes for the applicant (the prosecutor).

Vernon Gattie for quarter sessions.

J. R. Johnson for the defendant.

LORD GODDARD, C.J.: Counsel for the applicant has moved for an order of certiorari to bring up and quash an order made by the appeal committee of Durham Quarter Sessions whereby, on an appeal by a man named Bruce against a conviction before a court of summary jurisdiction, the committee directed that

“the matter of the said conviction be and is hereby remitted to a court of summary jurisdiction acting for the said county borough of South Shields, this court being of opinion that the statement made by [Bruce] to the said court of summary jurisdiction on July 30, 1951, should have been interpreted and accepted as a plea of ‘Not Guilty’.”

What happened was this. Bruce was charged with having stolen a motor bicycle. Before the court of summary jurisdiction he elected to be dealt with summarily, and, on being asked, he pleaded Guilty. No evidence was called, but a solicitor who appeared for the prosecution made a statement of the facts to the bench, none of which was disputed by the defendant, who was not represented. At the end of that statement, when asked whether he had anything to say, the defendant said:

“It was a mistake, I thought it was my mate’s cycle. My mate said, ‘Take it home’. My mate’s bike is identical.”

That was really a plea of Not Guilty, because, if his mate had asked him to take his bicycle home and he had taken the other bicycle by mistake, he was not guilty of larceny. However, he did not ask the justices to alter the plea and they did not do so. After hearing the defendant’s somewhat unfortunate record, they sentenced him to six months’ imprisonment. Bruce then asked if he could see a solicitor, and he was granted legal aid. Afterwards he was granted bail and appealed to quarter sessions. At quarter sessions the prosecution took the objection that, as he had pleaded Guilty, he had no right of appeal. It was said on the authority of *R. v. West Kent Quarter Sessions. Ex p. Files* (1) that quarter sessions could not entertain the appeal. Having, however, heard what the defendant said before the justices before he was sentenced, quarter sessions decided that the justices ought to have entered a plea of Not Guilty, and, accordingly, they sent the case back to the justices under the powers which they have under the Summary Jurisdiction Act, 1879, s. 31 (1) (vii), as substituted by the Summary Jurisdiction (Appeals) Act, 1933, s. 1.

The case depends on whether *R. v. West Kent Quarter Sessions. Ex p. Files* (1) applies or can be distinguished. Many cases have come before the court on the question whether or not a plea of Guilty has properly been entered. In *R. v. Graham Campbell. Ex p. Ahmed Hamid Moussa* (2) a man was charged with a breach of the Aliens Order, 1920, because he had not registered as an alien. He was an Egyptian, and when he was brought before the magistrate on the charge of having failed to register, he was not asked whether he pleaded Guilty or Not Guilty in the ordinary way, according to the practice which at that time obtained in the metropolitan police courts. Instead the clerk said to him: “Are you an Egyptian?”, and he answered: “Yes, I am”. That was construed as an admission that he was an alien. He was then asked whether he had failed to notify the registration officer of a change of address and he said he had, and thereupon he was convicted. He desired to appeal to quarter sessions and it was objected that, as he had pleaded Guilty, he had no right of appeal, but this court decided that he had not pleaded Guilty and granted mandamus to the London Sessions to hear the appeal.

That case is not quite *in pari materia* with the present matter because there the defendant had never been directly asked the question: “Are you guilty or

not guilty". He had been asked whether he was an Egyptian, and he said that he was. The view of AVORY, J., who dissented, was that that was an admission that he was an alien, and that, having admitted that he had not notified the change of address, he had then admitted the truth of the information. The other two judges, however, thought he had not made that admission because, although he said he was an Egyptian, he might have contended that, nevertheless, he was a British subject. They held that that did not amount to a plea of Guilty, and ordered quarter sessions to hear the case. A

R. v. Ingleson (3), which came before the Court of Criminal Appeal, is singularly like this case. The appellant was charged with receiving and without any doubt at his trial he pleaded Guilty. At the same time he handed up a statement to the learned recorder which, if believed, as LORD COLERIDGE, J., said, giving the judgment of the court, was a complete exculpation, concluding, as it did, with the words: "I am guilty of taking the horses not knowing them to be stolen". B The court held that that amounted to a plea of Not Guilty, because the appellant said he did not know the horses were stolen, and ordered that a plea of Not Guilty be entered and that the case go back for re-hearing. That is exactly what quarter sessions did in this case. They treated the proceedings before the justices as a nullity because the trial had proceeded on the footing that Bruce had pleaded Guilty when quarter sessions thought that the plea ought to have been C Not Guilty. Therefore, they said that the proceedings consequent on the plea were bad, a plea of Not Guilty must be entered, and the case must go back for re-hearing.

In *R. v. West Kent Quarter Sessions. Ex p. Files* (1) the facts were altogether different. A man of considerable education was charged with dangerous driving. D He had been served with the summons, and I said, in giving judgment ([1951] 2 All E.R. 729):

"Unless the applicant is blind, cannot read, or is mentally defective—none of which is suggested—there can be no doubt whatsoever that he must have understood that with which he was being charged. That goes to merits, perhaps, and not to jurisdiction. The evidence shows that the clerk of the court read out verbatim the full particulars of the charge as shown in the information." E

The charge was:

"Driving a motor vehicle on a road at a speed which was dangerous to the public, contrary to s. 11 (1) of the Road Traffic Act, 1930", F

and the particulars were,

"... on Feb. 3, 1951, at the parish of Northfleet . . . unlawfully did drive a motor vehicle, to wit, a motor car, on a road there called Watling Street, at a speed which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the road." G

The clerk read the summons to him verbatim, asked him if he was legally represented, and, when he said he was not, said that it was a serious charge. As I said in my judgment: H

"He then informed the applicant in formal language of his right to be tried by a jury at quarter sessions. Before he took his reply, he explained to him in simple language exactly what that meant, and the applicant answered: 'I want to be dealt with this morning'. 'I then said', says the clerk in his affidavit, 'In that case do you plead Guilty or Not Guilty?'. Neill replied: "Guilty". I spoke again to Neill in these terms: "You are

quite certain about that? You admit the offence, do you?", and Neill replied: "Yes".

A In those circumstances there was no question that the man not only pleaded Guilty, but also intended to plead Guilty. He persuaded quarter sessions, however, to hold an inquiry whether he had pleaded Guilty under a mistake. Quarter sessions, for reasons which, no doubt, appeared good to them, but which this court entirely failed to understand, said they had come to the conclusion that the man had made a mistake, and entertained an appeal. We said: "You cannot do a thing like that. Here is a man who in court deliberately and intentionally, after being warned, pleads Guilty. If everybody who pleads Guilty and finds that the sentence is one he does not like can appeal to quarter sessions, there will be no end to the proceedings". The present case, however, is, I think, distinguishable. It is true that in the *West Kent* case (1) I concluded my judgment by saying ([1951] 2 All E.R. 732):

B "It is not the case of a court inquiring into matters to find out whether they had jurisdiction or not. On the face of the proceedings before the court was a statement by the appellant that he pleaded Guilty. In those circumstances, quarter sessions had no right to hear the appeal, and they must be prohibited from entertaining it."

C I think the concluding words of my judgment go too far. Where the question in the case is whether or not the plea which was put in by the prisoner at the hearing before the justices amounted to a plea of Guilty or Not Guilty, that is a matter which the court can entertain. It would be putting it too high against an unrepresented prisoner who, when first charged, had said that he pleaded Guilty, but, before being sentenced, had made to the court a statement which showed that he meant to deny that he had acted feloniously or criminally, to say: "You said you were Guilty, and, therefore, there is an end of it". It must not be taken that the concluding words of my judgment in the *West Kent* case (1) preclude courts of quarter sessions from considering whether the plea which was made before the court of summary jurisdiction, taking all that the prisoner said together, was a plea of Guilty or Not Guilty.

E This is not a case of a defendant who unequivocally pleaded Guilty and then said: "I made a mistake". It is a case in which at the trial the defendant said: "Guilty, but . . ." and added a statement which showed that he was really pleading Not Guilty. Every judge and most magistrates know that it is quite a common thing for a prisoner arraigned at assizes or quarter sessions, when the charge is put to him, to say he is Guilty, but so-and-so and so-and-so, and the clerk of assize always says: "That is a plea of Not Guilty. Enter a plea of Not Guilty".

F The court of summary jurisdiction in this case ought to have entered a plea of Not Guilty, and then the case could have been tried. If convicted, the defendant would have had a right to appeal to quarter sessions. He appealed to quarter sessions against his conviction and his ground of appeal really amounted to this: "I did not plead Guilty. I pleaded Not Guilty and the plea of Guilty is wrongly recorded". Quarter sessions came to the conclusion that the plea of Guilty was wrongly recorded, not because the defendant did not understand or did not intend to plead otherwise than he did, but because, taking the whole of his plea together, they were satisfied that in law it amounted to a plea of Not Guilty. I think they were right in entertaining the appeal to that extent, and that, as the defendant had never been tried on a plea of Not Guilty, they were entitled to treat the conviction as a nullity, as the court did in *R. v. Ingleson* (3). Therefore, they were right to exercise the powers which they had under s. 31 (1) (vii) of the Act of 1879 (as substituted by the Summary Jurisdiction (Appeals) Act, 1933), of sending back the case to petty sessions with

an expression of their opinion. This application for certiorari must, therefore, be refused.

JONES, J.: I agree.

PARKER, J.: I agree.

Orders of certiorari and prohibition refused.

Solicitors: *Speechly, Mumford & Craig*, agents for *Harold Ayrey*, town clerk, South Shields (for the applicant); *Sharpe, Pritchard & Co.*, agents for *J. K. Hope*, clerk of the peace, county of Durham (for quarter sessions); *H. Pollard*, South Shields (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

WATES v. ROWLAND AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), February 5, 6, 7, 1952.]

Rent Restriction—Permitted increase—"Improvement" of house—Structural alteration—Repairs—Replacement of defective floor—Laying of additional concrete bed—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 2 (1) (a), s. 2 (5).

The wooden floor of a dwelling-house to which the Rent Restrictions Acts applied became rotten owing to the rise in the water level in the land. It constituted a statutory nuisance, to abate which the landlord raised the foundation of the house by adding a layer of concrete and replaced the wooden floor with a tiled one. He claimed, under s. 2 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to be permitted to charge an increase in the rent of eight per cent. of the amount expended on the raising of the foundation.

HELD: the replacement of the floor was within the description of repairs, but the laying of the additional concrete bed provided the house with a better substratum than it had had before and amounted to an improvement or a structural alteration of the house within s. 2 (1) (a), and, therefore, the landlord was entitled to increase the rent by an amount equal to the statutory percentage of the sum expended thereon.

Rabbitt v. Grant ([1940] I.R. 323), criticised and not followed.

FOR PERMITTED INCREASES OF RENT UNDER THE RENT RESTRICTIONS ACTS, 1920 to 1939, see HALSBURY, Hailsham Edn., Vol. 20, pp. 323-325, paras. 383-385; and FOR CASES, see DIGEST, Replacement, Vol. 31, pp. 678-680, Nos. 7713-7731, and Digest Supps.

Cases referred to:

- (1) *Rabbitt v. Grant*, [1940] I.R. 323; 2nd Digest Supp.
- (2) *Strood Estates Co., Ltd. v. Gregory*, [1936] 2 All E.R. 355; [1936] 2 K.B. 605; 105 L.J.K.B. 726; 155 L.T. 82; *affd.* H.L. [1937] 3 All E.R. 656; [1938] A.C. 118; 106 L.J.K.B. 752; 157 L.T. 338; 31 Digest, Replacement, 667, 7660.

APPEAL by the landlord against an order made by His Honour JUDGE SIR GERALD HURST, K.C., at Croydon County Court on Oct. 10, 1951, in an action brought by the landlord against the tenants of premises owned by him.

The premises were a dwelling-house to which the Rent Restrictions Acts applied, and the landlord's claim was in respect of what he alleged to be a permitted increase in the rent of the premises on the ground that he had incurred expenditure on their "improvement" (consisting of a reconstruction of the flooring on the ground floor), within s. 2 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The tenants denied that the work

had resulted in an "improvement" within para. (a), and said that it was done merely to abate a statutory nuisance. The learned judge held that, in view of the exclusion from the operation of para. (a) of expenditure on repairs, work which could be described as "repairs" could not constitute "improvement" within the paragraph, that the work in question could be described as "repairs", and, therefore, that the landlord could not recover the increased rent. The landlord appealed.

I. C. Baillieu for the landlord.

D. C. Humphreys for the tenants.

SIR RAYMOND EVERSHED, M.R.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J.: This is an appeal from the judgment of JUDGE SIR GERALD HURST, K.C., at Croydon County Court, dismissing a claim by a landlord to be entitled to add to the standard rent of premises the statutory eight per cent. increase based on the amount of his (the landlord's) expenditure on improvements to the premises. The sole issue is whether, on the true construction of the relevant provisions of the Rent Restrictions Acts, this expenditure, having regard to the nature of the work done, was an expenditure qualifying for the statutory increase.

The relevant provisions are to be found in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2 (1), as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) and sched. I, which provides:

"The amount by which the increased rent of a dwelling-house to which this Act applies may exceed the standard rent shall . . . be as follows, that is to say:—(a) Where the landlord has since [Sept. 2, 1939] incurred, or hereafter incurs, expenditure on the improvement or structural alteration of the dwelling-house (not including expenditure on decoration or repairs), an amount calculated at a rate per annum not exceeding eight per cent. of the amount so expended: Provided that the tenant may apply to the county court for an order suspending or reducing such increase on the ground that such expenditure is or was unnecessary in whole or in part, and the court may make an order accordingly."

Reference should also be made to the definition of "repairs" contained in s. 2 (5) of the Act of 1920, which is in these terms:

"For the purposes of this section, the expression 'repairs' means any repairs required for the purpose of keeping premises in good and tenantable repair . . ."

Reading s. 2 (1) (a) in its amended form in the light of that definition, it provides that where the landlord has, since the date mentioned, incurred, or hereafter incurs, expenditure on the improvement or structural alteration of the dwelling-house, not including expenditure on decorations or on any repairs required for the purpose of keeping the premises in good and tenantable repair, then the statutory percentage may be added to the rent, with the proviso already referred to under which the tenant may object to the increase on the ground that the expenditure in question on improvements or structural alterations is or was unnecessary.

The tenancy in the present case comprises the ground floor of No. 210 Rowan Road, Mitcham. The system of construction of the floor of that part of the house appears to have been this. There was a layer of concrete on which wooden joists were laid, and the floor was laid over and secured to those joists in the usual way. The result of that method of construction was that there was a cavity between the surface of the concrete and the under-side of the floor. That method was, apparently, considered adequate in view of the condition of the ground obtaining at the time when the house was built, but, for reasons

not satisfactorily explained, it appears that the land in this vicinity has of comparatively recent years tended to become waterlogged through, it is suggested, a rise, for some reason or other, in the water level, or water table (as I believe it is usually called), in the land. The effect of that has been that water has seeped through the lower part of the walls of the house, found its way into the cavity between the concrete substratum and the under-side of the wooden floor, and resulted in rotting of the floor. This condition of the floor and the cavity beneath it was considered by the sanitary authority as amounting to a nuisance within the meaning of the relevant public health legislation, and the landlord was anxious to do what was necessary to put the matter right. A formal notice to abate the nuisance was served, but it seems that there was a certain amount of co-operation between the local authority and the landlord inasmuch as the service of such a notice would facilitate the obtaining of the necessary licence.

The work required by the notice, which was dated Nov. 3, 1950, was described in concert with the landlord in the sense that the work it required was the work that he himself regarded, or his technical advisers regarded, as the proper way of getting rid of the trouble. The relevant part of the work, as shortly described in the notice, was this: "Lay concrete over existing site to raise site by approximately nine inches. Re-build sleeper walls, re-fix joists and plates, re-lay flooring and re-fix skirtings, door frames, etc." The necessary licence having been duly obtained, the work was done. It involved the laying of a further layer of concrete over the existing concrete, raising the surface of the concrete bed by a matter of nine inches. The surface so raised having been appropriately treated, a tiled floor was laid directly on it in the place of the original wooden floor. The question now is whether any part of the expenditure incurred on this work, and, if so, how much, ranks for the statutory percentage. The matter has been dealt with before us as a question of principle, and I understand it is, in effect, agreed between the parties that, in the event of the appeal succeeding, the appropriate calculation should be made so as to allow the statutory percentage on the cost of laying the addition to the concrete bed under the house, with a proper allowance for the cost of providing the tiled flooring, which for this purpose can be regarded as a replacement of, or as a substitute for, the old wooden flooring.

The judge in his judgment, after stating the facts, said:

"Speaking in the popular sense, I should have no hesitation in saying that the expenditure had been incurred in relation to 'improvements' . . . but that is not the issue I have got to decide. I have to decide whether such improvements are distinct from 'repairs', and in order to arrive at a true view whether such distinction can be made I am governed by authority . . . In the present case, I think it was implicit in the service of the sanitary inspector's notice that the existing dampness of the floor prevented these premises from being described as being in good and tenantable repair . . . In my view, I am governed by the decision in *Rabbitt v. Grant* (1). In that case a sanitary notice had been served and as a result the inadequate earth privy was superseded by a modern water-closet. In the present case I think a defective flooring has been superseded by an efficient floor, and although it is obviously a very great 'improvement' in the premises, the fact that it is also aptly describable as a repair of a bad system of flooring in order to make a defective flooring usable and the premises habitable prevents the plaintiff, in my view, from claiming the benefit of the eight per cent. increased rent. Against this I have been referred to the case of *Strood Estates Co., Ltd. v. Gregory* (2) in the Court of Appeal, a decision in which the works related, according to SIR BOYD MERRIMAN, P., to the substitution of modern drainage to the satisfaction of the local authority, and that seems very similar to what has happened in the present case."

Then the judge referred to the circumstance that there had been no sanitary notice served in *Strood Estates Co., Ltd. v. Gregory* (2) and to the absence from

the report of any details about the work done in that case, and he continued:

"I feel however that the case before the Irish courts is one which is so closely analogous to the present that it would be dangerous for this court to go behind it to the earlier decision in the Court of Appeal."

A It was suggested on behalf of the tenants that the judge should be understood to have found as a fact that, although the expenditure had been incurred in relation to "improvement" in the popular sense of that expression, nevertheless the work in question also answered the description of "repairs", and, that that being so, on the facts the expenditure was not within the section. I cannot read the judgment as involving a finding of fact to that effect. Looked at as a whole I think it comes to this, that, if the matter had been free from authority, B the judge would have been disposed himself to find on the facts that the work here done did amount to an "improvement" in the ordinary, popular, sense of that expression, but he felt himself constrained by the authority of *Rabbitt v. Grant* (1) to hold that the expenditure in question was also an expenditure on repairs, and that, therefore, the landlord was excluded from the benefit of the statute. Accordingly, I think the question raised before us can properly be C described as a question of law—that is to say, whether, on the facts of this case and the true construction of the relevant statutory provisions, this expenditure or some part of it was expenditure on the improvement or structural alteration of the dwelling-house as distinct from expenditure on repairs, within the meaning of the exception contained in s. 2 (1) (a) of the Act of 1920 as amended by the Act of 1939.

D Counsel for the landlord put his case on the construction of the section in this way. He said that he had got to show an expenditure on an improvement or structural alteration, and that he claimed to have shown for there is no doubt that the floor, as it stands at present, with its solid foundation, is a much better floor than the house ever had before. He then pointed out that, if the phrase "not including expenditure on decoration or repairs" is read in conjunction with the definition of "repairs", it is found that what is excepted is expenditure E on any repairs—not, he it observed, on any work of any kind—required for the purpose of keeping the premises in good and tenantable repair. He thus meets the judge's decision so far as it is based on the view that with the floor as it was before the work was done the premises could not be described as being in good and tenantable repair. He says that the mere fact that work is necessary F to put premises into good and tenantable repair does not conclude the matter against him, for "repairs", by definition, means repairs required for the purpose of keeping the premises in good and tenantable repair, and there may well be work required for that purpose which, however, does not fairly answer the description of "repairs", as, for instance, where, for the purpose of making a structure, originally defectively designed, a structure in good and tenantable G repair, it is necessary to make structural alterations and improvements, in the sense of making an addition or alteration to the premises which does not merely restore the premises to a condition approximating to the condition that they were in when new, but does make the premises in some way better in kind than they ever were before. The other point of construction taken on the landlord's side is to be found in the proviso to s. 2 (1) (a) of the Act of 1920:

H "Provided that the tenant may apply to the county court for an order . . . on the ground that such expenditure is or was unnecessary . . ."

That implies that there must be some improvements or structural alterations which can be made to a dwelling-house which are necessary, and thus supports the view that an improvement or structural alteration is not necessarily ruled out from ranking for the statutory percentage merely because it can be described as a necessary improvement or structural alteration, e.g., as being required for keeping the premises in good and tenantable repair or making them fit for

human habitation. To hold otherwise, it is pointed out, might lead to the result that no improvement or alteration could ever rank for the percentage, because, if it was required for the purpose of keeping the premises in good and tenable repair, it would be a repair, and, therefore, would be excluded from the benefit of the section, whereas, if it did something more than that, the tenant might raise an objection on the ground that the work was "unnecessary". In *Strood Estates Co., Ltd. v. Gregory* (2) the landlord had incurred expenditure in substituting a modern system of drainage for an old and antiquated system, and the question was whether that expenditure ranked for the statutory percentage by way of increase of rent, and it was held by SIR BOYD MERRIMAN, P., who delivered the judgment of the court, that the expenditure in question did so rank. There had been no sanitary notice served in that case, but it does seem that evidence had been given by the chief sanitary inspector that the houses before the work was done were not in all respects fit for habitation in accordance with the Housing Act, 1925, s. 1. The argument took a different course from the argument before us, but it does to some extent assist the present landlord's contention. The argument in *Strood Estates Co., Ltd. v. Gregory* (2) was that under s. 1 of the Housing Act, 1925, there was to be implied in the contract of letting an undertaking that the house would be kept by the landlord during the tenancy in all respects reasonably fit for human habitation. That being an undertaking to be implied in the contract for the letting of houses of a class to which the house in question belonged, it was argued that, inasmuch as, in substituting the new system of drainage, the landlord had done no more than he was obliged to do by this statutory term of the tenancy, he could not claim any right to the increase. SIR BOYD MERRIMAN, P., dealt with that argument mainly by reference to the proviso as to expenditure on unnecessary matters, and he said this ([1936] 2 All E.R. 366):

"As the subject-matter is a dwelling-house, it may, I think, fairly be assumed that in using the word 'unnecessary' the legislature meant that the work in respect of which the expenditure was incurred must be necessary for the purpose for which a dwelling-house is used—namely, for human habitation",

and it was pointed out, in effect, that, if the argument based on s. 1 of the Housing Act was accepted, then no improvement or alteration in circumstances such as those in that case could rank for the statutory percentage of increased rent unless it was necessary in order to make the premises fit for human habitation, and then the claim would be defeated by the Housing Act, 1925, s. 1.

I think that that case does assist the landlord, as showing that, at all events, the necessity or otherwise of work from the point of view of making premises fit for habitation does not necessarily govern the question whether the expenditure is expenditure on an improvement or structural alteration ranking for the increase. In *Rabbitt v. Grant* (1), followed by the judge, the expenditure was on work consisting of removing an earth privy and substituting for it a modern water-closet, pursuant to a sanitary notice, and the court came to the (to my mind) somewhat surprising conclusion that this was not an improvement in respect of which the increase could be claimed, because it was a repair, inasmuch as it had to be installed in order to put the premises into good and tenable repair, that expression being treated as extending to making the premises fit for human habitation according to modern sanitary standards by the installation of an entirely new and different type of convenience. I need only read a passage from the end of the judgment of SULLIVAN, C.J., where he said ([1940] I.R. 333):

"When this case was first heard we were not satisfied on two points, first, whether or not the earth privy had constituted a nuisance, and, secondly, whether the provision of a water closet in lieu of the privy was necessary for the purpose of putting the premises into good and tenable repair. Those questions have now been answered by the learned judge. He has

found that the earth privy was a nuisance and that the provision of a water closet was necessary for the purpose of putting the premises into good and tenantable repair. Notwithstanding these findings, Mr. Kingsmill Moore on behalf of the appellant asks us to hold that the work done was not repairs but an 'improvement'. But to do so would be, in my opinion, to misinterpret the provisions of s. 8 (1) (a) of the Act. Although the work done may have been an 'improvement' and a 'structural alteration', it was also a 'repair'. To entitle the landlord to an increase in rent it must be established that he has incurred expenditure which was not expenditure on repairs. On the facts as found in this case, the expenditure was on repairs. The question submitted for our decision should therefore be answered in the negative."

Then MURNAGHAN, J., said (*ibid.*, 334):

"The tenant is entitled to have the house maintained in a tenantable condition, and GEOGHEGAN, J., has found that the only way of putting the premises into a tenantable condition was by installing a water closet. This, although a 'structural alteration', is in the circumstances clearly a repair within the meaning of s. 8 of the Act."

I should mention that the statutory provisions referred to in these passages were in all material respects similar to those applicable in the present case. With respect to the learned judges who decided the Irish case, it seems to me that they proceeded on the fallacy that all work required to put the premises into a condition fit for human habitation was necessarily "repairs" within the meaning of the section. That, I think, overlooks the fact that the definition of "repairs" in s. 2 (5) of the Act of 1920 defines that expression as meaning

"repairs required for the purpose of keeping premises in good and tenantable repair . . ."

as distinct from work of any kind, whether in the nature of repairs or not, required to put the premises into a condition fit for human habitation, and I cannot regard the circumstances that before any work was done the premises were not in tenantable repair or not fit for human habitation and that after the work was done they were in such repair and were so fit as necessarily concluding against a landlord the question whether under this section his expenditure, or at all events some part of it, has been expenditure on improvements or structural alterations. The question is one, I think, which must turn very much on the facts of each particular case, and it would, in my view, be wrong for the court to regard the Irish case, itself hardly reconcilable with *Strood Estates Co., Ltd. v. Gregory* (2), as laying down any general principle which ought to be followed here.

Turning again to the facts of the present case in their relation to the relevant statutory provisions, there is no doubt that the landlord has incurred expenditure, and I think he has certainly incurred expenditure on a structural alteration, that is to say, the addition of the further nine inches of concrete. He has also incurred expenditure on what is *prima facie*, according to the ordinary meaning of the word, an "improvement", for on the evidence he has made the house, as regards its substratum and the system of construction of the floor and its foundations, very much better than they ever were before. Is there, then, any sufficient reason for holding that this expenditure is to be excluded from consideration on the ground that it was expenditure on repairs? In my judgment, the answer to that question is that up to a point the totality of the work done was work of repair. The tenant had a floor in the house when he went in, and clearly the house could not be said to be in good tenantable repair after the floor had become rotten. The replacement of a floor of some kind would, I think, therefore, fairly come within the description of "repairs". It would be making good a defect arising from the action of the water underneath the floor which had caused the floor to rot, and to that extent the expenditure, in my view, could not properly

rank for the eight per cent. increase, and it is not contended that it should so rank. The landlord, however, did substantially more than merely provide a new floor. He made a structural alteration and an improvement, consisting of the laying of the additional concrete bed over the existing concrete, and that provided the house with a better substratum than it had ever had before in the shape of a solid concrete bed on which the new floor could be laid direct, thus getting rid of the disadvantage under which the house had laboured from the time it was built, consisting of the cavity beneath the floor into which, under the changed conditions brought about by the rise in water level, water could find its way.

Accordingly, although this is not an easy case, in my view, the appeal should be allowed to the extent that the expenditure on the concrete work should be considered as expenditure on an improvement or structural alteration and not an expenditure on repairs. I assume that the parties will be able to agree the appropriate figure on that principle.

SIR RAYMOND EVERSHERD, M.R.: I am of the same opinion, and I only add some observations of my own because we are differing from the view of the judge and because of the part that *Rabbitt v. Grant* (1) played in his arriving at his conclusion. I have found the case difficult, and certainly it is on its facts unusual, for the question is whether the landlord can claim the benefit of s. 2 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, in respect of the cost incurred by him in making what is, undoubtedly, a structural alteration, and is, undoubtedly, in any ordinary sense an improvement, namely, the making of a new concrete sub-structure capable of meeting a new physical condition. I say "a new physical condition" because it seems clear that at some stage since the house was built, and probably since the tenancy started, a change took place in the water level, and it was in order to meet that change that this alteration was made. The judge clearly regarded himself as bound by the authority of *Rabbitt v. Grant* (1), that is to say, bound in the sense that (though the case was an Irish decision) it had an authority from which he should not depart. The basis of the decision of *Rabbitt v. Grant* (1), as I follow it, was that the substitution of a modern water-closet for an earth privy was merely a repair within the meaning of the section, because only by that substitution could the sanitary notice that had been served be satisfied. On that basis the judge felt bound to hold in this case that the building of the new concrete bed and the putting of the new floor on top of it was the only satisfactory way of complying with the notice that had been served. The judge in the circumstances did not go into the question, and there is no finding whether the restoration of the floor alone could have been done without doing this much more substantial work. The difficulties that I feel in accepting the authority of *Rabbitt v. Grant* (1) are, first, that the second finding of fact made by GEOGHEGAN, J., in that case seems to me to be open to objection, for I cannot regard it as a finding of fact, strictly, at all. It involved a decision, which is not a matter of fact, on the effect of the words of the Act "for the purpose of keeping premises in good and tenantable repair". I also feel difficulty in accepting the test which was applied in *Rabbitt v. Grant* (1), namely, that if the work done was the only way, or the only satisfactory way, of satisfying the sanitary notice, notwithstanding any changes in social conditions or in the standards of human habitation, it must be a "repair" only.

The decision in *Strood Estates Co., Ltd. v. Gregory* (2) clearly involves the proposition that the substitution of a modern drainage system for a more antique character of drainage could be an improvement within the section, although in the sense of *Rabbitt v. Grant* (1) it might be the only way of complying with the required standard of habitability; but the particular problem discussed before us was not, so far as I can see, debated in *Strood Estates Co., Ltd. v. Gregory* (2), and so we have to deal with the matter, I think, as *res integra*. In the course of

the argument examples were given showing that what was undoubtedly repair might yet involve some degree of improvement, in the sense of the modern substitute being better than that which had gone before. At the other end of the scale it was also clear that work done to satisfy modern standards, although it might involve restoration, and might be said to be restoration in the *Rabbitt v. Grant* (1) sense, yet clearly would be an improvement. Between the two extremes it seems to me to be largely a matter of degree, which in the ordinary case the county court judge could decide as a matter of fact, applying a common-sense man-of-the-world view. The judge in this case did not do that because he thought he should follow the case of *Rabbitt v. Grant* (1).

I think that the argument of counsel for the tenants, though it has been attractive, comes near to involving the proposition that, if an improvement is not a repair, it must be unnecessary. I am not suggesting that he so argued, still less conceded that that was so, but, as JENKINS, L.J., has pointed out, I think that clearly there must be improvements, in the way of structural alterations or otherwise, which are necessary, but which cannot satisfactorily be regarded as merely "repairs" within the meaning of the definition. I think, on the whole, that this is such a case, and I, therefore, agree that this appeal should be allowed.

HODSON, L.J.: Although we are differing from the judge, I agree so fully with the conclusion at which JENKINS, L.J., has arrived, and with the reasons that he has given, that I will add nothing except that I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Blundell, Baker & Co.* (for the landlord); *Copley Singleton & Billson* (for the tenants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

MASLIN v. MASLIN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Havers, J.), February 4, 6, 1952.]

Divorce—Condonation—Sexual intercourse—No intention by petitioner to effect reconciliation.

In 1947 the wife deserted the husband, and thereafter, whenever he visited her, she received him with rudeness and abuse and affirmed her refusal to return to him. On Mar. 26, 1951, however, she invited him to visit her and received him cordially. On this and subsequent occasions she asked him to live with her again, but he replied that he needed time to think it over. On Apr. 3, 1951, at the wife's invitation the husband stayed the night with her and "reluctantly gave in" to her and had sexual intercourse. On the following day he told her that he would not agree to live with her again. On the husband's petition for divorce on the ground of desertion,

HELD: the fact that the husband had sexual intercourse with the wife with full knowledge of her offence of desertion constituted condonation of that offence, it being immaterial that the husband did not have the intercourse with the express object of effecting a reconciliation.

AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-682, paras. 1004-1009; and FOR CASES, see DIGEST, Vol. 27, pp. 339, 340, Nos. 3184-3203, and Digest Supp.

Cases referred to:

- (1) *Henderson v. Henderson & Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 2nd Digest Supp.
- (2) *Roberts v. Roberts & Temple*, (1917), 117 L.T. 157; 27 Digest 339, 3182.

- (3) *Cramp v. Cramp & Freeman*, [1920] P. 158; 89 L.J.P. 119; 123 L.T. 141; 27 Digest 338, 3179.
- (4) *Edgington v. Fitzmaurice*, (1884), 29 Ch.D. 459; 53 L.T. 369; *affd.*, C.A., 29 Ch.D. 476; 35 Digest 32, 240.
- (5) *Viney v. Viney*, [1951] 2 All E.R. 204; [1951] P. 457; 115 J.P. 397.

UNDEFENDED PETITION by the husband for divorce on the ground of desertion.

During the desertion there had been one act of sexual intercourse between the parties, but it was contended for the husband that this did not amount to condonation since (i) he did not have intercourse with the express object of effecting a reconciliation, and (ii) the intercourse had been induced by a false and fraudulent misrepresentation of fact by the wife.

Victor Russell for the husband.

Cur. adv. vult.

Feb. 6. **HAVERS, J.:** This was a husband's petition for divorce on the ground of desertion. The suit was undefended, but in the course of the evidence a question arose to which counsel for the husband thought the attention of the court should be directed. Therefore, I reserved my judgment so that I might analyse the evidence in the light of the authorities.

The parties were married on July 29, 1939, and lived together at various places. The marriage was reasonably happy until the husband was demobilised in December, 1945. Shortly after that date, his wife's attitude changed entirely. She became very quarrelsome and hysterical, and her temper was very bad. She used to throw things at her husband and lock food away from him. In July, 1947, she left him and never returned. I am satisfied that she then deserted her husband and that that desertion continued until an occasion in April, 1951, when he had sexual intercourse with her.

[HIS LORDSHIP said that the husband called to see his wife on a number of occasions, but she was rude and abusive, and when he asked her to return to him she said she would never do so. After the husband had filed his petition, on several occasions the wife asked him to go and see her, and, when he did so, she asked him to stop the night, which he refused to do. On Apr. 3, 1951, however, which was the wife's birthday, at her request he took her out. He saw her home and she asked him to stay the night. He did so. When the parties went to bed the wife started to make love to him and he reluctantly gave in and had connexion with her. He said in evidence that he had not then made up his mind whether he would go back to her.]

HIS LORDSHIP continued: Therefore, it is beyond dispute that on that occasion the husband, who had full knowledge of the matrimonial offence of desertion which his wife had committed, did have sexual intercourse with her. The next morning when they were sitting down to breakfast, the wife said: "I do not need your answer now, I have got it." The husband said he did not see how she had got his answer. Later that day, when he had finished his work, he went to see her again, and he said that, on thinking things over, he did not think that they would be happy together. The wife flew into a temper and said they could both go their own ways and have separate beds. She called him a "dirty rat" and wanted him to stay the night. He refused, and she then cried and became hysterical. He said his wife's crying upset him and he did stay the night. He got into bed with her. She started to make love to him again, but he refused to have anything to do with her. On Apr. 6 he wrote a letter to her saying that he could not agree to live with her again, even if they went their own ways as she had suggested.

It has been laid down in *Henderson v. Henderson & Crellin* (1), that sexual intercourse is a condonation of the wife's adultery unless she induced it by a fraudulent mis-statement of fact. VISCOUNT SIMON, L.C., who delivered the leading opinion, said ([1944] 1 All E.R. 45):

"The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of

the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place. But where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect. The exception is that, if the intercourse was induced by a fraudulent mis-statement of fact by the wife, that circumstance will prevent the husband's actions from having the effect of condonation, for example, in *Roberts v. Roberts & Temple* (2), where the husband petitioned for a dissolution of his marriage on the ground of the wife's adultery and it appeared that she had confessed the adultery but had denied, in answer to his question, that she was pregnant in consequence of it, whereupon the husband forgave her and had marital relations with her. It was held by HILL, J., that, since the wife knew she was pregnant and had induced the acts of her husband by false and fraudulent statements, he had not condoned her adultery and was entitled to his decree. I think this decision was right and the view subsequently expressed by McCARDIE, J., in *Cramp v. Cramp & Freeman* (3), should not be understood to cover the exceptional case where the guilty party has made a deliberately false statement and has thereby brought about a situation which would otherwise have been proof of condonation."

Towards the end of his speech where VISCOUNT SIMON, L.C., is dealing with the nature of condonation, he said (*ibid.*, 46):

"Condonation is not a contract at all; it is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated. The result might be different if it could be shown that the husband's forgiveness and taking back of his wife was procured by the wife deliberately misrepresenting her true state of mind, for, as BOWEN, L.J., said in a well-known passage, the state of a person's mind, when it can be definitely ascertained, may be as much a fact as the state of his digestion (*Edgington v. Fitzmaurice* (4), 29 Ch.D. 483)."

Counsel for the husband particularly relied on that passage.

The application of this principle was further considered by the Divisional Court in *Viney v. Viney* (5), where the learned President, dealing with *Henderson v. Henderson & Crellin* (1), said ([1951] 2 All E.R. 208):

"LORD SIMON said . . . there may be a reinstatement without sexual intercourse, but, as against the husband, if there is sexual intercourse and no fraud, that is conclusive of the fact that the husband has confirmed his forgiveness by reinstating his wife as his wife."

I happened to be a member of that court and I expressed complete concurrence in the judgment of LORD MERRIMAN, P., on that issue.

The first point taken by counsel for the husband in the present case was that the husband did not have sexual intercourse with his wife with the express object of trying to effect a reconciliation, and it was contended that that fact distinguished this case from *Henderson v. Henderson & Crellin* (1) and *Viney v. Viney* (5). It seems to me that the intent which the husband has at the time he has sexual intercourse with his wife, he having full knowledge of her matrimonial offence, is completely immaterial. It is the fact that he has sexual intercourse with the wife which, in my view, constitutes condonation, he having full knowledge of her matrimonial offence.

The main contention put forward by counsel for the husband was that, accepting the principle laid down in *Henderson v. Henderson & Crellin* (1), on the facts of this case I ought to hold that the wife had induced the husband to have sexual intercourse with her by a false and fraudulent misrepresentation of fact. I invited counsel to point to any specific representation made by the wife which was false and fraudulent and he was unable to do so, but he contended that, looking at the whole of the statements made by the wife and her conduct prior to the act of sexual intercourse taking place, the wife was representing that she had a genuine desire and intention to live again with her husband as his wife. He contended that that intention was not genuine, that she never had any such intention, and that the only intention she had in her mind was to try to procure some more money from him and possibly also to frustrate the divorce proceedings which he was contemplating. Even assuming that the wife did make such a representation, I am unable to hold that it was false and fraudulent. Counsel relied on the statement which the wife made to the husband the morning after they had slept together: "I do not need your answer now. I have got it". He urged that that showed that the wife's intention was not a genuine intention to live with her husband again as his wife. I find myself unable to accept that as satisfactory evidence of the falseness of the wife's representation. I have to be satisfied not only that the wife made a false and fraudulent statement, but that the husband was thereby induced to have sexual intercourse with his wife. I am quite unable to come to any such conclusion. In my view, the wife was not appealing to the mind of the husband, trying to convince him in that way by means of a representation which was false. Her appeal was to his senses. On the evidence I am unable to find that the husband was induced by any false representation to have sexual intercourse with his wife.

Petition dismissed.

Solicitor: *E. F. Iwi* (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

R. v. MANCHESTER LEGAL AID COMMITTEE.

Ex parte R. A. BRAND & CO., LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.), February 4, 5, 14, 1952.]

Certiorari—Legal aid—Decision of local committee granting certificate—Excess of jurisdiction.

Legal Aid—Assisted person—Trustee in bankruptcy—Legal Aid and Advice Act, 1949 (c. 51), s. 2 (1)—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 4 (1) (3).

A local committee under the Legal Aid (General) Regulations, 1950, granted a civil aid certificate to a trustee in bankruptcy in order that he might appear as and for the plaintiff in a High Court action which had been commenced by the bankrupt against the applicants, a previous certificate granted to the bankrupt having been revoked by the committee on his bankruptcy. The National Assistance Board and the committee considered only the financial circumstances of the bankrupt and took no account of the fact that the trustee was an accountant with a disposable income in excess of £420 per year, the statutory limit imposed by the Legal Aid and Advice Act, 1949, s. 2 (1). On an application by the applicants for an order of certiorari to quash the legal aid certificate on the ground that the committee had exceeded their jurisdiction,

HELD: (i) under the Legal Aid (General) Regulations, 1950, reg. 4 (1), it was a condition precedent to the grant of a certificate that there should

have been a determination by the National Assistance Board of the disposable income and capital of the person applying for the certificate; a trustee in bankruptcy, *vis-à-vis* his opponent, was personally liable for costs; no determination under reg. 4 (1) had been made in regard to the trustee's disposable income or capital, but only in regard to that of the bankrupt; the provisions of reg. 4 (3) were not in substitution for those of reg. 4 (1), but, in the case of a trustee or other person mentioned in the paragraph, they imposed a further condition precedent to the grant of a certificate; and, therefore, the committee had exceeded their jurisdiction.

(ii) the local committee, a body of persons having legal authority to determine questions affecting the rights of subjects, had a duty to act judicially; the applicants, as persons who had incurred the risks inherent in having to defend an action brought by a person who had been granted legal aid, were "persons aggrieved"; and, therefore, an order for certiorari would be granted.

Observations of ATKIN, L.J., in *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* ([1924] 1 K.B. 205), applied.

AS FOR GROUNDS FOR CERTIORARI TO QUASH, see HALSBURY, Hailsham Edn., Vol. 9, pp. 880-889, paras. 1484-1493; and FOR CASES, see DIGEST, Vol. 16, pp. 417-431, Nos. 2763-2918, and Digest Supps.

Cases referred to:

- (1) *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; Digest Supp.
- (2) *R. v. London County Council. Ex p. Entertainments Protection Asscn., Ltd.*, [1931] 2 K.B. 215; 100 L.J.K.B. 760; 144 L.T. 464; 95 J.P. 89; Digest Supp.
- (3) *R. v. Minister of Health. Ex p. Davis*, [1929] 1 K.B. 619; 98 L.J.K.B. 636; 141 L.T. 6; 93 J.P. 49; Digest Supp.
- (4) *R. v. Woodhouse*, [1906] 2 K.B. 501; 75 L.J.K.B. 745; 95 L.T. 367, 399; 70 J.P. 485; *revsd. sub nom., Leeds Corpn. v. Ryder*, [1907] A.C. 420; 76 L.J.K.B. 1032; 97 L.T. 261; 71 J.P. 484; 16 Digest 398, 2421.
- (5) *Errington v. Minister of Health*, [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 154; 99 J.P. 15; Digest Supp.
- (6) *Board of Education v. Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 19 Digest 602, 290.
- (7) *R. v. Saunders*, (1854), 3 E. & B. 763; 24 L.J.M.C. 45; 23 L.T.O.S. 157; 18 J.P. 584; 118 E.R. 1327; 33 Digest 110, 739.
- (8) *Sharp v. Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 30 Digest, Replacement, 12, 51.
- (9) *R. v. Postmaster-General. Ex p. Carmichael*, [1928] 1 K.B. 291; 96 L.J.K.B. 347; 137 L.T. 26; 91 J.P. 43; 21 B.W.C.C. 226; Digest Supp.
- (10) *R. v. Boycott. Ex p. Keasley*, [1939] 2 All E.R. 626; [1939] 2 K.B. 651; 108 L.J.K.B. 657; Digest Supp.
- (11) *R. v. Coles*, (1845), 8 Q.B. 75; 15 L.J.M.C. 10; 6 L.T.O.S. 120; 10 J.P. 105; 115 E.R. 802; 16 Digest 413, 2725.
- (12) *R. v. White*, (1883), 11 Q.B.D. 309; *revsd. C.A.* (1884) 14 Q.B.D. 358; 52 L.T. 116; 49 J.P. 294; *sub nom. R. v. Sibly*, 54 L.J.M.C. 23; 38 Digest 591, 1222.
- (13) *Local Government Board v. Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 38 Digest 97, 708.
- (14) *R. v. Brighton & Area Rent Tribunal. Ex p. Marine Parade Estates (1936), Ltd.*, [1950] 1 All E.R. 946; [1950] 2 K.B. 410; 114 J.P. 242; 2nd Digest Supp.

- (15) *Franklin v. Minister of Town & Country Planning*, [1947] 2 All E.R. 289; [1948] A.C. 87; [1947] L.J.R. 1440; 111 J.P. 497; 2nd Digest Supp.
- (16) *R. v. Richmond Confirming Authority. Ex p. Howitt*, [1921] 1 K.B. 248; 90 L.J.K.B. 413; 124 L.T. 345; 85 J.P. 84; 16 Digest 459, 3340.
- (17) *R. v. Nicholson*, [1899] 2 Q.B. 455; 68 L.J.Q.B. 1034; 81 L.T. 257; 64 J.P. 388; 16 Digest 459, 3338.
- (18) *R. v. Surrey JJ.*, (1870), L.R. 5 Q.B. 466; 39 L.J.M.C. 145; 34 J.P. 614; 16 Digest 422, 2822. A
- (19) *Greenwood v. Sketcher*, [1951] 1 All E.R. 750.

MOTION for certiorari to bring up and quash a civil aid certificate dated Mar. 22, 1951, entitling a trustee in bankruptcy to legal aid in connection with proceedings in the Queen's Bench Division instituted by the bankrupt and continued by the trustee in that capacity against the applicants. It was contended for the applicants that the local legal aid committee had no power to grant the certificate because there had not been any determination of the financial position of the trustee but only of the means of the bankrupt. The committee contended that their proceedings were not subject to certiorari because they acted in an administrative and not a judicial capacity, and also that the applicants were not aggrieved persons. B

Sir Hartley Shawcross, Q.C., and *Caplan* for the applicants.

Salmon, Q.C., and *Cumming-Bruce* for the Legal Aid Committee.

N. Lawson for the trustee in bankruptcy.

J. P. Ashworth for the National Assistance Board. C

Cur. adv. vult. D

Feb. 14. **PARKER, J.**, read the following judgment of the court. In this case counsel moves on behalf of the applicants, *R. A. Brand & Co., Ltd.*, for an order of certiorari to remove into this court and to quash a civil aid certificate dated Mar. 22, 1951, entitling one Frank Higginson Walsh to legal aid under Part I of the Legal Aid and Advice Act, 1949, in connection with proceedings in the Queen's Bench Division continued by him as trustee in bankruptcy of one Leonard Brooks, carrying on business as *L. Brooks & Company*, against the said applicants. E

The facts leading up to the granting of this certificate can be stated shortly as follows. Brooks was in business as a photographic and film processor, and in 1948 he agreed to purchase from the applicants large quantities of paper for backing films. On Nov. 17, 1948, a balance of some £343 was due to the applicants in respect of paper delivered and the applicants issued a writ claiming that amount. On Dec. 20, 1948, Brooks delivered a defence, and on Nov. 24, 1949, he delivered an amended defence and counterclaimed some £6,000 as damages on the ground that the paper delivered from time to time had proved unfit. On Mar. 8, 1950, the case came on for trial, by consent the counterclaim was withdrawn without prejudice to the bringing of a fresh action, and judgment was given on the claim. That judgment was not satisfied, and, on Apr. 11, 1950, a bankruptcy notice was served. On Apr. 13, 1950, Brooks issued a writ claiming damages for breach of contract and warranty in connection with the paper delivered, and by the statement of claim, delivered on June 30, 1950, he formulated a claim to damages in a sum of £9,233. On July 31, 1950, the Divisional Court in Bankruptcy stayed proceedings on the bankruptcy notice on the debtor undertaking to prosecute the action and paying the sum of £300 to a stake holder by Oct. 3, 1950. This was not done and, on Nov. 22, 1950, Leonard Brooks was adjudicated bankrupt and the trustee became his trustee in bankruptcy. F

The position with regard to the estate was that, apart from the bankrupt's claim against the applicants and sundry small book debts amounting in the aggregate to about £9,260, there were assets of about £274 as against liabilities G H

of about £3,340. The main creditors were South London Press Pictures (£1,200), in respect of the processing of the paper; the applicants (£354), in respect of the judgment; Edwin Brooks (£300), a relative, in respect of a loan; Williams Deacons Bank, Ltd. (£504), in respect of a loan against security; and Alec Barker (£673), a solicitor, in respect of costs. Assuming, therefore, as we do for the purposes of this motion, that the bankrupt's claim against the applicants was worth some £9,000, that sum, if recovered, would enure as to £3,340 for the benefit of the creditors and as to about £6,000 for the benefit of the bankrupt. About the time of the bankruptcy Brooks had applied for legal aid, and, on Nov. 24, 1950—two days after the adjudication—he was granted a certificate of legal aid. On Dec. 18, 1950, this certificate was discharged at the instance of the bankrupt, his claim being then vested in his trustee in bankruptcy. Thereafter the trustee consulted the creditors with a view to getting an indemnity against costs in the event of his continuing the action against the applicants. The creditors were, however, not willing to give him an indemnity, and he conceived the idea of seeking to obtain legal aid himself.

The relevant provisions with regard to the obtaining of legal aid are as follows. By s. 1 (6) of the Legal Aid and Advice Act, 1949, it is provided:

“A person shall not be given legal aid in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto, and may also be refused legal aid if it appears unreasonable that he should receive it in the particular circumstances of the case.”

By s. 2 (1) it is provided:

“Subject to this Part of this Act, legal aid shall be available for any person whose disposable income does not exceed £420 a year: Provided that a person may be refused legal aid if he has a disposable capital of more than £500 and it appears that he can afford to proceed without legal aid.”

By s. 4 (6) it is provided:

“Subject to the provisions of this section, a person's disposable income and disposable capital, and the maximum amount of his contribution to the legal aid fund in respect of any proceedings, shall be determined by the National Assistance Board, and the board may call attention to any special circumstances affecting the maximum amount of the lump sum and periodical payments which he could reasonably make on account of any contributions.”

By s. 8 (1), (3), (8) and (9), it is provided:

“(1) Subject to this Part of this Act, it shall be the responsibility of the Law Society to make arrangements, in accordance with a scheme made by them with the approval of the Lord Chancellor and with the concurrence of the Treasury, for securing that legal aid and legal advice are available as required by this Part of this Act and generally to administer this Part of this Act. (3) The functions of the Law Society under this Part of this Act may be performed by the Council of the Law Society in general consultation with the General Council of the Bar on matters of policy or by any committee of the Council of the Law Society or by any committee set up by a scheme under this section. (8) Subject to this Part of this Act, a scheme under this section may include provisions as to the persons by whom and manner in which questions arising in the administration of this Part of this Act are to be determined and as to any other matters incidental to the administration thereof. (9) The Law Society shall exercise their functions under this Part of this Act under the general guidance of the Lord Chancellor, and as soon as possible after the end of any financial year shall make an annual report to him on the operation and finance of this Part of this Act during that year.”

In pursuance of the Act, a scheme known as the "Legal Aid Scheme, 1950", was duly prepared and approved, and under that scheme the country was divided into areas and an area committee was set up in respect of each area, and each such committee appointed local committees within that area. By the Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 3, made under the said Act, it was provided:

"(1) Any person desiring legal aid may apply for a certificate—(a) if resident in England or Wales, to any local committee; and (b) if resident elsewhere, to the local committee for London. (2) Every application shall be made in writing, on a form approved by the Law Society, or in such other manner, being in writing, as the secretary of the local committee may accept as sufficient in the circumstances of the case and shall be lodged with the secretary of the local committee. (3) Every application shall contain such information and shall be accompanied by such documents as may be requisite to enable—(a) a local committee to determine—(i) the nature of the proceedings in relation to which legal aid is sought and the circumstances in which legal aid is required; and (ii) the question whether it is reasonable that a certificate should be granted; and (b) the [National Assistance Board] to determine the disposable income and disposable capital of the applicant, for which purpose the applicant shall undertake to furnish the board with such further information as they may require in the circumstances of the case".

By reg. 4 (1) it is provided:

"Subject to the provisions of reg. 10, an application for a certificate shall not be approved, except after consideration by a local committee of the general circumstances in which it is made, including questions of fact or law arising out of any proceedings to which the application relates, nor, except as is provided by para. (3) of reg. 5, shall any application be approved except after determination by the board of the disposable income and disposable capital . . ."

The trustee in bankruptcy, accordingly, completed the approved form of application for a civil aid certificate to take proceedings (Form A.1) and sent it to the local committee. The whole form was not produced before us, but, as we understand the matter, the statement formed, or was intended to form, Part III of the form. Part IV of the form, the part to be sent on by the local committee to the National Assistance Board, was produced at the hearing. It is headed: "Statement of financial circumstances of an applicant for a civil aid certificate". Then there is set out the name and address of the trustee in bankruptcy and his occupation as chartered accountant, and then, in answer to the question: "Have you any persons dependent upon you?", he says: "I am trustee in bankruptcy of the estate of Leonard Brooks". Thereafter, in answer to the questions as to the persons living with him, the rent that he pays, whether he or his wife owns the house, as to his annual income, and as to his savings, he answers with the initials "N.A." (not applicable). Finally, in answer to the question whether there is any additional information affecting his financial circumstances, he says: "The only material financial circumstances are those of the bankrupt, to whom a civil aid certificate was granted prior to adjudication."

A study of this statement and Part IV shows, and, indeed, it is admitted, that both the trustee in bankruptcy and the local committee took the view, perfectly bona fide no doubt, that in the case of a trustee in bankruptcy his own disposable income was quite irrelevant and that it was the disposable income of the bankrupt which alone was relevant, if, indeed, in the case of a trustee the limit of disposable income applied. What the local committee appear to have overlooked was that a trustee in bankruptcy is, *vis-à-vis* his opponent, personally liable for costs like any other litigant. Accordingly, the local committee passed on Part IV

of the form to the board, who, in turn, took the same view and determined the disposable income of the trustee in bankruptcy as trustee and his maximum contribution to the Legal Aid Fund as "nil". Thereupon, the local committee, having considered the application and the board's determination, on Mar. 22, 1951, issued a certificate. This certificate reads as follows:

"This is to certify that Frank Higginson Walsh, hereinafter called 'the assisted person', is entitled, in accordance with the Legal Aid and Advice Act, 1949, and the regulations and scheme made thereunder, to legal aid as plaintiff in connection with the following proceedings, . . . This is further to certify that (1) the assisted person's solicitor is Alec Barker, Esq; (2) the National Assistance Board have determined the assisted person's disposable income as nil, his disposable capital as nil, and his maximum contribution as nil; (3) the local committee have assessed the assisted person's contribution at nil."

As a result, on June 16, 1951, notice was given to the applicants' solicitors that a civil aid certificate dated Mar. 22, 1951, had been issued to the trustee in bankruptcy in connection with the proceedings against the applicants. They were not unnaturally somewhat surprised that legal aid had been granted to an eminent accountant whose disposable income was clearly in excess of £420 a year, and these proceedings were instituted alleging that in granting the certificate the local committee had exceeded its jurisdiction, that they (the applicants) were persons aggrieved, and praying that the certificate should be quashed.

Accordingly, the first question which arises is whether the local committee exceeded their jurisdiction. *Prima facie* they did, since it is, under reg. 4 (1) of the Legal Aid (General) Regulations, a condition precedent to the grant of a certificate that there shall have been a "determination by the board of the disposable income and disposable capital of the applicant", and it is conceded that the board have not made any such determination in regard to the applicant's disposable income or capital, but have made a determination in regard to disposable income and capital of the bankrupt. It was faintly argued that the board were entitled to do this by reason of the Legal Aid (Assessment of Resources) Regulations, 1950 (S.I., 1950, No. 1358), sched. I, Part I, para. 9, and sched. II, Part I, para. 16, which enable the board in special circumstances to adjust the amount of income or capital calculated in accordance with the schedule in such way as may be appropriate in those circumstances. In our view, however, those paragraphs cannot enable the board in effect to substitute the bankrupt's income and capital for that of the applicant.

It was further faintly argued that by reason of reg. 4 (3) of the Legal Aid (General) Regulations there was in the case of a trustee in bankruptcy no limitation of income above which legal aid could not be granted. That regulation provides:

"Where an application for a certificate is made by a trustee, executor, administrator or other person in circumstances in which, in the opinion of a local committee, a court would order the taxed costs of the proceedings to be paid out of a property, estate or fund, the committee shall not grant the application unless it appears that the property, estate or fund would be so diminished or exhausted by that order as to cause hardship to any person beneficially interested."

It seems to us, however, clear that this provision is not in substitution of an income limit, but is, in the case of a trustee, executor, or administrator, a further condition precedent to the granting of a certificate. Nor can it be validly contended that, since the determination of the board, except in certain events, is final (see reg. 9 (2) of the Legal Aid (Assessment of Resources) Regulations), the local committee were in this case acting within their jurisdiction in granting the certificate. In fact, there has been no valid determination by the board and

the local committee have been privy to the invalidity in themselves passing on Part IV of the application to the board.

The truth of the matter is that at the moment there are no specific provisions dealing with the position of a trustee in bankruptcy in relation to the income test. That a special provision could be made is clear from s. 12 (3) of the Act, where it is provided:

"Regulations may also modify any provision of this Part of this Act so far as appears to the Lord Chancellor necessary to meet the special circumstances where—(a) a person seeking or receiving legal aid or advice . . . (ii) is concerned in a representative, fiduciary or official capacity."

It may be, but this is not a matter for this court, that some special provisions should be made, but at the moment there are none. It follows, therefore, that in the present case the local committee, acting perfectly bona fide and in an attempt to do what seemed right in the peculiar circumstances of this case, have exceeded their jurisdiction.

The next, and, perhaps, the more important question, is whether the local committee is a body against whom the remedy by way of certiorari will lie. It has been urged on us that, if it does not, here is a body (who, in effect, now recognise their mistake) who cannot be controlled by anyone. There is no appeal from them except by an applicant who has been refused a certificate. Further, though reg. 11 of the Legal Aid (Assessment of Resources) Regulations, 1950, enables the board with the consent of the committee to correct a determination by making an amended one, it is by no means clear that any committee can discharge or revoke the existing certificate. Regulation 11 of the Legal Aid (General) Regulations enables an area committee to discharge a certificate, but only in the circumstances there set out, none of which would seem applicable in the present case. While appreciating the force of this contention it does not seem to us that it is a matter which we ought to take into consideration in determining whether certiorari lies against the local committee. Either the remedy is available or it is not, regardless of the odd result which might follow in the latter event. The fact that there is no appeal, other than by an aggrieved applicant, does not of itself make the committee amenable to certiorari.

In considering this question it is sufficient, at any rate in the present case, to start with the principle, so often quoted, of ATKIN, L.J., in *R. v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1) ([1924] 1 K.B. 204):

"The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorised proceedings of the commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrain courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a court of justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Whether or not ATKIN, L.J., was there laying down an exhaustive definition of the bodies against whom certiorari lies it is unnecessary for us to determine and for the purposes of this judgment it is sufficient to assume that the definition is exhaustive. That the local committee was a body of persons having legal authority to determine questions affecting the rights of subjects was admitted and, indeed, is clear. The real contest in the present case is whether they also had the duty to act judicially. It was contended on behalf of the committee that there is no duty to act judicially unless the proceedings are judicial or quasi-judicial proceedings in the sense that there is some form of "lis" and there is a duty to hear both sides. This argument is supported by reference to *R. v. London County Council. Ex p. Entertainments Protection Asscn., Ltd.* (2), where SCRUTTON, L.J., said ([1931] 2 K.B. 233):

"An argument has been addressed to us, supported by a number of dicta in cases where the question was not raised, that this procedure of the Theatres Committee was not in any way a judicial act, but was an administrative act, and that if, in administration, they were doing a thing which they had no power to do, the writ of certiorari was not the proper means of questioning that action of theirs, though it was a usurped jurisdiction. Now in the early days of licensing there have been authorities bearing one way and the other, on the question whether the action of licensing justices is a judicial act, so that certiorari may lie, or is an administrative act, so that certiorari will not lie. The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior court. There has been a great deal of discussion and a large number of cases extending the meaning of 'court'. It is not necessary that it should be a court in the sense in which this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari; and I do not discuss further the nature of the writ, because very elaborate discussions of it will be found in the recent cases of *R. v. Electricity Comrs.* (1) and *R. v. Minister of Health. Ex p. Davis* (3). As far as licensing is concerned, whatever doubts there were in the early stages of the proceedings—and there were many doubts—since the case of *R. v. Woodhouse* (4) it is quite clear that every proceeding of magistrates or confirming authorities in granting new or renewing old licences is in the nature of a court, excess of jurisdiction in which can be dealt with by the writ of certiorari; and the procedures in granting licences under the Cinematograph Act, and proceedings consequential thereon, appear to me to stand exactly on the same footing as the proceedings of magistrates or confirming authorities dealing with licences for public houses."

Reference was also made to *Errington v. Minister of Health* (5), where MAUGHAM, L.J., said ([1935] 1 K.B. 271):

"In determining whether the position of the Minister is that which I have described as being quasi-judicial, I think it is necessary to appreciate that under a clearance area scheme to which objections are made by the owners of the property in the area, there is a true contest as between the owners of the property and the local authority; in other words, there are two sides as between whom the Minister has to come to a determination after consideration. It also has to be borne in mind that the rights of the

householders are being very seriously affected by an order that their houses shall be demolished without compensation. That, of course, must not be pressed too far, but it is a consideration which cannot be neglected."

Again, ROCHE, L.J., said (*ibid.*, 280):

"It is sufficient to say that whereas it is sometimes contended that the principles of natural justice are vague and difficult to ascertain, fortunately the principles of British justice have been authoritatively laid down; and they at all events extend to the assertion of this principle, that where judicial functions, or quasi-judicial functions, have to be exercised by a court or by a board, or any body of persons, it is necessary and essential in the words of LORD LOREBURN in *Board of Education v. Rice* (6), which have already been cited, that they must always give a fair opportunity to those who are parties in the controversy to correct or to contradict any relevant statement prejudicial to their view. In other words those principles of British justice proceed upon the basis that both sides have a right to be heard."

The test contended for on behalf of the committee would, however, appear to be in conflict with a long line of cases. Thus, in *R. v. Saunders* (7), orders of sessions allowing certain expenses were quashed. CROMPTON, J., said (3 E. & B. 778):

"Passing accounts is a judicial act; those who do so ought to examine, and allow or disallow according to law; and, this being a judicial act, and the certiorari not being taken away, we are bound, if it appears that an illegal item has been passed, to grant a certiorari and to quash the illegal allowance."

Again, in *R. v. Woodhouse* (4), it was held that certiorari would lie to bring up and quash an order made by licensing justices. VAUGHAN WILLIAMS, L.J., said ([1906] 2 K.B. 512):

"I ask myself, therefore, the question whether the licensing justices in granting or refusing a licence do a judicial act. In my opinion the grant or refusal of such a licence is a judicial act, and the judgment of LORD HALSBURY in *Sharp v. Wakefield* (8) seems to be an authority for this view; for he says, as appears on p. 179 of the report ([1891] A.C. 173) that 'an extensive power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something has to be done according to the rules of reason and justice, not according to private opinion, according to law, and not humour; it is to be, not arbitrary, vague, and fanciful, but legal and regular'. This view seems to me to be confirmed by old and recent decisions. It is impossible to read under the title 'certiorari' in BURN'S JUSTICE OF THE PEACE the list of the cases in which a writ of certiorari has been granted and the grounds for granting it without seeing that in practice a certiorari has issued in cases in which it is impossible to say that there was a court and a 'lis'."

In *R. v. Postmaster-General. Ex p. Carmichael* (9) the certificate of the chief medical officer of the Post Office certifying that one Carmichael, a clerk, was not suffering from telegraphist's cramp was quashed. Under the Workmen's Compensation Act, 1925, it was a condition precedent to a clerk obtaining workmen's compensation for telegraphist's cramp that he should obtain the certificate of the certifying surgeon that he was suffering from that condition. It was held that the chief medical officer of the Post Office has not been validly substituted for the certifying surgeon. All the members of the court were clear that such a certificate was a fit subject for certiorari, though it is only right to say that the

matter does not appear to have been fully argued. LORD HEWART, C.J., says ([1928] 1 K.B. 296):

"There was a moment in this case when it was argued that the document was of such a kind as not to be proper for the writ of certiorari. But I am satisfied, when I look at the part which a certificate of this nature must play in the making of any claim for compensation by a Post Office worker suffering from telegraphist's cramp, that the certificate of the certifying surgeon is of the nature of a judicial act, and is a fit subject for certiorari."

Finally, in *R. v. Boycott. Ex p. Keadley* (10), a decision of the Board of Education under the Mental Deficiency Act, 1913, whether a boy was or was not capable of receiving benefit from instruction was quashed. Reference may also be made to *R. v. Coles* (11) and *R. v. White* (12). In none of these cases, except possibly in *R. v. Woodhouse* (4), could it be said that the body in question had before it any form of lis or any duty to hear two sides, and we do not accept that test.

The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively. Where the decision is that of a court then, unless, as in the case, for instance, of justices granting excise licences, it is acting in a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, the duty to act judicially may arise in the course of arriving at that decision. Thus, if, in order to arrive at the decision, the body concerned has to consider proposals and objections and consider evidence, then there is the duty to act judicially in the course of that inquiry. That, as it seems to us, is the true basis of the decision in *Errington v. Minister of Health* (5). While the Minister's decision to confirm the clearance order was an administrative act for the purpose of which he was entitled and bound to take into consideration questions of policy, yet, before arriving at the decision, he had to consider the objections of the property owners and the views of the local authority. In other words, at one stage of the proceedings leading up to his decision there was something in the nature of a lis before him, and at that stage there was a duty to act judicially, as, for instance, not to hear one side behind the back of the other. Again, in *R. v. London County Council* (2), all that it seems to us SCRUTTON, L.J., was saying was that in the case of the London County Council it was enough to make them amenable to certiorari that they had to decide on evidence between a proposal and an opposition during which they had a duty to act judicially.

Further, an administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of and are not in accordance with the practice of a court of law. As LORD LOREBURN, L.C., said in *Board of Education v. Rice* (6) ([1911] A.C. 182):

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can

obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

Again, in *Local Government Board v. Arlidge* (13), VISCOUNT HALDANE, L.C., said ([1915] A.C. 132):

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organisation with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently."

More recently it has been held by this court on many occasions that certiorari will lie to quash the decision of rent control tribunals, and this notwithstanding that such a tribunal is entitled to act on its own knowledge and information, without evidence, unless submitted, and without a hearing except on notice from a party: see *R. v. Brighton & Area Rent Tribunal. Ex p. Marine Parade Estates* (1936), *Ltd.* (14).

If, on the other hand, an administrative body in arriving at its decision at no stage has before it any form of lis and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially: compare *Franklin v. Minister of Town & Country Planning* (15) ([1947] 2 All E.R. 295). The present case, as it seems to us, is an *a fortiori* case. Though the local committees may be said to be administrative bodies in the sense that they are responsible for administering the Legal Aid and Advice Act, they are quite unconcerned with questions of policy. They cannot refuse legal aid because the fund is becoming depleted or because they think that certain forms of action should be discouraged. They have to decide the matter solely on the facts of the particular case, solely on the evidence before them and apart from any extraneous considerations. In other words, they must act judicially, not judiciously. It seems to us that the present case is closely akin to the cases of *R. v. Postmaster-General. Ex p. Carmichael* (9) and *R. v. Boycott. Ex p. Keasley* (10). The certifying surgeon in the former case and the Board of Education certifying medical officer in the latter case were concerned solely with the facts of the particular case, facts presented to them *ex parte*, and it was not for them to take into consideration any questions of policy or expediency.

The last question which arises is whether the applicants are persons aggrieved. If so, certiorari will be granted *ex debito justitiae*. In *R. v. Richmond Confirming Authority. Ex p. Howitt* (16), EARL OF READING, C.J. ([1921] 1 K.B. 255), quotes

with approval *R. v. Nicholson* (17), where A. L. SMITH, L.J., said ([1899] 2 Q.B. 470):

"But, assuming certiorari to be the fitting remedy, as a matter of discretion the certiorari ought not to go. First, on the ground of delay . . . ; and, second, on the fact that the applicants have not shown, as it appears by *R. v. Surrey JJ.* (18) they should have shown, that they have a peculiar grievance of their own beyond some inconvenience suffered by them in common with the rest of the public."

That was a case of licensing justices having issued a licence without jurisdiction and in spite of an objection made by the applicants for certiorari, who were rival traders, but the principle is clearly laid down.

In the present case the applicants seem to us to be persons aggrieved within this principle. They are persons who incur the risks inherent in having to fight a party who has legal aid. Indeed, the legislation contemplates that they are persons interested in that reg. 15 (2) of the Legal Aid (General) Regulations provides that when a party to proceedings becomes an assisted person, his solicitor shall forthwith serve all other parties with a notice in Form VI in the schedule to those regulations. It is true that, if the action was fought to judgment and the applicants succeeded, they might, before the trial judge, prove the matters proved before us, and persuade him that the certificate should be treated as a nullity, as was done by the Court of Appeal in *Greenwood v. Sketcher* (19), but it seems to us that they should not be forced to take this course. In the premises an order of certiorari will be granted, and the civil aid certificate will be quashed.

Following the judgment an argument took place on the question of costs.

LORD GODDARD, C.J.: The trustee in bankruptcy, in opposing this motion for certiorari, obtained a legal aid certificate on the same grounds as he obtained the original legal aid certificate. We have held that the legal aid certificate was granted without jurisdiction and, therefore, we shall treat the legal aid certificate granted to oppose this application in exactly the same way as the Court of Appeal did in the case of *Greenwood v. Sketcher* (19), as a nullity, and the trustee in bankruptcy as a person not legally aided. Then the question arises as to the costs of this application. In the absence of misconduct we never order a tribunal whose order is quashed to pay the costs, but if the party affected chooses to come and oppose, he is as liable to costs as any other person. Therefore, we make the order here that this order for certiorari is made and the trustee in bankruptcy must pay the costs.

Order for certiorari.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the applicants); *Hempsons* (for the Legal Aid Committee); *Jaques & Co.*, agents for *Barker & Midgley*, Blackpool (for the trustee in bankruptcy); *Solicitor, National Assistance Board* (for the National Assistance Board).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

PAVIA & CO., S.P.A. v. THURMANN-NIELSEN.

[COURT OF APPEAL (Somervell, Denning, L.J.J., and Roxburgh, J.), February 18, 1952.]

Sale of Goods—Payment—Confirmed credit—Time for opening credit.

Sellers contracted to sell three thousand tons of Brazilian groundnuts for shipment from Brazil to Genoa of the first fifteen hundred tons in February, March, or April, 1949, and of the second fifteen hundred tons in March, April, or May, at sellers' option, payment to be by the opening of a confirmed, irrevocable, divisible, transmissible, and transferable credit in favour of the sellers and utilisable by them against delivery of shipping documents. The sellers guaranteed the necessary Brazilian export licence and the buyers the necessary Italian import licence. The export licence was obtained on Feb. 9, 1949, and the sellers so advised the buyers on that day by cable, giving them certain particulars which the buyers required for opening the credit and requesting them to open the credit forthwith. The buyers did not make the credit available until Apr. 22.

HELD: in the absence of an express stipulation in the contract, the credit should have been opened, not when the sellers were ready to ship the goods, but at the beginning of the shipment period; on the facts of the present case the credit should have been made available, in the case of the first shipment on Feb. 9, when the particulars were supplied to the buyers, and, in the case of the second shipment, on Mar. 1, or as soon after those dates as it could have been opened by the exercise of reasonable diligence by the buyers; and, therefore, the buyers were liable in damages to the sellers for the delay.

Decision of McNAIR, J. ([1951] 2 All E.R. 866), affirmed.

AS TO CONFIRMED CREDITS, see HALSBURY, Hailsham Edn., Vol. 29, p. 213, para. 283.

Cases referred to:

- (1) *Guaranty Trust Co. of New York v. Hannay & Co.*, [1918] 2 K.B. 623; 87 L.J.K.B. 1223; 119 L.T. 321; 6 Digest 161, 1037.
- (2) *Equitable Trust Co. of New York v. Dawson Partners Ltd.*, (1926), 25 Lloyd L.R. 90.
- (3) *Guaranty Trust Co. of New York v. Van den Berghs*, (1925), 22 Lloyd L.R. 447.

APPEAL by the buyers from an order of McNAIR, J., dated Oct. 17, 1951, and reported [1951] 2 All E.R. 866, on a Special Case stated for the opinion of the court under the Arbitration Act, 1934, s. 9 (1) (a).

By a contract dated Jan. 20, 1949, the buyers agreed to buy from the sellers three thousand tons of Brazilian groundnuts, the contract providing for shipment from Brazil to Genoa as to the first fifteen hundred tons in February, March, or April, 1949, and as to the second fifteen hundred tons in March, April, or May, at the sellers' option, and for payment by confirmed credit utilisable by the sellers on delivery of shipping documents. The sellers claimed damages for delay in providing the credit which, they said, had taken place between Feb. 9, when the necessary particulars were supplied to the buyers, and Apr. 22, when the credit was made available. They contended that the buyers were under an obligation to make the credit available to the sellers, if they reasonably could, so that the sellers would have the whole of the shipping period prescribed by the contract available to them. The buyers submitted that they were under no obligation to open the credit until the sellers were ready to tender the documents or took steps to ship the goods. The arbitrators held that the buyers were in default in not opening the credit in due time and were liable in damages. McNAIR, J., in upholding the award, held that the credit should have been made available,

as to the first shipment, on Feb. 9, and, as to the second shipment, on Mar. 1, or so soon thereafter as it could have been opened by the exercise of reasonable diligence on the part of the buyers.

Widgery for the buyers.

Mocatta, Q.C., and *M. R. Holman* for the sellers.

SOMERVELL, L.J.: This is an appeal from a decision of McNAIR, J., on a Special Case stated by the board of appeal of the Incorporated Oil Seed Association under s. 9 (1) (a) of the Arbitration Act, 1934. The dispute concerns a contract dated Jan. 20, 1949, which provided for the sale of about fifteen hundred tons of Brazilian groundnuts with an option to the sellers to raise that quantity to three thousand tons. The goods were to be shipped from Brazil to Genoa direct or indirect in February, March or April at the option of the sellers and partial shipments were authorised. The price was payable in United States dollars and there was a provision as to payment on which the present dispute turns:

“Payment: By opening of a confirmed, irrevocable, divisible, transmissible and transferable credit opened in favour of the sellers and utilisable by them against delivery of the following documents.”

The documents are bills of lading, weight note, analysis certificate and a commercial invoice. There is a provision for a weight certificate and then there is a provision to which I will refer although it does not ultimately affect the issue:

“The present contract is subject to the sellers obtaining the Brazilian export licence and to the buyers obtaining the Italian import licence before Jan. 31, 1949. If at that date the import and export licences have not been granted the buyers and the sellers have the right to cancel the present contract. A date later than Jan. 31 may be mutually agreed.”

On Jan. 31, 1949, there was a further contract, which incorporated and varied the first contract, the quantity agreed to be sold being increased to three thousand tons, fifteen hundred tons to be shipped February, March, April, and fifteen hundred tons March, April, May. At that date no export licence had been obtained, and this had to be done before the Italian import licence would be granted. The second contract contained a provision whereby the sellers guaranteed the Brazilian export licence and the buyers guaranteed the Italian import licence. All other conditions were to stand unchanged. On Feb. 9 the export licence was obtained, and the buyers were informed by cable and given further particulars. As from that date the sellers requested the buyers to open the credit throughout February and March. On Mar. 4 the buyers obtained their import licence and they repeatedly told the sellers that the credit would be available in a few days, but it was not made available before Apr. 22, 1949. The question on which the opinion of the court is sought is stated in the Case as follows:

“The question of law for the decision of the court as submitted on behalf of the [buyers] and agreed on behalf of the [sellers] is, when, on the facts found and the true construction of the contract, the credit under the said contract should have been opened by the [buyers] or made available to the [sellers].”

The matter came before McNAIR, J., and, after referring to some statements by SCRUTTON, L.J., in *Guaranty Trust Co. of New York v. Hannay & Co.* (1), *Equitable Trust Co. of New York v. Dawson Partners Ltd.* (2) and *Guaranty Trust Co. of New York v. Van den Berghs* (3) as to the general working of the credit system, he said ([1951] 2 All E.R. 869):

“Accordingly, the answer which I would give to the question of law submitted in the Case is that the date when the credit under the contract should have been opened by the buyers and made available to the sellers

is, as regards the first fifteen hundred tons, at such time as it would have been opened or made available if the buyers had exercised reasonable diligence after Feb. 9 to obtain the opening and making available of the credit, and that, as regards the second fifteen hundred tons, the date on which the credit should have been opened is Mar. 1, 1949, or so soon thereafter as it could have been opened by the exercise of reasonable diligence by the buyers."

McNAIR, J., took Feb. 9 and not Feb. 1, which was the beginning of the shipment period for the first fifteen hundred tons, because, in his judgment, it was accepted as common ground that it was not until Feb. 9, when the export licence was obtained, that certain particulars which were required by the buyers for the opening of the credit were transmitted by the sellers to them. I would have no doubt that under this contract, apart from any question arising with regard to export licences, the obligation of the buyers was, *prima facie*, to open the credit on Feb. 1 and to have it opened and available as from that date. Naturally, if the original term with regard to licences had stood, either side could have cancelled because no licence was in existence on Jan. 31, but under the supplemental contract under which the sellers guaranteed the Brazilian export licence and the buyers guaranteed the Italian import licence, I should have thought that the sellers passed out of the picture so far as concerned the relevant date when the credit was to be opened, though it might well have been that, if that clause was in the original contract, the buyers should have been allowed a reasonable time after Feb. 1, because until that date it was not clear whether the deal would be on at all. But as the learned judge has taken Feb. 9 and not Feb. 1, that seems to me to be no longer of any importance.

The argument of counsel for the buyers was that normally delivery and payment are concurrent conditions. The sellers did not need the credit until they were ready to deliver and had got the bills of lading and could go to the bank and get their money. Counsel drew our attention to the cases referred to by the learned judge in which SCRUTTON, L.J., pointed out—as, of course, I accept—that the main object of the credit system is that the seller may get his money when he has shipped his goods, and, at any rate, in some forms of credit the buyer gets an interval of time before he has to meet bills. Whether under this particular form of credit there would be any interval between the time of its operation and the time when the buyer had to put his bank in credit I do not know, and, to my mind, it does not matter. I am quite clear that SCRUTTON, L.J., was not addressing himself to the problem which is at present before us. My view is that the suggestion which counsel for the buyers put forward—that the buyers under this form of contract were under no obligation until a date, which they could not possibly know and which there was no machinery for their finding out, namely, when the sellers actually had the goods at the port ready to be put in the ship—is unworkable. There are no words in the contract which would justify us in arriving at that result, and there is no reason why we should imply any such term into the contract. When a seller is given a right to ship over a period and there is machinery for payment, that machinery must be available over the whole of that period. If the buyer is anxious, as he might be if the period of shipment is a long one, not to have to put the credit machinery in motion until shortly before the seller is likely to want to ship, then he must insert some provision in the contract by which the credit shall be provided, e.g., fourteen days after a cable received from the seller. In the absence of any provision of that kind, I think the answer which the learned judge gave to the question posed is plainly right, and the appeal should be dismissed.

DENNING, L.J.: The sale of goods across the world is now usually arranged by means of confirmed credits. The buyer requests his banker to open a credit in favour of the seller, and in pursuance of that request the banker or his foreign agent issues a confirmed credit in favour of the seller. This credit is a promise

by the banker to pay money to the seller in return for the shipping documents. When the seller presents the documents, he gets paid the contract price. The conditions of the credit must be strictly fulfilled, otherwise the seller is not entitled to draw on it. The question in the present case is this. In a contract which provides for payment by confirmed credit, when must the buyer open the credit? In the absence of express stipulation, the credit must be made available to the seller at the beginning of the shipment period. The reason is because the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid. The seller is not bound to tell the buyer the precise date when he is going to ship, and whenever he does ship the goods he must be able to draw on the credit. He may ship on the very first day of the shipment period. If the buyer is to fulfil his obligations, he must, therefore, make the credit available to the seller at the very first date when the goods may be lawfully shipped in compliance with the contract. I agree with the answer given by McNAIR, J., and that the appeal should be dismissed.

ROXBURGH, J.: I agree.

Appeal dismissed.

Solicitors: *Hicks, Arnold & Co.* (for the buyers); *Richards, Butler & Co.* (for the sellers).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

STARKOWSKI (ORSE. URBANSKI) (ORSE. JUSZCZKIEWICZ)
(by his next friend) v. ATTORNEY-GENERAL (STARKOWSKI
and others cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), January 14, 15,
16, 17, 18, February 18, 1952.]

Conflict of Laws—Legitimation—Validity of Austrian marriage—Retrospective effect of Austrian legislation—Determination according to Austrian law—Legitimacy Act, 1926 (c. 60), s. 1 (1)—Matrimonial Causes Act, 1950 (c. 25), s. 17 (1).

On May 19, 1945, H. went through a ceremony of marriage in Austria with R. according to the rites of the Roman Catholic faith. At that time the German Marriage Law of 1938 was still in force, which required that a marriage, to be valid, must be contracted before the civil authorities. On June 26, 1945, the provisional government of Austria published an order, to take effect on June 30, 1945, whereby: "Marriages which were solemnized during the period from April 1, 1945, to the coming into force of this law before incompetent lay authorities or before ministers of a recognised church or religious community have the effect of a marriage solemnized at a register office in accordance with . . . the Marriage Law of . . . 1938, as from the day of solemnization, as soon as they have been entered in the Family Book kept by the register office". In July, 1945, R. and H. left Austria for a transit camp in Italy, and in the autumn of 1946 they came to England. In the summer of 1947 R. and H. parted, and subsequently H. met M., by whom, on Mar. 27, 1949, she gave birth to C., the petitioner. On July 18, 1949, the ceremony of marriage between R. and H. of May 19, 1945, was registered in accordance with the law of June 26, 1945. On Feb. 11, 1950, H. went through a ceremony of marriage at a register office with M., then a bachelor and domiciled in England. On a petition by C. for a declaration that M. and H. were lawfully married and that he, C., was rendered legitimate by and from the date of such marriage,

HELD: the validity of the marriage between R. and H. must be decided according to Austrian law: *Berthiaume v. Dastous* ([1930] A.C. 79), applied; under the law of June 26, 1945, the ceremony between R. and H., though not originally valid, was constituted a valid marriage by its registration which validated it from the date of the ceremony; that registration occurred before the ceremony of Feb. 11, 1950; and, therefore, even assuming that by Feb. 11, 1950, H. had acquired an English domicile, on that date she was a married woman whose husband was still alive and was not free to marry M., with the result that there was no valid marriage between her and M. and the petitioner was not entitled to the declaration he sought.

AS TO THE LAW GOVERNING THE VALIDITY OF MARRIAGE, see **HALSBURY**, Hailsham Edn., Vol. 6, pp. 285-288, paras. 341, 342; and **FOR CASES**, see **DIGEST**, Vol. 11, pp. 415-417, Nos. 812-834.

Cases referred to:

- (1) *Berthiaume v. Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54; Digest Supp.
- (2) *Magor & St. Mellons Rural District Council v. Newport Corpn.*, [1951] 2 All E.R. 839.
- (3) *Lynch v. Paraguay Provisional Government*, (1871), L.R. 2 P. & D. 268; 40 L.J.P. & M. 81; 25 L.T. 164; 35 J.P. 761; 11 Digest 366, 458.
- (4) *Re Aganoor's Trusts*, (1895), 64 L.J.Ch. 521; 11 Digest 366, 459.
- (5) *Scott v. A.-G.*, (1886), 11 P.D. 128; 55 L.J.P. 57; 56 L.T. 924; 50 J.P. 824; 11 Digest 325, 133.
- (6) *Bank Voor Handel en Scheepvaart v. Slatford*, [1951] 2 All E.R. 779.
- (7) *Re Luck*, [1940] 3 All E.R. 307; [1940] Ch. 864; 109 L.J.Ch. 380; 164 L.T. 172; 2nd Digest Supp.
- (8) *Doe d. Breakey v. Breakey*, (1845), 2 U.C.R. 349; 27 Digest 61, 1.
- (9) *Re Godin*, 10 Clunet (1883), 61.

PETITION for declaration of legitimacy on the ground that the petitioner had been rendered legitimate as from the date of the subsequent marriage of his parents.

Heathcote-Williams, Q.C., and *Dobry* for the petitioner.
Colin Duncan and *Brian T. Neill* for the Attorney-General.
William Latey, Q.C., and *Crispin* for the parties cited.

Cur. adv. vult.

Feb. 18. **BARNARD, J.**, read the following judgment. This is a case under the Legitimacy Act, 1926, and the Matrimonial Causes Act, 1950, s. 17, in which Krzysztof Jerzy Mieczyslaw Starkowski, an infant suing by his next friend, Henryka Antonia Starkowski, a married woman, seeks a declaration that Mieczyslaw Starkowski and Henryka Antonia Starkowski were lawfully married on Feb. 11, 1950, at the register office in the district of Croydon in the county borough of Croydon in the county of Surrey, and that, by the said marriage, the petitioner became legitimated as from the date of the said marriage. The petitioner and the parties cited in this case are all of Polish nationality, and, therefore, for the sake of brevity, I propose to refer to them by their English equivalent Christian names.

Both Henrica and Richard, the second party cited, were born at Cracow in Poland and lived there until the autumn of the year 1944, when they moved to Kitzbuehel in Austria. At the time Henrica was pregnant by Richard, and their evidence clearly shows that they were both anxious to marry, and, both being of the Roman Catholic faith, were anxious to be married in a church by a priest. They encountered many obstacles both from the priest and the civil registrar, but eventually, on May 19, 1945, they went through a ceremony of marriage at the parish church at Kitzbuehel according to the rites of the Roman Catholic faith. I am not satisfied on the evidence that there was any insuperable difficulty

A in their being married before a civil registrar in accordance with the law of Austria in force at that time. On June 12, 1945, Barbara, the third party cited, was born, and on June 16, 1945, she was registered as an illegitimate child, but on July 15, 1945, she was baptised as legitimate. Richard and Henrica lived together as man and wife until the summer of 1947, when they separated. In July, 1945, together with Barbara, they left Austria for a transit camp in Italy, and in the autumn of the year 1946 they all left Italy for England, Henrica and Barbara preceding Richard by about a month. Assuming that Henrica was a
B feme sole I have no doubt on the evidence before me that she then acquired an English domicile. Either towards the end of the year 1947 or early in the year 1948 Henrica met Michael, the first party cited, and on Mar. 27, 1949, Henrica gave birth to Christopher, the petitioner, of whom Michael was the father. On Feb. 11, 1950, Henrica married Michael, who was then a bachelor and domiciled in England, at the register office at Croydon.

I have heard the evidence of three expert witnesses on Austrian law, Doctors Bresch, Harpner and Abel, and it is clear from their evidence that on May 19, 1945, when Richard and Henrica went through the religious ceremony of marriage at Kitzbuehel, such ceremony did not constitute a valid marriage according to
C the law then in force in Austria. The German Marriage Law of July, 1938, was still in force and by that law a valid marriage could only be concluded before the civil authorities. On Apr. 27, 1945, Austria was liberated and there was a good deal of confusion in Austria at that time as to what was the law. The provisional government of Austria then published an order, No. 6, on May 1, 1945, repealing some of the German laws in force, but confirming for the time
D being the Marriage Act, 1938. On June 26, 1945, the provisional government of Austria published a further order, No. 31, to come into force on June 30, 1945, the relevant sections of which are as follows:

“Section 3 (1): Marriages which were solemnized during the period from Apr. 1, 1945, to the coming into force of this law before incompetent lay
E authorities or before ministers of a recognised church or religious community have the effect of a marriage solemnized at a register office in accordance with s. 15 et seq. of the Marriage Law of July 6, 1938*, as from the day of solemnization, as soon as they have been registered in the Family Book kept by the register office. (2) The offices in which such marriages have been solemnized shall forward without delay to the register
F office which would have been competent to solemnize the marriage at the time of its solemnization in respect of the bridegroom true copies of the entries made in their marriage register showing exactly the words, figures and letters. . . . Section 5 (1): The register offices are to enter in their register the occurrences affecting personal status communicated to them in accordance with ss. 3 and 4.”

G Section 4 relates to the registration of births and deaths during the period Apr. 1, 1945, to June 30, 1945. The ceremony of the marriage in question was eventually registered in accordance with s. 5 (1) on July 18, 1949.

Counsel on behalf of Richard and Barbara argued that the marriage was a valid marriage on the day that it was solemnized because at that time the parties to the ceremony were of Polish nationality, and, according to the evidence of
H Dr. Lipnicki, an expert on Polish law, such a ceremony, even if not valid according to the law of the country where it took place, would be recognised as a valid marriage in the Austrian part of Poland, the form of such marriage being in accordance with the national law, namely, the law applicable to Austrian Poland. There can be no doubt that at that time they were also both domiciled in Poland. Dr. Lipnicki referred me to para. 7 of the Hague Convention, 1902, which was

* German Official Gazette, I, p. 807.

adopted as part of the law of Poland in the year 1939. Paragraph 7 reads as follows:

"The marriage, which is not valid as to the form in the country where it was celebrated, could, nevertheless, be recognised as valid in other countries, if the form prescribed by the national law of each of the parties has been observed".

So far as English law is concerned, the answer to this argument is to be found in the judgment of the Privy Council delivered by VISCOUNT DUNEDIN in *Berthiaume v. Dastous* (1), which reads as follows ([1930] A.C. 83):

"If there is one question better settled than any other in international law, it is that as regards marriage—putting aside the question of capacity—*locus regit actum*. If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage."

I, therefore, reject this argument. Counsel further argued that the object of Law No. 31 was to validate such a ceremony of marriage as took place in this case, and that, therefore, on the passing of the Act the marriage became a valid marriage retrospectively as from the day of solemnization, and that the registration of such marriage was merely a ministerial act. This may or may not have been the intention of Law No. 31, but, in my view, the wording of s. 3 (1) is clear and unambiguous and states that such marriages shall have the effect of marriages solemnized at a register office in accordance with the Marriage Law of July 6, 1938, as from the day of solemnization, as soon as they have been registered in the Family Book kept by the register office, the German word for "as soon as" being "sobald." The three Austrian lawyers agreed that this ceremony of marriage was not validated until it was subsequently registered, although they did suggest that from the date of the passing of the Act up to registration its validity was in some way suspended. I have come to the conclusion that I must construe this Act according to its language. LORD SIMONDS states the importance of this in his opinion in the recent case of *Magor & St. Mellons Rural District Council v. Newport Corpn.* (2). To construe this law in any other way would necessitate altering the ordinary common sense meaning of the words used in the section.

I now come to what I think is the real point of law to be decided in this case. On behalf of Richard and Barbara it was argued that, in considering the validity of the English marriage, which took place on Feb. 11, 1950, the court must ask itself whether at that time both parties had the capacity to marry. Bearing in mind the religious ceremony of marriage which Henrica had gone through on May 19, 1945, in Austria, was Henrica free to marry on Feb. 11, 1950? Counsel submits that the answer should be "No", because the religious ceremony was made a valid marriage as from the date of the ceremony as soon as it was registered on July 18, 1949. This argument is supported by the Attorney-General. All three Austrian lawyers agree that the ceremony of marriage in Austria became a valid marriage on July 18, 1949, as from the date of solemnization. On the other hand, it was argued by counsel on behalf of the petitioner that Henrica arrived in England with the legal status of a spinster and thereafter acquired a domicile of choice in England, and that any subsequent foreign law could only have territorial effect, and, therefore, could not alter the status of a domiciled English woman. In support of this latter proposition I was referred to various authorities including *Lynch v. Paraguay Provisional Government* (3). In this

case it was held that the government of Paraguay had no interest to question the will of the deceased, but LORD PENZANCE based his decision on the ground that succession to property in England of a deceased foreigner is regulated by the law of his place of domicile as it existed at the time of his death, and, therefore, no changes made in that law, even though having a retrospective operation, could by the law of this country be recognised as affecting the distribution of personal property in England. The basis of LORD PENZANCE's decision was approved by ROMER, J., in *Re Aganoor's Trusts* (4). The relevant time to consider the foreign law was at the time of death, but in the present case the relevant time is when the second ceremony of marriage took place. This case would have been a strong authority for the petitioner if the second ceremony of marriage had preceded the registration of the first ceremony of marriage.

In *Scott v. A.-G.* (5) the marriage was dissolved by a foreign court of competent jurisdiction which prohibited the guilty party from re-marrying as long as the innocent party remained unmarried. The guilty party came to England with the intention of living here permanently and re-married. It was held that English law would not have regard to the personal disability imposed by the foreign law. There is no question in the present case of the Austrian law imposing any such penalty. The Austrian lawyers, however, had suggested that there might be a state of suspended validity, which would operate to prevent a re-marriage between the coming into force of Law No. 31 and the actual registration. I might have had to consider this proposition if the registration had been effected after Feb. 11, 1950. I was also referred to a more recent case of *Bank Voor Handel en Scheepvaart v. Slatford* (6). In that case DEVLIN, J., was concerned with foreign legislation purporting to have effect on property within the territory of the United Kingdom and he held that such legislation would not be recognised by the English courts. In the course of his judgment ([1951] 2 All E.R. 787), DEVLIN, J., referred to a passage in DICEY'S *CONFLICT OF LAWS*, 5th ed., p. 20, on which counsel for the petitioner relies and which reads as follows:

"A State's authority, in the eyes of other States and the courts that represent them is, speaking very generally, coincident with, and limited by, its power. It is territorial. It may legislate for, and give judgments affecting, things and persons within its territory. It has no authority to legislate for, or adjudicate upon, things or persons (unless they are its subjects) not within its territory."

Law 31, however, became an effective law while Richard and Henrica were still resident in Austria, and it only purported to legislate in regard to something which had taken place in Austria.

I was also referred to *Re Luck* (7). In that case it was held that, as the father of an illegitimate child, born in California, had not acquired a domicile of choice in California at the date of the child's birth, a declaration of adoption after he had acquired such a domicile, which in Californian law purported to legitimate the child from its birth, could not be accepted by the English courts as having rendered the child legitimate. In the course of the majority judgment of SIR WILFRID GREENE, M.R., and LUXMOORE, L.J., this passage appears ([1940] 3 All E.R. 315):

"Let it also be assumed, as we conceive the law to be, that no provision of the law of a foreign country will be regarded in the English courts as effective to change the status of a person not domiciled in that country at the time, except, perhaps, in the case where the law of the country in which such person is domiciled would itself recognise the effectiveness of the foreign law in question."

In the present case the law of the foreign country was in force, although its effectiveness was delayed, before Henrica ever acquired an English domicile and

while she was still resident in Austria. Further, in their judgment (*ibid.*, 316) the following question is posed:

“Will the English courts recognise the power of Californian law retrospectively to affect the status of a person in respect of a period when that status was subject to the law of England and to none other?”

But the learned lords justices stated that they did not think it necessary or desirable to express a concluded opinion upon it. This case seems to me to be merely a refusal to accept the law of California as to legitimacy because it was in conflict with English law.

In the case before me the petitioner was born illegitimate, domiciled in England, and with a potentiality of being legitimated by the subsequent marriage of his parents. But his legitimation finally depends on the subsequent marriage being a valid marriage. There is nothing repugnant to English law in retrospective legislation as such. The English legislature in 1921 passed an Act validating certain decrees granted in India for the dissolution of marriages of persons domiciled in the United Kingdom—the Indian Divorces (Validity) Act, 1921—and they passed a similar Act validating decrees granted in Kenya Colony—the Kenya Divorces (Validity) Act, 1922. I cannot think that any such persons whose divorces and subsequent re-marriages occurred before the passing of such Acts could escape the effect of those Acts by a mere change of domicile.

Counsel for the Attorney-General referred me to two foreign cases for my assistance, one a Canadian case and the other a French case. The Canadian case was *Doe d. Breakey v. Breakey* (8). There an Irish marriage was at the time of the ceremony invalid, but was subsequently validated by an imperial statute. The Canadian court at that time, 1846, was bound by the imperial statute and so found, but ROBINSON, C.J., in the course of his judgment, stated (2 U.C.R. 357):

“Now, if none of the exceptions in the statute prevent its applying for the purposes of this action, and if the marriage were by that act made valid in Ireland merely, it follows that we must treat it here as having been a valid marriage at the time it was solemnized; for it is the *lex loci* that must govern. But this imperial statute, which we are bound judicially to notice, and which binds us as well as the courts in England, does, by its direct operation, place it on the footing of a legal marriage here, as much as if it had been solemnized by a clergyman of the church of England.”

I gather that the Chief Justice is saying that, at whatever time you have to consider the validity of a ceremony of marriage, that is the time to ascertain the *lex loci celebrationis*. In the French case—*Re Godin* (9)—the French courts had to consider the validity of a ceremony of marriage performed by a priest according to the Roman Catholic rites in Mexico. At the time of the ceremony such a marriage was invalid according to the law of Mexico. After the ceremony, and after the parties to it, who were French, had returned to France, a law was passed in Mexico validating such marriages retrospectively as from the date of solemnization. The French court held the marriage to be valid.

The parties in the present case have been the unfortunate victims of circumstances, and no blame attaches to any of them. Before Henrica went through the ceremony of marriage with Michael at the register office at Croydon she not only disclosed the fact of her former marriage to the registrar, but inquired of the registrar at Kitzbuehel in Austria whether her former marriage was valid or not and received a reply dated June 30, 1949, to the effect that she was not married at all in Kitzbuehel. It was argued on her behalf that she did not consent to the registration of her former marriage. This seems to me to be beside the point, for there can be no question that at the time she and Richard went through the ceremony of marriage on May 19, 1945, they both wanted to get married and were consenting parties to the marriage. Moreover, Law No. 31

merely validated what they had done and the date of registration of their marriage was a duty imposed on officials and something outside their control.

I have come to the conclusion that I must ask myself one simple question: Were both parties free to marry on Feb. 11, 1950? The answer to that question is "No", because at that time Henrica was a married woman. She had gone through a ceremony of marriage with another man, who was still alive, and according to the *lex loci celebrationis* that was a valid marriage. The validation of marriage has frequently been enacted in England by statute, and marriage ceremonies are clearly within the power of Austria to validate and the effectiveness of Austrian laws so validating a ceremony must be recognised by the comity of nations and by English law. I, therefore, declare that the marriage celebrated between Michael and Henrica on Feb. 11, 1950, at the Croydon register office is invalid, and that the petitioner is, therefore, illegitimate.

Petition dismissed.

Solicitors: *George & George* (for the petitioner); *Treasury Solicitor*; *Culross & Trelawny* (for second and third parties cited).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

KEMSLEY v. FOOT AND OTHERS.

[HOUSE OF LORDS (Lord Porter, Lord Goddard, Lord Oaksey, Lord Radcliffe and Lord Tucker), November 21, 22, 26, 27, 30, 1951, February 25, 1952.]

Libel—Fair comment—Need for facts on which comment made to be stated in alleged libel—Article criticising conduct of newspaper—Proof of truth of facts stated in particulars.

In an action claiming damages for libel the appellant, K., a shareholder and director of companies owning newspapers, alleged that the libel was contained in an article, written and published by the respondents, which was headed "Lower than [K.]" and which, making no further direct reference to K., was an attack on a report contained in a newspaper with which K. was not connected. K. claimed that the words meant, and were understood to mean, that he was a person who used his position as a director of newspaper companies to procure the publication of statements he knew to be false. The respondents in their defence denied the innuendo and pleaded: "Further or in the alternative if and so far as the said words refer to [K.] they are a fair comment made in good faith and without malice on a matter of public interest namely the control by [K.] of the newspapers . . . referred to in para. 1 of the statement of claim. Particulars of the specific facts on which the said words are a fair comment are delivered separately." On a summons to strike out this paragraph of the defence as being vexatious, embarrassing, and tending to prejudice the fair trial of the action on the ground that the defence of fair comment was not available because the facts, or some of them, on which the comment was made were not contained or specifically referred to in the article,

HELD: provided there was a substratum of fact stated or indicated in the words complained of which was sufficient to form a basis for the comment it was unnecessary for all the facts on which the comment was based to be stated in order to admit the defence of fair comment; in the present case the comment was on newspapers which were widely read and known and in the words complained of there was sufficient indication of the facts on which the comment was based; and, therefore, the paragraph should not be struck out.

Observations of FLETCHER MOULTON, L.J., in *Hunt v. Star Newspaper Co., Ltd.* ([1908] 2 K.B. 319), explained.

Decision of COURT OF APPEAL ([1951] 1 All E.R. 331), affirmed.

Per curiam: Whereas in a case where the facts relied on to justify the comment are fully set out in the alleged libel the truth of each fact must be proved by the defendant, where the facts relied on are contained only in the particulars it is not incumbent on the defendant to prove the truth of every fact so stated in order to establish his plea of fair comment. He need only establish sufficient facts to support the comment to the satisfaction of the jury.

AS TO FAIR COMMENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 486-499, paras. 593-611; and FOR CASES, see DIGEST, Vol. 32, pp. 141-153, Nos. 1730-1849.

Cases referred to:

- (1) *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K.B. 292; 73 L.J.K.B. 752; 91 L.T. 155; 32 Digest 149, 1805.
- (2) *Campbell v. Spottiswoode*, (1863), 3 B. & S. 769; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 122 E.R. 288; 32 Digest 149, 1802.
- (3) *Hunt v. Star Newspaper Co., Ltd.*, [1908] 2 K.B. 309; 77 L.J.K.B. 732; 98 L.T. 629; 32 Digest 139, 1702.
- (4) *Andrews v. Chapman*, (1853), 3 Car. & Kir. 286; 21 L.T.O.S. 108; 175 E.R. 558; 32 Digest 140, 1707.
- (5) *Ross v. Stent*, (1909), T.S. 988; 32 Digest 44, f.

APPEAL by the plaintiff from an order of the Court of Appeal (SOMERVELL, JENKINS and BIRKETT, L.JJ.), dated Dec. 14, 1950, and reported [1951] 1 All E.R. 331, allowing an appeal of the respondents from an order of PARKER, J., in chambers, made on a summons under R.S.C., Ord. 19, r. 27, and Ord. 25, r. 4, issued by the appellant in a libel action to have struck out a paragraph of the defence of the respondents which raised a plea of fair comment, and the particulars delivered thereunder, on the ground that they were vexatious and contrary to the rules of pleading and tended to prejudice, embarrass and delay a fair trial of the action, and disclosed no reasonable cause of action and were frivolous. The first three respondents were editors or on the editorial staff of a newspaper in which the alleged libel was published. The fourth respondent was the publisher of the newspaper. PARKER, J., struck out the paragraph and the particulars, but the Court of Appeal revised his decision.

The appellant contended that for the plea of fair comment to be available to the respondents there must be in the words complained of a statement of the fact or facts on which the comment was based, so that those reading the comment might be able to judge for themselves whether it was libellous or not.

Diplock, Q.C., and *T. G. Roche* for the appellant.

Gardiner, Q.C., and *H. J. Baxter* for the respondents.

The House took time for consideration.

Feb. 25. The following opinions were delivered.

LORD PORTER: My Lords, this case is concerned with the determination of a point of procedure and practice, leave having been given by your Lordships that it should be dealt with by this House.

Two points were originally involved: (i) whether an application in chambers to strike out para. 5 of the respondents' defence was properly the subject of such a summons or whether the matter should not have been dealt with by other means, e.g., by an objection taken in the pleadings and by setting down the point for argument under R.S.C., Ord. 25, r. 2, and (ii) whether a plea of fair comment is permissible where the facts or, at any rate, the salient facts on which the comment is made are not set out in the publication complained of. The application to strike out was, in fact, made on a summons in a libel action under Ord. 19, r. 27, and Ord. 25, r. 4, and sought to have para. 5, and certain particulars delivered thereunder struck out on the ground that they were vexatious and

contrary to the rules of pleading, and tended to prejudice, embarrass and delay the fair trial of the action, and disclosed no reasonable cause of action and were frivolous.

The libel alleged was contained in an issue of the "Tribune" dated Mar. 10, 1950, and it is enough to set out its opening paragraph. It reads as follows:—

"Lower than Kemsley.

"By Michael Foot.

"The prize for the foulest piece of journalism perpetrated in this country for many a long year, and that certainly is saying something, must go to Mr. Herbert Gunn, editor of the 'Evening Standard' and all those associated with him in the publication of an attack on John Strachey last week."

It goes on to make a somewhat violent attack on the conduct of the "Evening Standard". The words used were said to reflect on the appellant and a writ was issued against the respondents and one other defendant, viz., Hardy Press, Ltd. The last named has now altered its defence and is not a party to this appeal. The four first-named respondents, however, are all parties to the appeal, but, as their positions do not differ one from the other, it is enough for the determination of the issue presented to deal with the case of Michael Foot.

Paragraph 5 of the defence is in the following terms:

"Further or in the alternative if and so far as the said words refer to the [appellant] they are a fair comment made in good faith and without malice on a matter of public interest, namely, the control by the [appellant] of the newspapers (other than the 'Evening Standard') referred to in para. 1 of the statement of claim. Particulars of the specific facts on which the said words are a fair comment are delivered separately."

The master, to whom the application was made, struck out two paragraphs of the particulars, but refused to strike out para. 5 of the defence or any of the other particulars. On appeal, however, PARKER, J., in chambers struck out the paragraph itself and all the particulars under it. The respondents appealed from the order of PARKER, J., to the Court of Appeal, who allowed the appeal and restored the master's order and at the same time gave leave to the respondents to amend the particulars of defence. In these circumstances it is not, in my view, necessary to set out the particulars in detail. It is enough to say that they contain excerpts from the appellant's newspapers and allegations of certain respects in which they are inaccurate or untruthful, together with complaints of their tone and the impropriety of their method of dealing with the news contained in them even when it is accurate. I need not make any reference to those particulars, the object of which is to show the responsibility of the appellant for the contents of the papers, inasmuch as the appellant accepts responsibility for the allegations made.

The rest of the particulars under discussion begin by asserting that they are particulars of the facts on which the words complained of are fair comment. Paragraph 3 is, perhaps, as good an example as can be adduced of the matters relied on. It begins as follows:

"The [appellant] in exercise of such control as aforesaid [i.e., general editorial control] caused or permitted to be published, as items of news, matter which did not correspond with the facts or was so coloured with comment as not to give an accurate representation of the news it purported to report, and headlines which distorted the news reported thereunder."

So far as I can discover no allegation of conscious lying is asserted in terms. The comment on these matters is said to be criticism of the way in which the appellant's newspapers are conducted, and to assert that that conduct is of a low character, that the respondents are entitled to criticise that conduct, and, as it is a matter of public interest, to comment fairly on it. The appellant, on

his part, maintains that the right of comment is dependent on the existence in the words alleged to be libellous of a statement of some fact or facts on which comment is made so that those reading the comment may be able to judge for themselves whether it is justified or not. The respondents say that, in a case where the dispute between the opposing sides is one of this nature, an attempt to strike out para. 5 of the defence under the rules and orders specified above is not justified. Those rules should, they maintain, be used only in plain and obvious cases. If a serious discussion of legal principles is required, the point at issue should be taken in the pleadings and set down for argument under Ord. 25, r. 2. At the request of both parties, however, the Court of Appeal decided the substantive question as well as that concerned with procedure, and, as they have done so, all your Lordships have thought it proper to determine that matter and have not heard argument on the technical question as to the propriety of the course adopted. They have assumed that the application to strike out was rightly made, and, accordingly, have confined their consideration to the question of the correctness of the order made by the Court of Appeal in refusing to strike out para. 5 of the defence on the ground that no or no sufficient statement of the facts on which the comment is made appear in the article complained of. It is not, as I understand, contended that the words contained in that article are fact and not comment. Rather it is alleged that they are comment with no facts to support it. The question for your Lordships' decision is, therefore, whether a plea of fair comment is only permissible where the comment is accompanied by a statement of facts on which the comment is made, and to determine the particularity with which the facts must be stated.

Before one comes to consider the general question it is, I think, desirable to determine what the language of the alleged libel can be held to assert. It may, in my opinion, be construed as containing an inference that the Kemsley Press is of a low and undesirable quality and that Lord Kemsley is responsible for its tone. Indeed, as I understand the defence and such particulars as have been delivered, an imputation no less severe has been accepted by the respondents as being a true interpretation of the words used. Although the article complained of uses the phrase "Lower than Kemsley", that language is accompanied by an attack on Lord Beaverbrook's papers, and it is at least arguable that the attack is on the Kemsley Press and not on Lord Kemsley's personal character save in so far as it is exhibited in the Press for which he is responsible. Nevertheless, libel must reflect on a person and Lord Kemsley is held up as worthy of attack on the ground that he is a newspaper proprietor who prostitutes his position by conducting his newspapers or permitting them to be conducted in an undesirable way. In this sense the criticism does not differ from that which takes place when what is called literary criticism comes in question. In such case the attack is not on the personal character of the person libelled, it is on him as responsible for certain productions, e.g., an article in the Press, a book, a musical composition, or an artistic work. Later I shall have to come back to the truth and accuracy of this analogy, but I have thought it right to set out the basis of literary criticism at this point, because a distinction is sought to be drawn and, indeed, in some of the decided cases has been drawn, between literary criticism and a personal attack on the character of an individual.

If an author writes a play or a book or a composer composes a musical work, he is submitting that work to the public and, thereby, inviting comment. Not all the public will see or read or hear it, but the work is public in the same sense as a case in the law courts is said to be heard in public. Obviously not all those who wish to attend a trial can do so, but in so far as there is room for them in the court all are entitled to do so, and the subject-matter on which comment can be made is indicated to the world at large. The same observation is true of a newspaper. Whether the criticism is confined to a particular issue or deals with the way in which it is, in general, conducted, the subject-matter on which criticism has been made has been submitted to the public, though by no means

A all those to whom the alleged libel has been published will have seen or are likely to see the various issues. Accordingly, its contents and conduct are open to comment on the ground that the public have at least the opportunity of ascertaining for themselves the subject-matter on which the comment is founded. I am assuming that the reference is to a known journal. For the present purpose it is not necessary to consider how far criticism without facts on which to base it is subject to the same observation in the case of an obscure publication. A further ground for the distinction sought to be drawn between an attack on an individual and criticism of a literary work appears to suggest that comment on the literary production must be confined to criticism of it as literature. This is not so. A literary work can be criticised for its treatment of life and morals as freely as it can for bad writing, e.g., it can be criticised as having an immoral tendency. B The fairness of the criticism does not depend on the fact that it is confined to form or literary content.

The question, therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action, and I find my view well expressed in the remarks contained in ODGERS ON LIBEL AND SLANDER (5th ed., 1911) at p. 203:

C "Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' D this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. E The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be F careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact."

But the question whether an inference is a bare inference in this sense must depend on all the circumstances. Indeed, it was ultimately admitted on behalf of the appellant that the facts necessary to justify comment might be implied G from the terms of the impugned article, and, therefore, the inquiry ceases to be: Can the defendant point to definite assertions of fact in the alleged libel on which the comment is made? and becomes: Is there subject-matter indicated with sufficient clarity to justify comment being made?, and whether the comment actually made is such as an honest though prejudiced man might make.

H Is there, then, in this case sufficient subject-matter on which to make comment. In an article which is concerned with what has been described as "the Beaverbrook Press" and which is violently critical of Lord Beaverbrook's newspapers, it is, I think, a reasonable construction of the words "Lower than Kemsley" that the allegation which is made is that the conduct of the Kemsley Press was similar to, but not quite so bad as, that of the Press controlled by Lord Beaverbrook, i.e., it is possibly dishonest, but in any case low. The exact meaning, however, is not, in my opinion, for your Lordships, but for the jury. All I desire to say is that there is subject-matter and it is at least arguable that the words

directly complained of imply as fact that Lord Kemsley is in control of a number of known newspapers and that the conduct of those newspapers is in question. Had the contention that all the facts justifying the comment must appear in the article been maintainable, the appeal must have succeeded. But the appellant's representatives did not feel able to, and, I think, could not, support so wide a contention. The facts, they admitted, might be implied and the respondents' answer to their contention is: "We have pointed to your Press. It is widely read. Your readers will, and the public generally can, know at what our criticism is directed. It is not bare comment. It is comment on a well-known matter, much better known, indeed, than a newly printed book or a once performed play."

One further matter on which some discussion took place does not, in my opinion, directly arise on this appeal, but, as it may be raised in interlocutory proceedings later in the course of the action, I think it desirable to express an opinion on it. In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence. Does the same principle apply where the facts alleged are found, not in the alleged libel, but in particulars delivered in the course of the action? In my opinion, it does not. Where the facts are set out in the alleged libel, those to whom it is published can read them and may regard them as facts derogatory of the plaintiff, but where, as here, they are contained only in particulars and are not published to the world at large, they are not the subject-matter of the comment, but facts alleged to justify that comment. In the present case, for instance, the substratum of fact on which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that that Press is a low one. As I hold, any facts sufficient to justify that statement would entitle the respondents to succeed on a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact was sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the respondents' plea. The protection of the defendant in such a case would, in my opinion, be, as it often is in cases of the like kind, the effect which an allegation of a number of facts which cannot be substantiated would have on the minds of a jury who would be unlikely to believe that the comment was made on the one fact or was honestly founded on it, and, accordingly, would find it unfair. It is true that KENNEDY, J., in *Joynt v. Cycle Trade Publishing Co.* (1) ([1904] 2 K.B. 292) says that a comment cannot be fair which is built on facts which are not truly stated, and in the same case in the Court of Appeal (*ibid.*, 298) VAUGHAN WILLIAMS, L.J., quotes the language of CROMPTON, J., in *Campbell v. Spottiswoode* (2) (32 L.J.Q.B. 200):

"If he [the critic] . . . imputes to the person whom he is criticising base and sordid motives which are not warranted by the facts, I cannot think for a moment that because he bona fide believes that he is publishing what is true, that is any defence in point of law."

But in each of these cases the court was dealing with the lack of any basis of fact sufficient to warrant the comment made and, in any case, what is fair or unfair comment and what amounts to an imputation of base and sordid motives are matters for the jury and not a subject for your Lordships' decision. In reaching the conclusion which I have stated I am not conscious of being at variance with the authorities, or, at any rate, with cases decided in this country.

The main support for the appellant's argument is founded on the observations of FLETCHER MOULTON, L.J., in *Hunt v. Star Newspaper Co., Ltd.* (3) ([1908] 2 K.B. 319). The observations relied on are:

"The law as to fair comment, so far as is material to the present case, stands as follows: In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with

the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v. Chapman* (4). The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses . . . In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. This has been so frequently laid down authoritatively that I do not need to dwell further upon it: see, for instance, the direction given by KENNEDY, J., to the jury in *Joynt v. Cycle Trade Publishing Co.* (1), which has been frequently approved of by the courts. Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation."

It must be remembered that in that case a jury had found a verdict for the plaintiff. That verdict had been taken on the general issue and it was not apparent whether, in their view, the facts were truly stated or not, or whether they thought the comment unfair. LAWRENCE, J., had ended his summing up by telling the jury (*ibid.*, 312):

"If a newspaper publishes exactly what took place with no comment whatever, they would be justified in so doing as a matter of public interest, but if they add to that comment of their own, then the question is whether that comment was bona fide and fair comment, or whether it was comment which tended, as alleged here, to charge the plaintiff with improper conduct."

Such a charge obviously mis-stated the elements of fair comment. The facts truly stated might warrant an imputation by an honest man that the plaintiff's conduct was improper, and, accordingly, the Court of Appeal sent back the case for a new trial in order that it might be ascertained (i) whether the facts stated were true, and (ii) if the comment was such as an honest man might make on those facts. It was in those circumstances that FLETCHER MOULTON, L.J., gave his judgment. He was seeking to distinguish facts from comment, and, in effect, saying that the facts alleged must be such as to warrant an honest man's making the comment complained of. He had not to consider whether the facts must be set out in full or whether a reference to well known or easily ascertainable facts was a sufficient statement of those relied on. In that case the facts were all set out and the only question which the court had to consider was whether, on facts assumed to be truly stated, the comment was honestly made. As the jury had been wrongly directed on this matter, the case was sent back in order that it might be ascertained whether facts were true and, if true, whether the comment was an honest comment on facts truly stated. The limited measure of the learned lord justice's criticism is to be found in the last sentence which I have quoted, and I should myself accept it as it stands.

I do not think it necessary to go through the other cases one by one, but reference must be made to the South African case of *Roos v. Stent* (5). If I thought that that judgment represented a new and independent view, it would be necessary to analyse its reasoning carefully. But in truth it is founded on FLETCHER MOULTON, L.J.'s opinion in *Hunt v. Star Newspaper Co., Ltd.* (3), and does not contain any fresh point of view. It is the only direct decision on the point in issue. Admittedly no English authority determines this question, and for the

reasons I have given I am of opinion that in this case a sufficient substratum of fact is to be found in the words complained of, and I would dismiss the appeal with costs.

My Lords, **LORD GODDARD** has not written an opinion in this case, but has asked me to say that he agrees with that which I have delivered.

LORD OAKSEY: My Lords, I agree. The forms in which a comment on a matter of public importance may be framed are almost infinitely various, and, in my opinion, it is unnecessary that all the facts on which the comment is based should be stated in the libel in order to admit the defence of fair comment. It is not, in my opinion, a matter of importance that the reader should be able to see exactly the grounds of the comment. It is sufficient if the subject which, *ex hypothesi*, is of public importance is sufficiently and not incorrectly or untruthfully stated. A comment based on facts untruly stated cannot be fair. What is meant in cases in which it has been said that comment to be fair must be on facts truly stated is, I think, that the facts, so far as they are stated in the libel, must not be untruly stated. In the present case the word which indicates the subject is "Kemsley" and it must be read in its context and in that context it must, I think, mean the newspapers controlled by Lord Kemsley. That is the subject-matter of the comment. The comment is that those newspapers are nearly as low as Lord Beaverbrook's newspapers, about which many defamatory statements are made in the alleged libel. It is not, in my opinion, a statement of fact that a newspaper is low. It is a comment. It may be a statement of fact to say that a man is fraudulent for there is a legal sanction for fraud, but there is no legal sanction for publishing low newspapers. I think, therefore, that the words "lower than" are words of comment and that the particulars which are sought to be struck out were alleged for the purpose of supporting the comment, and, if it is proved to the satisfaction of the jury that an honest man might have made such a comment on Lord Kemsley's newspapers, the defence of fair comment will have been established. It is one thing to publish a defamatory statement of fact, it is quite another to allege a defamatory statement of fact in a pleading in order to show that a published comment was fair. A defendant who has made a defamatory comment on a matter of public importance must be entitled to adduce any relevant evidence to show that the comment was fair, and, in order to do so, must be entitled to allege and attempt to prove facts which he contends justify the comment. Whether the facts alleged are satisfactorily proved or not it will still be for the jury to say whether they consider that the comment in the circumstances proved might have been made by an honest man. I am, therefore, of opinion that the order of the Court of Appeal was right and this appeal should be dismissed.

LORD RADCLIFFE: My Lords, I agree.

LORD TUCKER: My Lords, I am in complete agreement with the reasons which have been stated by my noble and learned friend on the Woolsack in support of the motion to dismiss this appeal. I also desire expressly to state my concurrence in his opinion that where the facts relied on to justify the comment are contained only in the particulars, it is not incumbent on the defendant to prove the truth of every fact so stated in order to establish his plea of fair comment, but that he must establish sufficient facts to support the comment to the satisfaction of the jury.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.*, and *Deacons & Pritchards* (for the appellant); *Hale, Ringrose & Morrow* (for the respondents).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

EARL FITZWILLIAM'S WENTWORTH ESTATES CO. v.
MINISTER OF HOUSING AND LOCAL GOVERNMENT AND
ANOTHER.

[HOUSE OF LORDS (Lord Porter, Lord Goddard, Lord Oaksey, Lord MacDermott and Lord Tucker), December 3, 4, 5, 6, 1951, February 25, 1952.]

Compulsory Purchase—Building land—Compulsory purchase by Central Land Board—Power of board to acquire land for disposal for permitted development—Planning permission granted by local authority to prospective lessee—Owner unwilling to sell at existing value—Town and Country Planning Act, 1947 (c. 51), s. 43 (1).

The appellants, who were the owners of a plot of land, offered to grant to R., who wished to build a house on it, a three hundred years' lease thereof at an annual rent which exceeded the existing use value of the plot and to assign to him the benefit of the appellants' claim for compensation for loss of development rights under the Town and Country Planning Act, 1947, R. to pay the development charge under the Act. Permission to build the house was granted to R. by the local authority. On a request by R. that a compulsory purchase order should be made for his benefit because the appellants did not propose to lease the land at the existing use value, the Central Land Board wrote to the appellants asking them whether they would be prepared to adopt one of three methods of disposing of the land. The methods, which the board considered fair to buyers who wanted a house immediately, were set out in a document entitled "House 1", and were: (i) to sell the land at existing use value, the buyer paying development charge, (ii) the seller to pay the development charge, and then to sell the land at a fair price, including the development charge; or (iii) the seller to pay the development charge, erect the house and then sell the house and land at a fair price, including the development charge. The appellants refused to adopt any of these methods, and the board then tried to negotiate with them a purchase by agreement. The existing use value of the land was £35, but the appellants would only agree to sell it at £462 (its probable value if it were developed). As they were unable to acquire the land by agreement on what they considered to be reasonable terms, the board resolved to acquire it compulsorily, and on June 22, 1949, an order to that effect was made under s. 43 (2) of the Act of 1947, and was confirmed by the Minister of Town and Country Planning on Dec. 3, 1949. On an application to the court by the appellants for an order that the compulsory purchase order and the Minister's confirmation order be quashed, the appellants contended (*inter alia*) that the functions of the board were limited to the assessment and collection of development charges and did not extend to the acquisition of land for the purpose of development, and, further, that the action of the board prevented the assignment by the appellants under s. 64 (2) of their right to receive compensation, and, therefore, the order was invalid as it was made for a purpose not authorised by s. 43 (1).

HELD: on the true construction of s. 43 (1) of the Act of 1947, the purpose referred to in the second part of the sub-section introduced by the words "in particular" was a "purpose connected with the performance of [the board's] functions" within the meaning of the first part of the sub-section, and, therefore, the board, in acquiring the land compulsorily for the purpose of disposing of it to R. for development, were acting within their powers, even though by so doing they were limiting the appellants' right of assignment under s. 64 (2) of the Act.

Decision of COURT OF APPEAL ([1951] 1 All E.R. 982), affirmed.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 43 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 551.

APPEAL by Earl Fitzwilliam's Wentworth Estates Co. from an order of the Court of Appeal (SOMERVELL, SINGLETON, L.J.J., DENNING, L.J., *dissentiente*), dated Apr. 13, 1951, and reported [1951] 1 All E.R. 982, affirming an order of BIRKETT, J., dated July 31, 1950, and reported [1950] 2 All E.R. 765, whereby he refused to make an order quashing a compulsory purchase order made by the Central Land Board on June 22, 1949, and a confirmation order made by the Minister of Town and Country Planning* on Dec. 3, 1949.

The appellants were the owners of large estates in Sheffield which they had been developing for some years by leasing plots of land on building leases for a term of three hundred years. In August, 1948, they informed the prospective lessee of one of the plots of the terms on which they would grant a lease to him. The prospective lessee, who had obtained permission from the local authority to build a house on the land, wrote to the Central Land Board complaining that the appellants did not propose to lease the land at present use value, and asking if the board would make a compulsory purchase order for his benefit. The board drew the appellants' attention to three methods of disposing of the land which they considered fair to buyers and asked the appellants if they were prepared to accept one of these methods. The appellants replied that they were not, and on June 22, 1949, the board made a compulsory purchase order in respect of the land. On Dec. 3, 1949, the order was confirmed by the Minister of Town and Country Planning. The appellants contended that the order was not within the powers conferred on the board by the Town and Country Planning Act, 1947, s. 43 (1) and s. 43 (2), because its object was to compel the appellants to conform to the board's policy that land should not be sold at a price greater than its existing use value and it was made as a reprisal for the appellants' refusal to conform to the methods of sale suggested to them. They also contended that the power conferred by the second part of s. 43 (1), viz., the power to acquire land for the purpose of disposing of it for development for which permission had been granted under the Act, was limited by the power conferred by the first part of the sub-section, and, therefore, it was a power exercisable only in connection with the performance by the board of their functions under the Act (viz., the ascertainment of development values and the determination of development charges), and was not a separate and independent power. It was further argued that the action of the board deprived the appellants of the benefit of their rights under s. 64 (2) in that they could not transmit their right to payment as a term of the agreement to sell the property in respect of which their right to payment arose. The respondents, the Minister and the board, contended that the action of the board was taken in exact accordance with the terms of the Act, in that they were unable to acquire the land by agreement on reasonable terms and that they, therefore, acquired it compulsorily for a purpose connected with the performance of their functions under the Act, and, in particular, for the purpose of disposing of the land for development for which permission had been granted.

BIRKETT, J., held that the power given to the board by the second part of s. 43 (1) was not limited by the earlier words of the sub-section, but was wide enough to allow the board to make the compulsory purchase order in the circumstances of the case, and, therefore, the order was valid. The Court of Appeal held that on the true construction of s. 43 (1) the second part of the sub-section did not confer on the board a power wholly independent of the first part of the sub-section, but was introduced to make it clear that the power of the board to acquire land for the purpose mentioned in the second part was a

* By art. 1 (1) of the Minister of Local Government and Planning (Change of Style and Title) Order, 1951 (S.I., 1951, No. 1900), which came into operation on Nov. 3, 1951, the style and title of the Minister of Local Government and Planning conferred on the Minister of Town and Country Planning by the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951, was changed to the Minister of Housing and Local Government.

purpose connected with the performance of the board's functions under the Act within the opening words of the sub-section.

Simon, Q.C., and *J. H. Barrington* for the appellants.

Sir Hartley Shawcross, Q.C., *J. P. Ashworth* and *R. J. Parker* for the respondents.

The House took time for consideration.

Feb. 25. The following opinions were read.

LORD PORTER: My Lords, this is an appeal from an order of His Majesty's Court of Appeal in England (SOMERVELL, SINGLETON and DENNING, L.JJ.), dated Apr. 13, 1951, affirming an order made by the King's Bench Division (BIRKETT, J.) on July 31, 1950, in favour of the respondents, whereby the appellants' motion to quash a compulsory purchase order made by the Central Land Board on June 22, 1949, and a confirmation order made on Dec. 3, 1949, by the Minister of Town and Country Planning (now the Minister of Housing and Local Government and hereinafter called "the Minister") was dismissed. The question for your Lordships' consideration is whether, on the true interpretation of s. 43 (1) of the Town and Country Planning Act, 1947, and in the circumstances hereinafter described, the Central Land Board validly made an order, and were validly authorised by the Minister, to acquire compulsorily under that section a plot of land belonging to the appellants, which the appellants intended to lease for building purposes at a rent in excess of what would be commensurate with its existing use value.

The facts are not in dispute. The appellants are the owners of large estates in Ecclesall in the city of Sheffield. They and their predecessors in title have been developing these estates for over thirty years by leasing plots of land for three hundred years on building leases. In August, 1948, a Mr. C. N. Rodgers approached the surveyors to the appellants through his architect, a Mr. A. Lushby, for a long lease of a plot of land at Whirlow Lane, Sheffield, on which to build a house. He was informed that he could have a lease of a plot for a term of three hundred years at an annual rent of £20 10s. and the assignment of the benefit of the appellants' claim in respect of that plot on the sum of £300,000,000 from which payments in respect of the depreciation of land values are to be made under Part VI of the Act of 1947, on condition that he paid any development charge levied under Part VII of the Act. On Aug. 16, 1948, Mr. Rodgers obtained a grant of planning permission under Part III of the Act to build a house on the plot in question, and on Oct. 7, 1948, Mr. Lushby, on behalf of Mr. Rodgers, wrote to the Central Land Board a letter calling their attention to the fact that the appellants did not propose to lease the plot save at a rent which exceeded its existing use value. He requested the board to make a compulsory purchase order or lease for the benefit of his client. As a result of that letter, the secretary of the Central Land Board wrote to the appellants' surveyors, enclosing a pamphlet issued by the board entitled "House I", and asked whether the appellants were prepared to adopt in regard to the said plot of land one of the three alternative methods (and, if so, which) set out in the pamphlet. The three methods were, briefly: (a) To sell at existing use value, leaving the buyer to pay the development charge. (b) To accept liability to pay the development charge and to sell at a fair price, including that charge. (c) To pay the development charge, build the house, and then sell the house and land at a fair price including that charge. On Nov. 5, 1948, the surveyors to the appellants replied to the Central Land Board stating that the appellants were not disposed to adopt any of the three methods recommended by the board. Thereupon, the Central Land Board wrote to the Sheffield City Council to ascertain whether it was, in the opinion of the council, expedient in the public interest that certain sites, including the plot at Whirlow Lane, should be acquired and made available for housing development, and received a reply from the town clerk to the Sheffield City Council stating that, in the opinion of the council,

it was in the public interest that the sites should be made immediately available for housing development. A report from the city engineer was enclosed with this letter. On Dec. 23, 1948, the Central Land Board again wrote to the surveyors to the appellants stating that the approved development of the plot might be hindered, if not prevented, unless it was made available, and that the district valuer had, therefore, been requested urgently to negotiate for the immediate purchase of the plot on the basis of existing use value provided by s. 51 (2) of the Act, which basis the board considered to be the reasonable terms referred to in s. 43 (2) of the Act. At the end of that month heads of agreement were sent to Mr. Rodgers by the appellants. They included the terms which the appellants had previously offered. On Jan. 7, 1949, the district valuer wrote to the surveyors to the appellants asking for certain information to enable him to negotiate for the acquisition of the plot. Meanwhile, negotiations between Mr. Rodgers and the appellants continued, but they finally broke down, whereupon the district valuer repeated his request for information. The surveyors to the appellants then replied that they recommended a price of £462 for the acquisition. On May 13, 1949, the Central Land Board passed a resolution to the effect that it was desirable to acquire the plot for the purpose of disposing of it for development for which planning permission had been granted on terms inclusive of any development charge payable in respect of the development, and that the plot should be acquired compulsorily since the board were unable to acquire the plot by agreement on reasonable terms. In accordance with this resolution the board purported to make an order on June 22, 1949, authorising them to purchase the plot compulsorily.

On July 20, 1949, the appellants made an objection to the confirmation of the order on the grounds: (i) That the order was ultra vires, in that it had been made to secure an object which was not within the board's powers to achieve, namely, that the appellants should bear the loss resulting from the vesting of development rights in the State by virtue of the Town and Country Planning Act, 1947, and that it should not be permitted to make it a condition of sale that the purchaser should stand in its shoes. (ii) That it was not expedient in the public interest that the board should acquire the plot. (iii) That the terms on which the appellants were prepared to lease the plot were reasonable. As a result of this objection a public local inquiry was conducted at Sheffield by Mr. Fitzgibbon, an inspector of the Ministry of Town and Country Planning, and on Dec. 3, 1949, after his report, the Minister confirmed the compulsory purchase order and recited that he was satisfied that it was expedient in the public interest that the board should acquire the plot and that the board were unable to acquire it by agreement on reasonable terms. On Feb. 10, 1950, by virtue of the provisions of para. 15 (1) of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, the appellants gave notice of motion to challenge the validity of the compulsory purchase and confirmation orders on the grounds (i) that the compulsory purchase order had been made for a collateral purpose, namely, to enforce the policy of the Central Land Board set forth by them in their pamphlet "House 1", and (ii) that the board in making the order and the Minister in confirming it had taken into consideration and been influenced by extraneous matters, namely, the board's policy set forth in pamphlet "House 1", which policy was unlawfully directed to preventing landowners from making it a condition of a sale or long lease of land that the purchaser or lessee should stand in the owner's shoes and accept the risk of not receiving a payment from the £300,000,000 under Part VI of the Town and Country Planning Act, 1947, equivalent to the full development value of the land which value had become vested in the State. On the hearing of the motion BIRKETT, J., gave judgment for the respondents and confirmed the order. An appeal from his decision was dismissed.

As has been stated above, the substantial issue in the case depends on the proper construction of s. 43 (1) of the Town and Country Planning Act, 1947. The section reads as follows:

- "(1) The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular
A may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development. (2) If the Minister is satisfied that it is expedient in the public interest that the board should acquire any land for any such purpose as aforesaid, and that the board are unable to acquire
B the land by agreement on reasonable terms, he may authorise the board to acquire the land compulsorily in accordance with the provisions of this section . . . (4) Any land acquired by the Central Land Board under the provisions of this section shall be disposed of by them in accordance with such directions as may be given to them in that behalf by the Minister, and until the land is so disposed of the board may manage it in accordance
C with such directions: Provided that nothing in this section shall be construed as authorising the board to carry out any development of land acquired by them thereunder."

Together with this section the resolution of the board of May 13, 1949, must be set out. It is in the following terms:

- D "That it was desirable to acquire the land in Whirlow Lane, Sheffield (Appendix 'A') for the purpose of disposing of it for development for which planning permission has been granted on terms inclusive of any development charge payable in respect of that development, and that, as the board were unable to acquire the said land by agreement on reasonable terms, an order be made to acquire the land compulsorily."
- E The board say that their action is taken in exact accordance with the terms of the Act in that they were unable to acquire the land by agreement on reasonable terms and they, therefore, acquired it compulsorily for a purpose connected with the performance of their functions under the following provisions of the Act, and, in particular, for the purpose of disposing of it for development for which permission has been granted. This contention gives rise to two considerations:
F (i) What is the standard by which "reasonable terms" are to be determined? (ii) Can the board acquire land compulsorily for the purpose of disposing of it simpliciter, or is any limit set to their powers, i.e., is their only right to acquire it where their object is to fulfil one of the functions under the subsequent provisions of the Act, and, if so, what are those functions? The first question is not seriously in dispute. There was evidence in an affidavit
G by Sir William Fraser on behalf of the respondents that the appellants were not willing to sell their land for less than £462, and that the district valuer, on the basis of Part V of the Act, estimated its value to be about £35. Indeed, the fact that the appellants' terms, whether for letting or sale, always exceeded the existing use value was not disputed by the appellants. A rent of £20 10s., and a liability for development charge, even though a claim on the £300,000,000
H fund was assigned, is obviously in excess of the existing use value.

The second question gives rise to more difficulty. In their motion to quash the order and the confirmation of it by the Minister, the appellants contended: (i) that the orders had been made by the board for a collateral purpose, namely, to enforce the policy of the board set out in the pamphlet, "House 1", hereinbefore referred to and to prohibit any other method of dealing with the land; and (ii) that the board and the Minister, in exercising their statutory discretions, had taken into consideration and been influenced by extraneous matters, namely,

the policy set forth in "House 1". The honesty of the Minister or of the board was not challenged. They were misguided, it was said, but not consciously unfair. If these contentions are to succeed it must be inferred that the board did not concern themselves with the particular facts of the case, but were minded to carry out a policy which they had adopted whatever the circumstances might be. I see no evidence to this effect. The suggestion is purely speculative and is not borne out by any of the documents produced. But the appellants put their case in another and more persuasive way. The functions of the board, they say, are financial. The planning authority is the local authority in whose hands are placed the task of determining how development shall be planned. The board's only task is to determine the sums payable as development charges and to collect them: see Parts VI and VII of the Act. The contention has some force, but is not determinative of the case. It would have been possible so to limit the powers of the board that they should have authority only for the direct performance of the function of assessment and collection, but the Act has not done so. It has given them certain collateral powers of which those contained in s. 43 are an example. I should myself be inclined to hold that, even without the specific permission contained in sub-s. (1), the board, under their financial powers, are entitled to acquire land compulsorily in order to enable them to assess and collect the development charge, but I am of opinion that, in case this construction should be subject to any doubt, the fact that they are so entitled is expressly provided by the second half of the sub-section. As I understand his judgment, BIRKETT, J., relied on that half as decisive of the case. In his opinion, it conferred a second and independent power on the board quite irrespective of their other powers and functions. On the other hand, the majority of the Court of Appeal took the view that the second half did not confer a separate power, but was interpretative of the general powers contained in the first half. This view which was expressed by SOMERVELL and SINGLETON, L.JJ., adopts, I think, a correct construction of the wording of the section.

If the view that the function of the board was limited to finance and nothing else were to prevail, it is difficult to see any reason for giving it the compulsory powers contained in s. 43 (4), and, in particular, power to take over land. Jurisdiction to take over land, given, as it is, in direct terms, must be connected with some of the board's functions, and it must, therefore, either be a direct and separate power, or be given to assist in assessing and collecting development charges. It was, indeed, suggested that its object was to enable the board to test the market in order to assist them in determining the proper amount of the development charge or to help them to collect it. Either suggestion is, in my opinion, remote from reality. There must be ample opportunity of calculating value from other sales. In default of other reasons for the power given, the natural explanation is that it was given to enable them to perform their functions as assessors and collectors of the development charge.

It was said, however, that so to decide was contradictory of the provision in s. 64 (2) which makes the right to receive any compensation for loss of development value transmissible by assignment or by operation of law. This provision was, I think, natural in the case of a new charge for which some compensation was to be given. It was desired to make it clear that the compensation was not personal to one who was owner at the appointed day, but was transmissible by or from him. It is, in fact, transmissible in all cases except as part of the consideration given to the purchaser of the land in exchange for an undertaking to pay the development charge. The limitation on transmission imposed by the exception does not conflict with the provisions of the sub-section. It merely ensures that the right to transmit the compensation shall not be used to increase the price charged for the interest assigned to a sum greater than the present use value of that interest. The point is a new one and I do not get any assistance from the cases cited to your Lordships. I would dismiss the appeal with costs.

- LORD GODDARD:** My Lords, the question which falls for decision in this case in the main depends on the true construction of s. 43 of the Town and Country Planning Act, 1947. In my opinion, that section confers a single power on the Central Land Board and not two powers. They have power to acquire land for a purpose connected with the performance of their functions, and the words which have been described throughout the argument as the second limb of the section, in my opinion, are no more than a particular instance of that which the legislature regarded as part of the board's functions. It would seem that in this case the board have acted in accordance with the clear words of the statute. The land which they have acquired was land for which permission for development had been granted and they acquired the land for the purpose of disposing of it on terms inclusive of the development charge.
- A** They disposed of it to a person to whom permission to develop had been granted, but, although the section does not say that they must dispose of it to such a person, it can, in my opinion, make no difference that that person is also one who has received permission to develop. The appellants' argument, however, is based on the contention that the board has nothing to do with development and that their functions are purely fiscal. The board, on the other hand,
- B** contend that this power is given to them for the purpose of facilitating the collection of the development charge. If it is not given to them for that purpose, I have great difficulty in seeing the reason for giving them power to acquire land. I cannot agree that Parliament could have intended to confer this power of compulsory purchase on the board merely for the purpose of enabling them to test the market. That they could use the power for this purpose may be true, though I should think it highly unlikely that they would ever do so, and equally
- C** I think it would be most unlikely that Parliament would confer on them or the Minister powers of compulsory purchase merely to achieve such an object. Again, I cannot think that this power was conferred for the purpose of enabling them to realise a security that may have been taken for development charge. It is, I think, of great significance that the only land that they can acquire is
- D** land for which permission to develop has been granted. One of the duties of the board is to collect the development charge for the purpose of providing funds for the payment of compensation to landowners who have been obliged to part with the development value to the State. If, therefore, permission has been given by the appropriate authority to develop land which it is in the public interest should be developed and a landowner is unwilling to sell at the
- E** existing use value, it follows that the board would be unable to collect the development charge which would otherwise become payable. A would-be purchaser cannot obtain compulsory powers of purchase. It appears to me, therefore, that Parliament intended to give to the Central Land Board, if they obtain the permission of the Minister, the power to acquire the land themselves, so that they may dispose of it at a price which will include the development
- F** charge from a purchaser who is willing to carry out the development, and thus to collect the appropriate sum.
- G**

A further objection which was taken by the appellants was that by their action the board are preventing the assignment by the landowner of his right to receive the compensation to which he may become entitled. I am unable to agree with this contention. The landowner has, no doubt, the right to

H participate in the compensation fund, and he can still assign that right as he can assign any other chose in action. The only thing that he cannot do is to assign the right to a purchaser as part of the consideration of the purchase, but for all other purposes his right to assign remains, and, after all, this is a mere temporary provision as the compensation money is to be paid in 1953 after which there will be nothing to assign. But it was said that the real object of the action of the Central Land Board was to enforce a policy whereby all sales of land would have to take place at existing use values, and it is said

that that is going beyond the provisions of the Act, as, if this had been the intention of Parliament, it would have been quite easy to provide in the Act that land should henceforth be sold only at that value. In my opinion, it cannot be said that, though it may well be, as I think, it was the desire of the board that sales should take place at existing use value, this would make the exercise of the power given to them *ultra vires*.

For the reasons I have expressed above, I think it clear that the action of the board in these or similar circumstances does facilitate the collection of the development charge, and we have here a case in which the landowner was endeavouring to obtain ground rent of an amount in excess of what could have been obtained if existing use value should be the governing consideration. I do not think we need consider whether the intending purchaser might, had the board not intervened, have still been willing to take a lease on the proposed terms. I think it is pretty clear, in fact, that he would not, but I do not find anything in s. 43 which prevents the Central Land Board exercising the express power which is given to them if they and the Minister think it is in the public interest so to do, and, accordingly, I would dismiss the appeal. A B

LORD OAKSEY: My Lords, I agree. In my opinion, the purpose referred to in the second part of s. 43 (1) of the Town and Country Planning Act, 1947, is a "purpose connected with the performance of their functions" by the Central Land Board within the meaning of the first part of that sub-section. Express power is given to the board by the sub-section to acquire land for the purpose of disposing of it for development for which permission has been granted on terms inclusive of any development charge. It is conceded by the appellants that the functions of the board include the duty to assess and collect development charges, and it appears to me that the power to acquire land for the purpose of disposing of it on terms inclusive of any development charge is clearly a purpose connected with the performance of these functions. C D

Counsel for the appellants has argued that the advice of the Central Land Board contained in the document headed "House 1", and the correspondence between the board and the appellants' agents, show that the board exercised their powers for the purpose of preventing the appellants obtaining more than the existing use value of the land in question and that there is nothing in the Act to prohibit a sale at such a value. It is true that there is nothing in the Act to prohibit sales at such values, but the express power to acquire land compulsorily for which permission to develop has been granted is inconsistent with a right by the landowner to sell at all in the particular class of cases dealt with. It was further argued on behalf of the appellants that s. 64 (2) of the Act, which provides that the right to receive payment from the sum payable for depreciation of land values shall be transmissible by assignment, was limited by the construction sought to be placed on s. 43 because the landowner could not transmit his right to payment as a term of the agreement to sell the property in respect of which his right to payment arose, but, in my opinion, the right to payment remained transmissible within the meaning of s. 64 (2), and such a limitation is no ground for placing a different interpretation on s. 43. It was also argued that if the development charge could be assessed at less than its full value the landowner would have been forced to sell his land at its existing use value while the purchaser would obtain without paying for it a part of its development value. It may be true that land acquired compulsorily under s. 43 may be disposed of on terms inclusive of a development charge which is less than the full development value, but there is nothing in the Act to which your Lordships' attention was drawn to show that land cannot be sold at prices higher than its existing use value, and I am unable to see that the discretion, if there is a discretion, which the board have to assess the development charge on less than the full developed value has any bearing on the interpretation of s. 43. E F G H

LORD MACDERMOTT: My Lords, this appeal seems to me to present little difficulty once a decision is reached as to the true construction of s. 43 (1) of the Town and Country Planning Act, 1947. This sub-section provides as follows:

"The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development."

In the course of the argument three views were advanced as to the meaning of this enactment. These, in my opinion, exhaust the relevant possibilities. They may be stated thus: (i) The second limb of the sub-section confers a power separate and distinct from, and wholly independent of, that contained in the first limb, the words "and in particular" which introduce the second limb being used as words of emphasis only and not as indicating an example of the power conferred by the first; (ii) the second limb but particularises something already within the general terms of the first, and, accordingly, the expression "for any purpose connected with the performance of their functions" must be satisfied before power arises under either limb—in other words, the board will have no power of acquisition in a case falling within the language of the second limb if the purpose of the acquisition is not also in fact connected with the performance of their functions under the subsequent provisions of the Act; and (iii) the second limb gives an instance of the power conferred by the first, but in terms which amount to a statutory recognition of the purpose described in the second limb as being within the scope of the first. Accordingly, if the case comes within the wording of the second limb (the word "so" being read as connoting acquisition by agreement and with the approval of the Minister) there is no need, in order to perfect the power it purports to confer, to trace a connection between the purpose therein mentioned and the performance of some function of the board. Of these alternatives view (i) is the most easily discarded. The structure of the sub-section is against it and so, I think, is the ordinary usage of the expression "in particular", though, no doubt, these words are occasionally employed merely to stress or direct attention to what they preface. Moreover, I find it difficult to see why a power to acquire land should be conferred on a statutory body in terms which are not to be related to the performance of its statutory functions, as the acceptance of this view would apparently entail. It seems to me that the proper approach to the second limb must be through the first, and not regardless of it, and, if that is right, view (i) falls out of account and the choice lies between views (ii) and (iii).

This choice I am content to make on what appears to me to be the natural meaning of the wording of s. 43 (1), for I have not found elsewhere in the Act anything to indicate that the language of the sub-section is used otherwise than in its ordinary everyday sense. Reading the enactment in this way I am in favour of view (iii). The word "so" in the expression "and in particular may so acquire" at the beginning of the second limb incorporates the earlier words of the first limb, "with the approval of the Minister, by agreement . . ." but it is, I think, impossible to go further and say that it also incorporates the expression "for any purpose connected with the performance of their functions." And if that expression is not to be read into the second limb by way of reference I see no good reason for implying it on the strength of the context. It may also be observed that view (ii), unlike view (iii), denies the second limb any practical legislative effect, and, further, that in s. 43 (2) the words "for any such purpose as aforesaid" are, grammatically and naturally, capable of referring to the purpose described in the second limb alone. Both these considerations seem

to me to lend support to view (iii) and the definitive character of the second limb which it adopts, but, when all is said, perhaps the best reason for the conclusion I have reached is just that it accords with what this second limb of the sub-section says, namely, that the board "may so"—i.e., by agreement and with ministerial approval—"acquire any land for the purpose of disposing of it for development . . . on terms inclusive of any development charge . . ." If the purpose thus described had no perceptible connection with the performance of the board's statutory functions the position might be different. But, as it is, the purpose of disposing of land ripe for development at a price inclusive of the development charge is, *prima facie*, connected with the board's function of collecting the charge, and I think what the legislature has done in the second limb is simply to preclude the possibility of contention as to whether, in fact, a connection of this sort exists by coupling the power to acquire plainly and directly to the specified purpose. I find nothing strange or irrational in this for it is reasonable enough that a purchaser from the board who pays the development charge as part of the price should not have his title dependent on what may or may not come within a phrase so vague and wide as "any purpose connected with the performance of their functions under the following provisions of this Act".

My Lords, with s. 43 (1) construed in this manner, there is no need to embark on the task of tracing a connection between the acquisition in question and the board's statutory functions. The bona fides of the board and the genuineness of their resolution of May 13, 1949, have not been challenged. This resolution states the purpose of the acquisition in terms which echo those of the second limb of s. 43 (1), and there has been no suggestion that in fact such was not the true and immediate purpose of the acquisition. In these circumstances it is, in my opinion, beside the point that, in seeking to acquire land for the purpose thus stated, the members of the board, or some of them, may have been moved by considerations of policy which, in themselves, would not (as I shall assume without deciding) constitute a purpose within the meaning of any part of s. 43 (1). The short answer to all the submissions as to motive is that on the facts here the board have brought their case within the express terms of the second limb of that sub-section. For these reasons I would dismiss the appeal.

LORD TUCKER: My Lords, this case turns on the proper construction of s. 43 (1) of the Town and Country Planning Act, 1947. [HIS LORDSHIP read the sub-section and continued:] Sub-section (2) goes on to give the Minister power to authorise the board to acquire the land compulsorily in any such case where the board are unable to acquire the land by agreement on reasonable terms if he considers it expedient in the public interest that the board should acquire the land for any such purpose.

Now, it is not in dispute that, in the present case, the compulsory purchase was made with a view to the acquisition of the land by the board for the purpose of disposing of it for development for which permission had been granted at an inclusive price, a transaction which is plainly within the express language of sub-s. (1). But it is said that the order was ultra vires by reason of the words in the sub-section preceding the words "in particular". My Lords, it is, of course, possible that the preceding words might have been so framed as to bring about this somewhat surprising result, but they would have to be very clear before I was persuaded to put such a construction on them. In my view, the true construction of this sub-section is that placed on it by SOMERVELL, L.J., where he says ([1951] 1 All E.R. 990):

"I think that the words should be construed as making it clear that a certain power, as to which there might have been doubt, is to be regarded as one in connection with the functions of the board."

I think it would otherwise have been open to debate whether or not a purchase of this kind was connected with the functions of the board. The language

- used has, however, in my view, placed the matter beyond dispute, although were it necessary for the decision of the case I should have been prepared to hold that such a purchase was "connected with" two functions of the board, viz., their function of assessing the development charge and their function of collecting it. I think that unrestricted sales on a large scale at prices in excess of existing use value would render more difficult the proper ascertainment of the true
- A existing use value which is a necessary element in calculating the development charge, and that, it being the function of the board to collect the charge to set it against the payments which they will have to make out of the £300,000,000 compensation fund, a policy which tends to facilitate and ensure a speedy payment of the charge by including it in the sale price is a policy the implementing of which is connected with their fiscal functions under the Act. The
- B declared policy of the board to discourage—by compulsory purchase if necessary—sales of land at prices in excess of existing use value seems to me to be one which the Act has empowered them to carry out by conferring on them this power to acquire land for the purpose of disposing of it for development for which permission has been granted at an inclusive price, and it is impossible to say that purchases made for this purpose are *ultra vires*. That the Act
- C might have, but did not, prohibit sales in excess of existing use value, or that the exercise of such powers tends to restrict in some degree the right given by s. 64 (2) to assign a claim on the compensation fund, are matters which afford me no assistance in the construction of s. 43 (1). On this short ground I would dismiss this appeal.

Appeal dismissed.

- D Solicitors: *Warren, Murton & Co.*, agents for *Newman & Bond*, Barnsley (for the appellants); *Treasury Solicitor* (for the Minister).
[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

NOTE.

Re A DEBTOR (No. 360 OF 1951). *Ex parte* THE DEBTOR v. NATIONAL PROVINCIAL BANK, LTD. AND ANOTHER.

[COURT OF APPEAL (Jenkins, Hodson, and Romer, L.JJ.), January 11, 14, February 8, 1952.]

- F *Bankruptcy—Act of bankruptcy—Remaining out of England with intent to defeat or delay creditors—Standard of proof—Fraudulent preference—Payments to some creditors—Bankruptcy Act, 1914 (c. 59), s. 1 (1) (c) (d).*

APPEAL by the debtor from a receiving order in bankruptcy made by Mr. Registrar PARTON on Oct. 17, 1951.

- G The debtor was an American citizen who lived in England for some years down to Nov. 4, 1950. He served in the British Army during the war of 1939-1945, and later engaged in various businesses. He became managing director of a firm called Hillsleigh, Ltd., to which firm the petitioning creditor, the National Provincial Bank, Ltd., made various loans. The debtor guaranteed the repayment of these loans, and also loans made by the bank to one William Lorrain Owen.
- H On Aug. 25, 1950, the bank issued two writs against the debtor, claiming payment of the amounts due under the guarantees. Difficulty was experienced in effecting service, and orders for substituted service were obtained. Judgment was given in both actions against the debtor, in one, on Nov. 14, 1950, under R.S.C., Ord. 14, and in the other, on Dec. 1, 1950, in default of appearance.

On Nov. 4, 1950, the debtor left England for the United States of America, and thereafter he divided his time between the United States and Canada, in both of which countries he had relations and friends. From Nov. 16, 1950, until

the presentation of the petition on June 5, 1951, correspondence passed between the bank's solicitors and the debtor's solicitors. The debtor's solicitors stated that the debtor had gone to America to discuss the position with his family. In February, 1951, proposals were made by the bank's solicitors for the payment of the judgment debts by instalments. The proposals were communicated to the debtor, who replied that he was "leaving for Canada next week" and proposed to discuss the matter with his family solicitor. On May 18, 1951, the debtor's solicitors informed the bank's solicitors that the debtor was still in America and that they "could not take the matter further". The bank's solicitors obtained an order for service of the bankruptcy petition in New York, at an address obtained by them from solicitors acting for a Colonel Dodds Parker who claimed to be a creditor of the debtor.

The petition was founded on the allegation that the debtor within three months before the date of the presentation of the petition had committed an act of bankruptcy within the Bankruptcy Act, 1914, s. 1 (1) (d), viz., on or about Dec. 6, 1950, with intent to defeat or delay his creditors, the debtor departed out of England and being out of England with a like intent remained out of England and continued so to remain at the date of the presentation of the petition. On Oct. 12, 1951, the debtor swore an affidavit in New York in which he denied that it was or had at any time been his intention to defeat or delay his creditors. He said that he intended to return to England in or about March, 1952. He had, he said, paid various debts in England amounting to £1,757 18s. since he went to America, and, if given reasonable time in which to develop his present business and to obtain the assistance of relatives and friends, he could pay all his debts in full. He was a prospective beneficiary under his mother's will, but, if made bankrupt, he would be deprived of that inheritance by a clause in the will.

Cases referred to:

- (1) *Re Kushler (M.), Ltd.*, [1943] 2 All E.R. 22; [1943] Ch. 248; 112 L.J.Ch. 194; 169 L.T. 17; 2nd Digest Supp.
- (2) *Ex p. Crispin. Re Crispin*, (1873), 8 Ch. App. 374; 42 L.J.Bcy. 65; 28 L.T. 483; 37 J.P. 391; 4 Digest 72, 612.
- (3) *Ex p. Gutierrez. Re Gutierrez*, (1879), 11 Ch.D. 298; 40 L.T. 355; 4 Digest 72, 613.
- (4) *Ex p. Brandon. Re Trench*, (1884), 25 Ch.D. 500; 53 L.J.Ch. 576; 50 L.T. 41; 4 Digest 74, 632.
- (5) *Ex p. Campbell. Re Wallace*, (1885), 15 Q.B.D. 213; 54 L.J.Q.B. 382; 53 L.T. 208; 4 Digest 202, 1860.
- (6) *Theophile v. Solicitor-General*, [1950] 1 All E.R. 405; [1950] A.C. 186; 2nd Digest Supp.

Joseph Jackson for the debtor.

Muir Hunter for the petitioning creditor.

Cur. adv. vult.

Feb. 8. **JENKINS, L.J.**, in a written judgment, said that he did not think that the order under appeal was warranted by the evidence. Intent to defeat or delay creditors was an essential element in the act of bankruptcy defined by s. 1 (1) (d) of the Act, and the onus was on the petitioning creditor to prove such intent. HIS LORDSHIP appreciated that direct evidence of intent was rarely available, and that proof of it must, generally speaking, be a matter of inference from the circumstances in each case. He was sensible also of the caution as to the degree of proof which a court should require administered by the Court of Appeal in *Re M. Kushler, Ltd.* (1). That was a case of fraudulent preference, but the same principle applied here. An intent to defeat or delay creditors was a fact to be proved like any other, and it was wrong to hold that the onus of proof could only be discharged by demonstrating that the existence of such an intent on the debtor's part was the only possible explanation of the debtor's conduct.

The proper standard of proof of the fact of such intent was no less and no more than the common standard of proof, which demanded at least that the court should be satisfied that in all the circumstances of the case the presence of the intent was so much the most probable explanation of the debtor's conduct as to make it in effect the only probable one.

A HIS LORDSHIP asked himself, therefore, whether in all the circumstances of the case it was proved by this standard that the debtor, who, admittedly being out of England, remained out of England, did so with intent to defeat or delay his creditors? In other words, was this in effect the only probable, though not necessarily the only possible, explanation of his conduct? In his judgment, those questions should be answered in the negative. It was to be noted that the debtor was of American origin. It was, therefore, a reasonable supposition that B the debtor genuinely believed that, if he went to and remained in America, he would be in a better position to raise funds wherewith to pay his creditors than if he remained in this country. The distinction in the matter of inferring intent between an Englishman going to a strange country and a foreigner returning to his own country or an Englishman returning from England to a foreign country in which he had made his home was recognised in *Ex p. Crispin. Re Crispin* (2), C *Ex p. Gutierrez. Re Gutierrez* (3), and *Ex p. Brandon. Re Trench* (4), although those cases did not by any means conclude the present case in the debtor's favour.

D The bank had relied on the evidence that the debtor had paid to various creditors sums totalling £1,757 18s. as supporting their contentions because the payments involved preference of some creditors over others, and this view seemed to have been taken by the learned registrar. In HIS LORDSHIP's view, so far from being evidence of intent to defeat or delay the debtor's creditors, these payments were cogent evidence of an intention on the debtor's part to pay his creditors as and when he could.

E Once it was conceded that the original departure from England was not with intent to defeat or delay creditors, but, on the contrary, was with intent to raise funds wherewith to pay them, a change to the opposite and nefarious intent was not to be lightly inferred. If the debtor had engaged in business in the United States of America and hoped by this means to obtain money to pay his creditors, the mere prolongation of his absence provided no evidence of intent to defeat or delay his creditors. This case was clearly distinguishable on its facts from *Ex p. Campbell. Re Wallace* (5).

F Counsel for the bank had suggested that the receiving order could in any case be supported on the strength of an act of bankruptcy under the Bankruptcy Act, 1914, s. 1 (1) (c), on the debtor's own admission that in making the payments totalling £1,757 18s. he had preferred some creditors to others. There were several objections to this course. First, it seemed questionable whether a mere payment was a "conveyance or transfer of property" within s. 1 (1) (c), which did not expressly mention payments, particularly in view of the fact that s. 44 of the G Act (which dealt with fraudulent preferences) did expressly mention payments as well as conveyances or transfers. Secondly, some evidence of intent beyond the mere fact of payment was necessary, and here there was none. Finally, there was no evidence that any of these payments was made within the three months preceding the presentation of the petition.

HODSON and ROMER, L.JJ., concurred.

Appeal allowed.

Solicitors: *M. A. Jacobs & Sons* (for the debtor); *Jacobson, Ridley & Co.* (for the petitioning creditor).

F.G.

MINISTER OF MATERIALS v. STEEL BROTHERS & CO., LTD.

[COURT OF APPEAL (Singleton and Morris, L.J.J., and Lloyd-Jacob, J.), February 5, 6, 7, 8, 1952.]

Sale of Goods—Quality—Clause regulating buyer's claim for inferior quality—Application to deterioration owing to defective packing.

Under a contract in writing for the sale of goods the buyer agreed to purchase rubber known as "R.M.A.2 ribbed smoked sheet Hevea Braziliensis". A clause in the contract read as follows: "Quality: To be as described above. If found inferior . . . buyer shall accept the rubber with a fair allowance . . . Notice in writing of any objection on the grounds of quality must be given . . . not later than sixty days after discharge of goods at destination . . ." The sellers delivered the rubber to the buyer's warehouse, where later the buyer discovered that it had suffered damage through the adhesion of defective coverings in which the sellers had wrapped it. The buyer gave notice of objection outside the time limit laid down by the quality clause in the contract, and the sellers refused to admit the claim on the ground that the notice of objection was out of time.

HELD: the complaint of the buyer was not that the sellers had supplied goods which were not of the quality contracted for, but that the goods supplied had suffered damage; the words of the quality clause were not expressed with sufficient clarity to include such damage to the goods as had been suffered in this case; and, accordingly, the buyer's claim was not out of time and he was entitled to an allowance.

Dicta of BANKES and SCRUTTON, L.J.J., in *Szymonowski & Co. v. Beck & Co.* ([1923] 1 K.B. 464, 466), applied.

AS TO BREACH OF CONDITIONS AND WARRANTIES, see HALSBURY, Hailsham Edn., Vol. 29, pp. 53-56, paras. 65-68; and FOR CASES, see DIGEST, Vol. 39, pp. 466-470, Nos. 917-945.

Case referred to:

- (1) *Szymonowski & Co. v. Beck & Co.*, [1923] 1 K.B. 457, *affd.* H.L., *sub nom.* *Beck & Co. v. Szymonowski & Co.*, [1924] A.C. 43; 93 L.J.K.B. 25; 130 L.T. 387; 39 Digest 467, 925.

APPEAL by the buyer from an order of McNAIR, J., dated July 20, 1951, made on a Special Case stated by the appeal tribunal of the Rubber Manufacturers Association.

The buyer under a contract for the sale of goods claimed an allowance for deterioration caused by defective packing, but the sellers rejected the claim as being out of the time laid down by a clause in the contract regulating defects as to quality. The dispute was referred to arbitration, and the arbitrators found that the quality clause in the contract applied to the defect in question, so that the buyer was out of time in his claim. The buyer appealed to the appeal tribunal, who upheld the award of the arbitrators. The appeal tribunal stated their award in the form of a Special Case for the opinion of the High Court, and McNAIR, J., set aside their award. The sellers appealed.

Scott Cairns, Q.C., and *Honeyman* for the sellers.

Diplock, Q.C., *J. P. Ashworth* and *R. J. Parker* for the buyer.

SINGLETON, L.J.: This dispute arises out of a contract for the sale of rubber. The parties to the contract were the Board of Trade, Rubber Directorate, as buyer, and Steel Brothers & Co., Ltd., the sellers. The position of the Board of Trade is now taken by the Minister of Materials. The contract is in the terms of this note from the sellers' brokers to the buyer:

"We have this day bought for your account from our principals Messrs. Steel Brothers & Co., Ltd., whose solvency we guarantee, the following plantation rubber, in bales and/or cases and/or bareback, viz., about nine

and a half tons R.M.A.2. Ribbed Smoked Sheet Hevea Brasiliensis at forty-nine and a half Straits cents per lb. nett shipping weights to be delivered free on board at Rangoon during the month December, 1946, for shipment to London and/or Liverpool."

Below that there is a note:

A "This purchase is made subject to . . . (b) The f.o.b. contract for eastern ports adopted by the Rubber Trade Association of London to be effective on and after June 13, 1946, and agreed by the Board of Trade, Rubber Directorate."

B In fulfilment of that contract the sellers delivered to the ship selected by them according to the contract the amount of rubber called for by the contract. The grade of the rubber, in the terms of the contract, was to be "R.M.A.2.", which meant "Rubber Manufacturers Association, Grade 2". The rubber reached Liverpool in due course and was placed in a warehouse. When it was examined on behalf of the buyer a long time afterwards, it was found that some of it was damaged. The buyer made a claim against the sellers, which was first indicated by a letter from the buyer to the sellers' brokers, dated July 2, 1947, C which was in these terms:

"We have been advised by the wharfingers who are storing the above-mentioned parcel of rubber that the hessian covering the five hundred bales is adhering to the rubber and the rubber beneath the wrapping has become tacky as a result of a preparation applied to the hessian as a rot-proofing agent. The wharfingers asked a firm of surveyors to inspect this rubber, D and they suggested that a sample should be sent to a chemist to be analysed. The result of the analysis shows that there is oil in the hessian and this has acted on the rubber. To avoid further damage to the rubber it will be necessary to strip the hessian from the rubber and also the wrapper sheets which are damaged, and we hereby hold you responsible for the charges which will accrue. If you desire to inspect this rubber, we shall be pleased E to make the necessary inspection order available."

The sellers answered that the notification of claim was too late, and they based that contention on a term in the f.o.b. contract for eastern ports which was brought into the terms of the contract of sale by the note at the foot of the contract which I have read. The term is:

F "Quality: To be as described above. If found inferior, and failing an amicable settlement, buyer shall accept the rubber with a fair allowance to be decided by arbitration in London. Notice in writing of any objection on the grounds of quality must be given by last buyer to his broker in London not later than fifty-six days after discharge of goods at destination declared under this contract."

G The period of fifty-six days mentioned was altered by letter of a later date to sixty days. The answer made by the sellers was that the claim in respect of these goods related to quality, and that, as no notification of it was made until some eighty-five days after discharge, the claim of the buyer was out of time. It was said that the clause relating to quality contained a condition precedent to the buyer recovering an allowance in respect of these goods, and that the H claim was barred.

The dispute was referred to the arbitration of two arbitrators, and they, stating their award in the form of a Special Case, came to the conclusion that the contention of the sellers was right. There was an appeal from their decision to the appeal tribunal of the Rubber Manufacturers Association, and that tribunal likewise decided in favour of the sellers. At the request of the parties, they stated their award in the form of a Special Case. That case was argued before McNair, J., who reached the conclusion that the decision of the appeal

tribunal was wrong, that the quality clause in the contract did not apply to this dispute, and that, consequently, the buyer's claim was not barred by lapse of time.

The quality clause begins by the words "Quality: To be as described above." If one refers back to the particular contract, one finds that the quality is contained in those letters, "R.M.A.2." That is a well-recognised grade of rubber, and the rubber which was to be supplied was ribbed smoked sheet. In the association's form of contract the preceding clause is a packing clause. The marginal note is "Packing", and that reads:

"In the case of ribbed smoked sheets each package of rubber shall be completely wrapped on all sides with equal quality sheet, and, in the case of other grades, in conformity with such specifications as may be prescribed from time to time by the Rubber Trade Association of London. Non-compliance with the foregoing shall not form a ground of rejection, but buyer shall be entitled to claim an allowance if it is proved that the contents have deteriorated owing to defective packing and for inferior quality wrappers. Where rubber is packed in bales or bareback, sellers not to be responsible for contents arriving in massed condition."

If a question arises on that clause, it does not appear that there is any time limit other than that prescribed by the Limitation Act, 1939, but the submission of counsel for the sellers is that, if you have deterioration in quality through bad packing, the quality clause applies and with it the limitation of sixty days within which a claim could be made also. Counsel for the buyer drew our attention to the words in the packing clause:

"Non-compliance with the foregoing shall not form a ground of rejection, but buyer shall be entitled to claim an allowance if it is proved that the contents have deteriorated owing to defective packing and for inferior quality wrappers."

[HIS LORDSHIP read the certificate of the grading committee of the association, said that that document showed that the goods, speaking generally, were equal to the contract quality, but that at some date after June 25, 1947, some of them had been damaged by reason of faulty wrappers, and continued:] In those circumstances the question, and the only question, which arises is: Was the claim made by the buyer too late? In other words, is the submission which counsel made on behalf of the sellers, that the quality clause applied to the damage in this case, right? In *Szymonowski & Co. v. Beck & Co.* (1) a somewhat similar question was raised, a discussion took place as to how far a clause of this kind gave protection to a party to a contract, and BANKES, L.J., said ([1923] 1 K.B. 464):

"A buyer has, in the event of his seller breaking his contract, a prima facie right to avail himself of one or other of several alternative remedies, and if the seller desires by a clause in the contract to restrict the buyer's right to those remedies he must say plainly whether he intends to deprive the buyer in certain events of all those remedies or only of one or more of them, and if so of which."

SCRUTTON, L.J., said (*ibid.*, 466):

"The sellers relied on a printed clause No. 5 on the back of the contract. Now I approach the consideration of that clause applying the principle repeatedly acted upon by the House of Lords and by this court—that if a party wishes to exclude the ordinary consequences that would flow in law from the contract that he is making he must do so in clear terms."

There was an appeal to the House of Lords in that case, where the judgment of the Court of Appeal was upheld, LORD BUCKMASTER dissenting. LORD BUCKMASTER, in his dissenting speech, said ([1924] A.C. 48):

"The sole question, and it is one of some difficulty, is whether the general provisions of the clause apply to the particular breach? I agree with what was said by SCRUTTON, L.J., that in a contract from which the ordinary rights of buyer and seller ensue an attempt to exclude either party from those rights by general terms applicable to all contracts can only be effected by the use of plain language."

A That, indeed, is the accepted principle which we have to apply.

Counsel for the buyer submitted that the quality clause in the contract did not cover this dispute. He argued that he was entitled to infer from the terms of the certificate of the grading committee that the damage did not fall within the quality clause at all, and he said that, if he had had to settle a pleading in this case, he would have set up either a breach of the packing clause, as to which

B there was no time limit, or a breach of an implied term in the contract. The bales, he said, had to be wrapped in hessian covers according to the ordinary practice, hessian coverings were put on them, and there must be implied into the contract a term that the covers used would be proper and suitable for their purpose. If they were not, there would be breach of an implied term in the contract entitling the buyer to damages for breach of contract, a claim which

C would not fall within the quality clause at all. The submission of counsel for the sellers was that it did not matter what the cause of the damage was. The goods were found inferior within the meaning of the quality clause, and it mattered not whether they were found inferior by reason of damage during the voyage or at some later stage. The damage was something which went to quality, and it followed that the time limit in the quality clause applied. Indeed, his

D submission went further and was that, if at any time when the goods were examined after they had been discharged from the ship and put into warehouse, they were found damaged from any cause, that went to quality, and, however they had been damaged, the sixty days' limitation applied.

I do not think that the quality clause in this general form of contract covers a claim for damage. The claim of the buyer is not that there was anything wrong

E with the quality of the goods supplied, but that the coverings were unsuitable and caused damage to the goods at some later stage. If the sellers wished to avoid a claim of that kind, or to limit the time in which such a claim could be made, they ought to have used clearer terms. They could have said in their contract that no claim of any kind should be made or received after sixty days had gone. They did not say that. The time limit applies, and applies only, in

F respect of quality. In my opinion, the judgment of McNAIR, J., was right.

MORRIS, L.J.: I find myself in entire agreement with the judgment which my Lord has just delivered. The question of law which arose for the decision of the court was by agreement stated as follows: .

G "Whether, on the true construction of the said contract, the buyer is precluded from recovering damages in respect of the damage sustained by the goods delivered under the said contract (such damage being of the nature found in the award and caused in manner found by the award) by reason of the fact that notice of a claim in respect of such damage was not given until eighty-five days after the discharge of the said goods into a recognised warehouse."

H The point, therefore, was whether the buyer was precluded from recovering damages in respect of the damage sustained by the goods delivered under the contract. The quality clause does not, in so many words, state that, unless there is a notice in writing of an objection within the stipulated period, a claim shall be barred, but it was common ground that the words must be read as meaning that, if a notice in writing of an objection on the grounds of quality is not given within that period, a claim is barred. Counsel for the sellers submitted that any claim that related to the condition of the goods was a

claim under which objection was made on the grounds of quality. The contract is one for the sale of goods f.o.b. There are, however, certain special terms. One is that certain loss in weight during transit, excluding theft and pilferage, may be for the sellers' account. Another is that on the sellers is imposed an obligation to engage the necessary tonnage. The sellers may dispatch the rubber in bales and/or cases and/or bareback. If, in the exercise of their option, the sellers choose to pack the rubber, it is not disputed that they must pack it properly. The claim which is put forward by the buyers is that the rubber sustained damage because it was defectively packed. It is not said that the rubber that was shipped was not properly described at R.M.A.2. ribbed smoked sheets, *Hevea Braziliensis*.

There is clear authority for the proposition that, if a party to a contract wishes to exclude the ordinary consequences that would flow in law from the contract that he is making, he must do so in clear and unambiguous terms. In my judgment, it is not shown that the claim which the buyer makes is barred by the words relied on. He does not raise an objection on the grounds of quality. He does not say that the rubber was, as to its quality, inferior to the quality denoted by the contract. Even if it could be said that the complaint could in words be formulated so as to be an objection to the quality of the rubber, the buyer did not need so to formulate it, and, if otherwise formulated, it is not within the barring words. The buyer does not, in fact, assert, and does not need to assert, that the rubber, when shipped, was not of contract quality. He does not need to assert that the rubber on arrival was not of contract quality. What is said is that, because of defective packing, damage was at some date caused to rubber which was of contract quality. I agree with the learned judge that a claim based on a term of the contract, either express or implied, that the packing should be of such a nature as not to damage the goods is not to be regarded as an objection on the grounds of quality within the words of this particular clause in this contract.

LLOYD-JACOB, J.: I also agree. It is said that the clause prescribing a time limit within which objection may justifiably be made by the buyer must be clear and free from ambiguity, if it is to operate effectively as a bar. The clause relied on, to which the side-note "Quality" is applied, begins with the phrase, "to be as described above." The description to which a reference is thus made is of the type of material to be loaded at Rangoon for shipment. The clause proceeds, "if found inferior . . .", and this plainly imports the potentiality of a determination in conformity, or otherwise, with the description at a date subsequent to the time of loading. The question whether, on its true construction, this clause calls for conformity with the description at the time of loading, or at the time of discharge at the warehouse, or at the time of examination, if any, only arises if it be assumed that a variation in description is contemplated as possible with the passage of time or with the subsequent examination. No evidence is available as to the general understanding of these words by those experienced in the trade, and it is noteworthy that changes in condition of the goods between the time of loading and delivery are specifically referred to elsewhere in the contract. One reference does appear in the quality clause itself, and that is to mouldy wrapper sheets, and this might conceivably be regarded as a reference to a condition, but, as it is found in that part of the clause which is dealing with sampling, it may well be included merely for convenience of reference and to avoid repetition of directions for sampling in other parts of the contract. I agree that there are plain difficulties in construing the language of this agreement, and, were it necessary to decide the point, I should, as at present advised, be disposed to hold that the quality clause cannot fairly be construed as though after the words "if found inferior" there were notionally inserted the phrase, "that is not in accordance with description or in an unsatisfactory condition." It is, however, sufficient, for the purpose of the present case, to hold that the

clause is certainly not so clear in its terms as to give to the buyer a clear indication that an objection on the grounds of unsatisfactory condition must be presented within the time limit prescribed in the clause. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Waltons & Co.* (for the sellers); *Solicitor, Board of Trade* (for the buyer).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

WEBB v. WEBB.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (KARMINSKI, J.), January 30, 31, 1952.]

Divorce—Custody—"Child the marriage of whose parents is the subject of the proceedings"—*Child born during marriage, but not child of husband—Husband registered as father—Matrimonial Causes Act, 1950 (c. 25), s. 26 (1).*

Before her marriage the wife conceived a child by a man who was not her husband. She told the husband that she was pregnant, and, when the child was born after the marriage, he registered himself as the father of the child. The wife, having obtained a decree nisi against the husband, applied for an order for the custody of the child.

HELD: on the true construction of s. 26 (1) of the Matrimonial Causes Act, 1950, the child with relation to whose custody the order is made must be a child of the marriage of persons who are in fact the parents of the child; the husband was not the parent of the child; and, therefore, the court had no power to make an order for custody.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 26 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 413.

APPLICATION by the wife, who had obtained a decree nisi against her husband, for the custody of a child born during the marriage, but whose father was not the husband.

Miss M. Morgan Gibbon for the wife.

J. B. Gardner for the husband.

KARMINSKI, J.: This is an application by the wife, who today obtained a decree of dissolution of her marriage, for the custody of a child born during the marriage.

The parties were married on Nov. 19, 1947. The child was born on Jan. 9, 1948. In the proceedings which were completed today it was made abundantly clear—and, indeed, it was never contested—that the father of this child, who was conceived in or about April, 1947, was a man other than the husband. It is fair to say that the wife told the husband she was pregnant by this man some months before the marriage, that the husband accepted the position and undertook to look after the child as his own, and, indeed, that when the child was born in January, 1948, he registered himself as being the father of the child.

The wife having obtained a decree nisi, I am asked by her counsel to make an order in her favour for custody of that child. I have heard an interesting and ingenious argument, but, in my view, the matter is concluded by the Matrimonial Causes Act, 1950, s. 26 (1) which provides:

"In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court."

The essence of that sub-section is this. First, there must be a child or children. Then there must be a marriage, but the marriage has to be a marriage of the persons who are in fact and in flesh and blood the parents of the child. Counsel for the wife has argued that because this child was born during the currency of the marriage, therefore, it is *prima facie* not only legitimate, but the child of the parties in this case. I think the proposition so far is unexceptional, but the presumption of legitimacy cannot, in my view, survive clear and cogent evidence to the contrary. Counsel invited me to divide my mind into two separate compartments—one, to deal with the history and facts of the marriage as they were given in evidence in a heavily contested case, and the other, to regard only the birth of the child and the fact that there was a marriage before that birth.

On an application for custody it would be quite wrong to disregard the important fact that clear and compelling evidence was given in the other part of the suit, which, in my view, completely destroys and rebuts any presumption which may have existed until that evidence was given that the child of the marriage was the child of the husband and wife. In my view, s. 26 (1) means precisely what it says, namely, that the child with relation to whose custody an order is to be made is a child of the marriage of his parents. In this case clearly the husband was not the father of the child, and I hold that I have no jurisdiction to make an order in respect of the custody of the child.

Application dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Hallett & Co.*, Ashford, Kent (for the wife); *Foyer, White & Prescott*, agents for *Whatley & Mellor*, Great Malvern, Worcs. (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

SMITH v. W. H. SMITH AND SONS, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), February 18, 1952.]

Negligence—Judgment—Both parties to blame—Judgment on claim and counter-claim for damages in proportion to responsibility for damage—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1).

Negligence—Costs—Both parties to blame.

The plaintiff's motor car was in collision with a motor van driven by a servant of the defendants. Both vehicles suffered damage, the plaintiff claimed damages for negligence, and the defendants filed a counterclaim on the same ground. The county court judge found both parties equally to blame, and he dismissed the claim with costs and the counterclaim with costs.

HELD: (i) having regard to the terms of the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), the proper form of order was judgment on the claim for damages in respect of half of the damage proved by the plaintiff and judgment on the counterclaim for damages in respect of half of the damage proved by the defendants.

(ii) the order as to costs made by the county court judge gave an undue advantage to the defendants, and without laying down any rule of practice to be followed in all cases in which there were cross-claims for negligence and each side was held equally to blame, justice would be done in the present case if there were no order as to costs on the claim or counterclaim.

FOR THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 17, p. 12.

Cases referred to:

- (1) *Wilson v. Walters*, [1926] 1 K.B. 511; 95 L.J.K.B. 624; 134 L.T. 597; 40 Digest 437, 571.
- (2) *Jay (William A.) & Sons v. Veevers, Ltd.*, [1946] 1 All E.R. 646; 2nd Digest Supp.
- (3) *Cinema Press, Ltd. v. Pictures & Pleasures, Ltd.*, [1945] 1 All E.R. 440; [1945] K.B. 356; 114 L.J.K.B. 368; 172 L.T. 295; 2nd Digest Supp.
- (4) *Medway Oil & Storage Co. v. Continental Contractors*, [1929] A.C. 88; 98 L.J.K.B. 148; 140 L.T. 98; Digest Supp.

APPEAL by plaintiff from an order made by His Honour JUDGE DONALD HURST at Oxford County Court on Nov. 12, 1951.

J. D. May for the plaintiff.

H. B. Grant for the defendants.

SIR RAYMOND EVERSLED, M.R.: The claim in the present action was for damages for negligence arising out of a collision between two motor vehicles at Headington, Oxford. The vehicles involved were the private motor car of the plaintiff and a van driven by a servant of the defendants. The damage suffered by the plaintiff was, except for a difference of a few shillings, of the same amount as that suffered by the defendants. The county court judge concluded that the parties were equally to blame, and he dismissed the plaintiff's claim and a counterclaim brought by the defendants, in each case with costs. We are told that the judge's attention was drawn to the provisions of the Law Reform (Contributory Negligence) Act, 1945, and, no doubt, he had them in mind, but the making of the order in the form in which he made it is in two respects open to criticism. The result, having regard to *Wilson v. Walters* (1) and other authorities, is that the defendants would appear to gain an appreciable advantage, for the plaintiff would have to pay their general costs of the action while they would be liable to pay by way of costs of the counterclaim only such costs as the registrar would allow as being costs additionally incurred by reason of the fact that there was a counterclaim, and the latter would be trivial compared with the former.

It was submitted that, having regard to the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), even though the monetary result was not different from the result achieved by the judge's order, the plaintiff was entitled to have judgment for damages in respect of half his damage, and counsel for the plaintiff conceded that the defendants were equally entitled to judgment for damages for half the damage they had proved. The substantial matter of the form of order has not been in dispute, and I am satisfied, in view of the terms of the Act, that the judge should have made the order in the form suggested, that is, judgment on the claim in respect of half the damage proved by the plaintiff and judgment on the counterclaim in respect of half the damage proved by the defendants.

The defendants' claim for damages set out in their counterclaim amounted to £58 6s. 11d., and that sum was admitted. The plaintiff's claim, admitted or proved in evidence, amounted to £58 15s. 2d. and thus exceeds the claim of the defendants by the sum of 8s. 3d. When divided by two the result is that the difference between them is reduced to approximately 4s. Even so, in my judgment, the order made ought to be set aside and in lieu there should be judgment for the plaintiff on the claim for half £58 15s. 2d., namely, £29 7s. 7d., and judgment for the defendants on the counterclaim for half £58 6s. 11d., namely, £29 3s. 5½d.

There remains the question of costs. In the ordinary way this court would not interfere with the exercise of the judge's discretion in the matter of costs, but the form of order as to costs which he made clearly depended on the form of order dismissing the claim and counterclaim. Once the latter is displaced it seems to me that the form of order as to costs cannot stand, and that this court,

in the exercise of our discretion, must decide how the costs should be borne. It has been suggested that there should be, so to say, a reversal of the judge's order—that, each party having succeeded to an appreciable extent, the plaintiff should get the costs of the action and the defendants the costs of the counterclaim. That would, as it seems to me, give an advantage to the plaintiff equally deserving with the advantage which the judge's order as to costs gave to the defendants. I do not wish to be thought to be laying down any rule of practice to be followed in all cases in which there are cross-claims for negligence and each side is held equally or approximately equally to blame. The judges of the Queen's Bench Division have great experience in this class of case and deal with matters of costs according to their discretion, avoiding when possible the complexities of a double taxation: see *William A. Jay & Sons v. Veevers, Ltd.* (2). In this case I think that justice would be done if there were no order as to costs on the claim or the counterclaim in the court below. The order of the learned judge should be set aside and there should be substituted judgment for the figures I have given in favour of the plaintiff and the defendants, with no order as to costs.

JENKINS, L.J.: I agree.

HODSON, L.J.: I think it might be useful to refer to a decision of this court in *Cinema Press, Ltd. v. Pictures & Pleasures, Ltd.* (3), in which LORD GODDARD delivered the judgment of the court. That was not a case involving claim and counterclaim, but there was a complicated decision which produced difficulties on taxation. In the closing passage of his judgment ([1945] 1 All E.R. 444) LORD GODDARD cited LORD BLANESBURGH's speech in *Medway Oil & Storage Co. v. Continental Contractors* (4) ([1929] A.C. 112):

“... this appeal will not be without permanent utility if it brings home to learned judges the necessity, in cases like these, of adjusting critically their orders as to costs if these orders are not sometimes to produce results at once unintentional and unjust’.”

LORD GODDARD, in giving the judgment of the court, added these words:

“We would add that the simplest way is to award costs in such proportions as the judge thinks fair.”

I agree with the judgment of SIR RAYMOND EVERSHED, M.R., and with the order proposed.

Appeal allowed.

Solicitors: *G. Howard & Co.* (for the plaintiff); *Berryman's*, agents for *Brain & Brain*, Reading (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. DOWDELL O'MAHONEY & CO., LTD.

HOUSE OF LORDS (Lord Oaksey, Lord Reid, Lord Radcliffe and Lord Tucker),
November 14, 15, 16, 1951, February 25, 1952.]

Excess Profits Tax—Deductions against profits—Deduction of Eire taxes against English profits—Income Tax Act, 1918 (c. 40), sched. D, Rules Applicable to Cases I and II, r. 3 (a)—Finance (No. 2) Act, 1939 (c. 109), sched. VII, Part I, para. 5, para. 8—Finance Act, 1940 (c. 29), s. 30 (1) (2).

A company resident in Eire carried on business at two branches in England. The whole of its profits, including those arising from the businesses in England, were subject in Eire to income tax, corporation profits tax (corresponding to the United Kingdom national defence contribution), and excess profits tax, and its profits from the businesses in England were subject to United Kingdom excess profits tax. The company sought to deduct a proportion of the Eire taxes in computing the profits of the businesses in England for assessment to excess profits tax in the United Kingdom.

HELD: (i) the Irish taxes were not disbursements or expenses wholly and exclusively laid out for the purposes of the company's trade in the United Kingdom within the meaning of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D, to the Income Tax Act, 1918; they were not paid for the purpose of earning profits, but were an application of the profits when made; and, therefore, the exception to the rule (as applied by the Finance (No. 2) Act, 1939, s. 14 (1)) did not authorise the deduction claimed.

Smith's Potato Estates, Ltd. v. Bolland. Smith's Potato Crisps (1929), Ltd. v. Inland Revenue Comrs. ([1948] 2 All E.R. 367), and dictum of LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* ([1906] A.C. 453), applied.

Stevens v. Durban-Roodeport Gold Mining Co. (1909) (100 L.T. 481), considered.

(ii) although the Finance (No. 2) Act, 1939, sched. VII, Part I, para. 5 and para. 8, indicated a belief on the part of the legislature that there existed a right to deduct such taxes in computing profits, that belief was erroneous, and those provisions could not be regarded as enacting by implication that such a deduction should be allowed; the Finance Act, 1940, s. 30, conferred no new power on the commissioners to allow a deduction unless an appropriate Order in Council were made; and no such Order had at the relevant time been made.

Decision of COURT OF APPEAL ([1950] 1 All E.R. 969), reversed.

FOR THE INCOME TAX ACT, 1918, sched. D, Rules Applicable to Cases I and II, r. 3 (a), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 156; and FOR THE FINANCE ACT, 1940, s. 30, see *ibid.*, pp. 478, 479.

Cases referred to:

- (1) *Strong & Co., Ltd. v. Woodfield*, [1906] A.C. 448; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215; 28 Digest 57, 290.
- (2) *Inland Revenue Comrs. v. Von Glehn*, [1920] 2 K.B. 553; 89 L.J.K.B. 590; 123 L.T. 338; 12 Tax Cas. 232; 28 Digest 46, 236.
- (3) *Inland Revenue Comrs. v. Warnes & Co.*, [1919] 2 K.B. 444; 89 L.J.K.B. 6; 121 L.T. 125; 12 Tax Cas. 227; 28 Digest 46, 235.
- (4) *L. C. Ltd. v. G. B. Ollivant, Ltd.*, [1944] 1 All E.R. 510; 2nd Digest Supp.
- (5) *Smith's Potato Estates, Ltd. v. Bolland. Smith's Potato Crisps (1929), Ltd. v. Inland Revenue Comrs.*, [1948] 2 All E.R. 367; [1948] A.C. 508; [1948] L.J.R. 1557; 30 Tax Cas. 267; 2nd Digest Supp.
- (6) *Stevens v. Durban-Roodeport Gold Mining Co.*, (1909), 100 L.T. 481; 5 Tax Cas. 402; 28 Digest 54, 277.

- (7) *Mersey Docks & Harbour Board v. Lucas*, (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 2 Tax Cas. 25; 28 Digest 21, 104.
- (8) *Rushden Heel Co., Ltd. v. Keene. Rushden Heel Co., Ltd. v. Inland Revenue Comrs.*, [1948] 2 All E.R. 378; [1948] L.J.R. 1570; 30 Tax Cas. 298; 2nd Digest Supp.
- (9) *Inland Revenue Comrs. v. Ayrshire Employers Mutual Insurance Assocn., Ltd.*, [1946] 1 All E.R. 637; 175 L.T. 22; 27 Tax Cas. 331; 2nd Digest Supp.

APPEAL by the Crown from an order of the Court of Appeal (SOMERVELL and SINGLETON, L.JJ., and ROXBURGH, J.) dated Apr. 4, 1950, and reported [1950] 1 All E.R. 969, allowing the appeal of the taxpayer, Dowdell O'Mahoney & Co., Ltd., from an order of CROOM-JOHNSON, J., dated Oct. 25, 1949, remitting to the Special Commissioners a Case stated for the opinion of the High Court for them to state the evidence on which their finding was based, and to state, in summary form, the nature, effect, and incidence of the three Irish taxes referred to.

Both parties agreed that the Case set out all the evidence called, and they agreed in summary form a statement as to the Irish taxes. The appeal to the Court of Appeal was placed in the interlocutory list for hearing, but the Court of Appeal decided that it had jurisdiction to dispose finally of the substantive issue. The transfer of the appeal to the final list was ordered, the order of CROOM-JOHNSON, J., for remitting the Case to the Special Commissioners was set aside, and the Court of Appeal heard the appeal as a final appeal.

Cyril King, Q.C., and *Sir Reginald Hills* for the Crown.
Grant, Q.C., and *Senter* for the taxpayer.

The House took time for consideration.

Feb. 25. The following opinions were delivered.

LORD OAKSEY: My Lords, the question arising in the present appeal is whether the proportion of certain taxes paid by Dowdell O'Mahoney & Co., Ltd. (hereinafter referred to as "the company") in Eire in respect of profits of its trade arising in England are deductible in arriving at its profits assessable to excess profits tax of the United Kingdom. An agreed memorandum as to the nature of these Irish taxes was put in and is as follows:

"That the Irish income tax, corporation profits tax and excess profits tax referred to in the Case Stated were imposed under Irish statutes, the provisions of which are similar to the provisions of the United Kingdom Finance Acts imposing income tax, national defence contribution and excess profits tax, and in particular that the Irish income tax was imposed on the profits of a trade, which profits were computed on income tax principles similar to United Kingdom income tax principles and that the profits of a trade for assessment to Irish corporation profits tax and excess profits tax were computed on Irish income tax principles with adaptations similar to the adaptations for the purposes of United Kingdom national defence contribution and excess profits tax."

The company was incorporated in Eire and it is managed, controlled and resident there. Its business there is that of margarine manufacturers and butter merchants. It has two branches in England, one at Manchester and the other at Cardiff, where a general grocery business is carried on.

In the Court of Appeal and in your Lordships' House the question raised was treated as involving two points: (i) whether the Irish taxes in question were disbursements or expenses wholly and exclusively laid out or expended for the purposes of the trade of the company in England within the meaning of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D; and (ii) whether, even if they were not, the company was entitled to deduct them by reason

of the provisions of para. 5 of Part I of sched. VII to the Finance (No. 2) Act, 1939, and s. 30 of the Finance Act, 1940. On the first question it was contended on behalf of the appellants that the authorities establish that the payment of such taxes by a trader is not a disbursement wholly and exclusively laid out for the purposes of his trade, and that this is so whether such taxes are United Kingdom taxes or foreign or Dominion taxes, and reliance was placed on *Strong & Co., Ltd. v. Woodfield* (1), *Inland Revenue Comrs. v. Von Glehn* (2), *Inland Revenue Comrs. v. Warnes & Co.* (3), *L. C. Ltd. v. G. B. Ollivant, Ltd.* (4), and *Smith's Potato Estates, Ltd. v. Bolland. Smith's Potato Crisps* (1929), *Ltd. v. Inland Revenue Comrs.* (5). On behalf of the company it was contended that the principle of these cases ought not to be extended, and that Dominion and foreign taxes stand on a different footing from United Kingdom taxes and ought to be considered as disbursements which the trader has, as a matter of fact and not of law, to pay for the purposes of his trade in the United Kingdom. Reliance was also much placed by the respondents on *Stevens v. Durban-Roodeport Gold Mining Co.* (6), in which CHANNELL, J., held that a tax paid in the Transvaal of ten per cent. on the net produce obtained from working gold mines should be deducted from the profits of the year to which it related before striking the average for the three years. I may say at once that, in my opinion, this is not a decision which affords much help since it was agreed between the Crown and the taxpayer in that case that the tax on the profits was to be brought into the computation and the only question was whether it was to be deducted from the profits of the year to which it related or from the average profits of three years.

On the first question, I am of opinion that taxes such as those now in question, viz., income tax, corporation profits tax and excess profits tax, are not, according to the authorities, wholly and exclusively laid out for the purposes of the company's trade in the United Kingdom. Taxes such as these are not paid for the purpose of earning the profits of the trade; they are the application of those profits when made and not the less so that they are exacted by a Dominion or foreign government. No clear distinction in point of principle was suggested to your Lordships between such taxes imposed by the United Kingdom government and those imposed by Dominion or foreign governments.

The second question is one of more difficulty, but I have come to the conclusion that neither para. 5 of Part I of sched. VII to the Finance (No. 2) Act, 1939, nor s. 30 of the Finance Act, 1940, confers on the taxpayer the right to deduct such taxes. The provision in para. 5 of Part I of sched. VII to the Act of 1939 was, I think, necessary in order to make clear that, in cases which would otherwise have come under Cases IV and V, deduction of Dominion income tax was still to be allowed although the computation was now by s. 14 (1) to be made under Case I. But this provision confers no new right of deduction: it merely leaves the right to deduct income tax on investments and possessions in the Dominions as before. As to s. 30 of the Finance Act, 1940, I am of opinion that the section confers no new power on the commissioners to allow a deduction in respect of excess profits tax unless an Order in Council has been made, and none had been made at the time the present assessments were made. Sub-section (2) was, I think, intended to allow the commissioners either to make such adjustment of the excess profits tax as might be necessary to give effect to the arrangements with the government of the Dominion or to allow the deduction of the Dominion excess profits tax. It was provided by sub-s. (2), no doubt, that the adjustment should not be less favourable to the taxpayer than the effect of allowing the deduction, but I do not think these words can be read as conferring a right to the deduction unless the Order in Council was made. For these reasons, though not without some doubt, I am of opinion that the appeal must be allowed and I so move your Lordships. In accordance with the order of the Court of Appeal each party will pay their own costs of this appeal.

LORD REID: My Lords, the respondents are a company incorporated, managed and controlled in Eire. They are margarine manufacturers and butter merchants and they had two branches in Manchester and Cardiff where they carried on business as grocers. They were assessed to excess profits tax in the United Kingdom in respect of the profits of these branches for seven consecutive chargeable accounting periods ending on Mar. 31, 1946, for amounts varying between £5,400 and £9,000. They have paid taxes in Eire in respect of the profits of these two branches for these periods and in this case they maintain that they are entitled to deduct taxes which they have paid in Eire in computing the profits of their two branches for the purposes of United Kingdom excess profits tax. No question as to United Kingdom income tax arises because, as a result of an agreement between the British government and the government of the Irish Free State, confirmed by the Finance Act, 1926, s. 23, the respondents, are not liable to pay United Kingdom income tax, but there is nothing in that agreement or elsewhere to modify the ordinary provisions of the law of the United Kingdom with regard to their liability to pay excess profits tax for the periods in question.

Before the Special Commissioners, the respondents contended that the proportion of income tax, corporation profits tax and excess profits tax paid by them in Eire in respect of these two branches was a business expense and deductible in arriving at their profits assessable to excess profits tax in the United Kingdom. The Special Commissioners upheld this contention. In their decision they said:

"In our opinion, it was a necessary expense for the respondent company, in carrying on part of its trade at branches in England, to incur Irish taxes. We hold that the appropriate part of the taxes paid in Eire by the respondent company, applicable to the English branches, constitutes money wholly and exclusively laid out and expended for the purposes of its trade as a whole and is deductible in computing its profits or gains for excess profits tax."

A Case stated by the commissioners came before CROOM-JOHNSON, J., who ordered that the said Case be remitted to the said commissioners for them to state the evidence on which the finding was based that it was a necessary expense of the respondent company in carrying on part of its trade at branches in the United Kingdom to incur Irish taxes, and also for the said commissioners to state in summary form the nature, effect and incidence of the three Irish taxes, referred to in the said Case, and for this latter purpose, but not otherwise, to hear further evidence. The parties agreed a memorandum regarding these matters which is as follows:

"That the Irish income tax, corporation profits tax and excess profits tax referred to in the Case stated were imposed under Irish statutes, the provisions of which are similar to the provisions of the United Kingdom Finance Acts imposing income tax, national defence contribution and excess profits tax, and in particular that the Irish income tax was imposed on the profits of a trade, which profits were computed on income tax principles similar to United Kingdom income tax principles and that the profits of a trade for assessment to Irish corporation profits tax and excess profits tax were computed on Irish income tax principles with adaptations similar to the adaptations for the purposes of United Kingdom national defence contribution and excess profits tax."

The case then came before the Court of Appeal and on Apr. 4, 1950, the respondents' appeal was allowed and the determination of the commissioners affirmed. Against that judgment the present appeal is taken.

Excess profits tax was imposed by the Finance (No. 2) Act, 1939. Section 14 (1) directs that profits shall be computed on income tax principles as adapted in accordance with the provisions of Part I of sched. VII to the Act and "income

tax principles" are defined as meaning the principles on which the profits arising from the trade are computed for the purposes of income tax under Case I of sched. D or would be so computed if income tax were chargeable under that Case in respect of the profits so arising. So those "income tax principles" must be applied to the facts of this case. It is enacted in sched. D:

"(1) Tax under this schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; and (iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom."

The respondents are assessed to United Kingdom excess profits tax by virtue of sub-para. (iii) which I have just quoted, and no doubt they were assessed in Eire in respect of profits arising in the United Kingdom by virtue of the provision in the Irish legislation corresponding to sub-para. (ii). The same rules apply whichever be the sub-paragraph applicable. The relevant rules in this case are the Rules Applicable to Cases I and II, rr. 1 and 3 of which provide:

"1 (1) The tax shall be charged without any other deduction than is by this Act allowed . . . 3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation."

So, it is necessary to determine whether any part of the Irish taxes paid by the respondents can in law be regarded as money wholly and exclusively laid out or expended for the purposes of the respondents' trade.

It was argued for the respondents that this is a question of fact, and that, therefore, the decision of the commissioners on this matter is final in their favour. I cannot accept this argument. If certain payments made by a taxpayer are of such a kind that they are capable in law of being regarded as coming within the exception in r. 3 (a), then, no doubt, it is for the commissioners to determine whether the circumstances of the case are such that in fact they do come within that exception. But it is, in my judgment, a question of law whether particular payments are of a nature capable of coming within the exception, and that is the issue here.

The respondents argue that foreign taxes on income have in the past been regarded by the Revenue as proper deductions, and that in several enactments Parliament has shown by the language it has used that it regarded such taxes as proper deductions. The question does not appear to have come up in any case before 1909. In that year *Stevens v. Durban-Roodeport Gold Mining Co.* (6) was decided. In that case the taxpayer had paid tax under the Profits Tax (Gold Mines) Proclamation, 1902, of the Transvaal. It was not disputed that this taxpayer was entitled to some deduction in respect of that tax: the only issue in the case was how the deduction should be computed. United Kingdom income tax was payable by the company on the average of the profits of the preceding three years, and the Transvaal tax had only been paid in the last of these years. The company contended that in computing its income for United Kingdom income tax the Transvaal tax should be deducted from its average profits so that it would get the advantage in that particular year of assessment of the deduction of the whole of that tax. But it was contended, successfully, for the Crown that that tax should be deducted from the profits of the year when it was paid before those profits were averaged with those of the two preceding years. This meant that for that particular year of assessment the company only got a deduction equal to one-third of the tax it had

paid, though in the following two years the amount of Transvaal tax paid would also come into the account. It was argued for the appellants in this case that that case is distinguishable because the Transvaal tax was not really a tax on income. Even if this were so, I do not think that it is material. The arguments of the parties are reported in the report in TAX CASES and neither in the arguments nor in the judgment of CHANNELL, J., is there any reference to this distinction. The admission made on behalf of the Crown appears to have been of a general character. The reported argument of the Attorney-General contains this passage with regard to the Transvaal tax (5 Tax Cas. 405):

"If it is a sum which, in fairness to the shareholders, must be treated as withdrawn from the amount available for division, it is rightly dealt with as a deduction from the profits of the year in which it falls."

It does not appear whether this admission for the Crown was based on an interpretation of the rule which is now r. 3 (a) or on some other ground, but it is difficult to see what else could have been regarded as a warrant for this deduction. It was argued for the respondents that this case is an authority in their favour because the decision is exactly what they are now contending for, but the decision proceeded on an admission which is now withheld. I think that all that the respondents can take from this case is that the Crown's former advisers had a different view of the law from that now maintained. It must now be determined which view is right.

The respondents then drew attention to certain statutory provisions with a view to showing that Parliament has long recognised a wider basis for deductions than that for which the appellants now contend. The first of these provisions in point of time is r. 1 of Case IV of sched. D. That rule in its present form first appeared in the Finance Act, 1914, s. 5. Before that date, a taxpayer was only liable to pay income tax in respect of income arising from securities in any place out of the United Kingdom in so far as that income was remitted to the United Kingdom and the question of deducting foreign income tax could hardly arise. But, in 1914, a British taxpayer became liable in respect of all such income whether it had been or would be received in the United Kingdom or not, and, therefore, the question of the right to deduct foreign income tax became material. There was then enacted a right to

"the deduction (where such a deduction cannot be made under any other provision of the Income Tax Acts) of any sum which shall have been paid in respect of income tax in the place where the income shall have arisen."

Of course, the enactment of a deduction under Case IV and of a similar deduction under Case V cannot help the respondents. What they rely on is the phrase

"where such a deduction cannot be made under any other provision of the Income Tax Acts."

This certainly indicates that Parliament, when enacting this legislation, must have been of opinion that foreign income tax was in some cases at least a good deduction under some other provision of income tax legislation, and it is difficult to see what that other provision could be if not r. 3 (a). One curious feature of this enactment is that it seems to indicate an opinion that, apart from this enactment, foreign income tax would sometimes be deductible and sometimes not. No explanation has been suggested of how that could be and none occurs to me. The arguments of both parties in this case are inconsistent with this view. If the appellants are right, foreign income tax is never a good deduction under Case I; but if the respondents are right, it would seem that foreign income tax must always be a good deduction.

The respondents next found on the terms of the Finance Act, 1920, s. 27 (4). The purpose of that enactment is to mitigate the hardship of double payment of income tax, and it begins,

"Notwithstanding anything in the Rules Applicable to Case IV or Case V of sched. D or in any other provision of the Income Tax Acts, no deduction shall be made on account of the payment of Dominion income tax . . ."

The importance of this section to the respondents' argument is in the phrase "or in any other provision of the Income Tax Acts". Again it indicates, though, perhaps, not so clearly as Case IV, r. 1, that Parliament was of opinion that there was some right to deduct Dominion income tax other than that given in respect of Case IV and Case V. I think that the indication here is not so clear because a draftsman sometimes inserts general words of this kind without any very clear idea of what they are intended to cover, and I would not attach great importance to these words if this section stood alone.

But the next provision founded on by the respondents is more significant. I have said that for the purposes of excess profits tax profits are computed on the principles of Case I of sched. D as adapted by Part I of sched. VII to the Act of 1939. The respondents found on two of the paragraphs of this schedule. Paragraph 5 enacts:

"The provisions of sub-s. (4) of s. 27 of the Finance Act, 1920 (which disallows deductions on account of the payment of Dominion income tax) shall not apply"

and para. 8 enacts:

"No deduction shall be made on account of liability to pay, or payment of, United Kingdom income tax, the national defence contribution, or excess profits tax."

Paragraph 5 must, it is said, have been intended to have some effect. It can have no effect unless s. 27 (4) has something to do with Case I, because excess profits tax is only concerned with Case I, and para. 5 is only concerned with excess profits tax. But s. 27 (4) only refers expressly to Cases IV and V. So the draftsman of para. 5 must have thought that the general words in s. 27 (4) to which I have already referred—"Notwithstanding anything . . . in any other provision of the Income Tax Acts, no deduction shall be made . . ."—were a sufficiently clear indication that some deduction otherwise permissible under Case I was being disallowed by s. 27 (4) to make it necessary for him to exclude s. 27 (4) and thereby restore that deduction under Case I. If the draftsman had thought that the general words in s. 27 (4) were of doubtful effect, he would not have used the positive words which are in para. 5. Parliament must, therefore, be taken to have legislated in the belief that there would be this deduction available to the taxpayer. I think that there is some substance in this argument and I shall return to it. The argument on para. 8 is twofold. In the first place, the whole paragraph is unnecessary unless there would have been some right to a deduction in respect of payment of these taxes if the paragraph had been omitted, and, secondly, it is significant that the paragraph only applies to United Kingdom income tax, etc. This limitation is said to show that income tax, etc., payable to foreign governments must have been intended to be deductible. I do not find the first branch of the argument very convincing. It is true that one ought not lightly to assume that any statutory enactment has no effect or is superfluous, but it is not very uncommon to find the legislature inserting superfluous provisions under the influence of what may be excessive caution. Paragraph 8 has the effect of providing inter alia that, in computing profits for assessment to United Kingdom excess profits tax, no deduction shall be made on account of liability to pay United Kingdom excess profits tax. I can hardly think that anything but superlative caution can have given rise to this provision. Moreover, it is somewhat difficult to reconcile para. 8 with s. 18 of the same Act. This section makes payments of excess profits tax a good deduction in computing profits for income tax purposes, so in drafting this section the draftsman must have thought that without it

such payments out of profits would not have been allowable deductions. But profits for excess profits tax purposes are also computed on income tax principles, so one would think that when the draftsman came to the schedule he would still have thought that payments out of profits would not be allowable deductions in computing profits for excess profits tax and would, therefore, have seen that para. 8 was, strictly speaking, unnecessary. Nevertheless, he put it in. Putting in a provision of this kind is not misleading, and its insertion may well be explained by a cautious desire to make sure. But the limitation to United Kingdom taxes is not so easy to explain, particularly when taken in conjunction with para. 5 and I think that this limitation adds some weight to the argument founded on the insertion of para. 5.

The respondents also founded on the Finance Act, 1940, s. 30. That section empowers His Majesty to declare by Order in Council that excess profits tax is payable in another part of His Majesty's dominions in respect of profits in respect of which excess profits tax is also payable in the United Kingdom and that arrangements have been made with the government concerned for giving relief from double taxation in accordance with principles which are then set out. The first principle set out is

"(i) that there shall be computed the amount of excess profits tax which would be payable in each territory if excess profits tax in the other territory, and national defence contribution in the United Kingdom, were disregarded except in computing capital."

Then the method of calculating relief in each territory is set out. Sub-section (2) then provides:

"Where any such Order in Council is made, then, if the commissioners are satisfied that any case is one which falls within the arrangements to which the Order relates, they shall, in lieu of allowing, in computing profits for the purpose of excess profits tax or the national defence contribution, any deduction in respect of excess profits tax charged in the part of His Majesty's dominions outside the United Kingdom to which the Order relates, make such adjustment of the excess profits tax payable in the United Kingdom or the national defence contribution as may be necessary to give effect to the arrangements, and allow any necessary relief accordingly by repayment or otherwise, so, however, that the effect of the adjustment shall not be less favourable to the taxpayer than the effect of allowing the deduction."

The respondents contend that this section also clearly shows that Parliament was of opinion that, before this Act was passed, a taxpayer had a right to deduct excess profits tax paid elsewhere in the computation of his profits for United Kingdom excess profits tax. I agree. Sub-section (2) directs the commissioners in a case where an Order in Council applies, "in lieu of allowing . . . any deduction in respect of excess profits tax charged" in the other territory, to make the adjustment for which s. 30 provides, but it adds, "so, however, that the effect of the adjustment shall not be less favourable to the taxpayer than the effect of allowing the deduction". Parliament does not purport in this section to enact that the taxpayer shall be entitled to deduct the other excess profits tax in his computation of profits for United Kingdom tax. It would have been easier and simpler so to enact if it had been thought that the taxpayer had no pre-existing right to make the deduction. Instead, Parliament enacted that in lieu of allowing the deduction (which is not expressly authorised by the section) the arrangement shall be followed, but only if the arrangement is not less favourable than the deduction. Moreover, principle (i) which I have quoted directs that there shall be computed the amount of excess profits tax which "would be payable" if excess profits tax in the other territory were disregarded. This phraseology is quite inappropriate if the law then was

that excess profits tax in the other territory must always be disregarded in computing profit for United Kingdom tax. The appellants' reply must be that, even if Parliament did think in 1939 and 1940 that there was a pre-existing right to make such a deduction under income tax principles, Parliament was wrong in so thinking. There is a difference between Parliament exhibiting an erroneous opinion as to the existing law and enacting that that law shall be changed. Before considering this matter I think it necessary to determine what was the existing law, and whether, in light of decisions of this House, it is possible to read the rules which are applicable to Case I in a way which would permit the deductions claimed. Counsel for the respondents admitted, rightly in my opinion, that r. 3 (a) of the Rules Applicable to Cases I and II is the only rule on which he could reply.

The rule in the Income Tax Act, 1842, which corresponded with what is now r. 3 (a) was considered in *Strong & Co., Ltd. v. Woodfield* (1). I need not set out the facts of that case. I shall only quote the passage in the speech of LORD DAVEY dealing with this rule. He said ([1906] A.C. 453), of the words in the rule "for the purposes of the trade", that these words

"... appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

This explanation has always been regarded as authoritative and is difficult to reconcile with the respondents' contention. But I think that the matter is put beyond doubt by the reasons given by the majority in this House in *Smith's Potato Crisps* (1929), *Ltd. v. Inland Revenue Comrs.* (5). In that case, an increase of salary to a servant of a subsidiary company had been disallowed for the purpose of excess profits tax. There was a successful appeal against this disallowance and the companies contended that the costs incurred in prosecuting this successful appeal were an admissible deduction for income tax and excess profits tax purposes. The Finance (No. 2) Act, 1939, s. 18, makes the amount of excess profits tax a good deduction for income tax purposes, but did not cover the sum expended in this case, so the case turned on the proper interpretation of r. 3 (a). By a majority the House held that the costs of the appeal were not deductible. VISCOUNT SIMON and LORD OAKSEY dissented. If their opinion had prevailed, I think that there would have been much to be said for the respondents in this case. VISCOUNT SIMON said ([1948] 2 All E.R. 369):

"... since excess profits tax is deductible as an expense when calculating the proper assessment of the trader to income tax, the fixing of a correct figure for the former is essential to the correct calculation of the latter, and it is only when the latter is ascertained that the trader knows how much of his commercial profit he can carry forward, or, if a company, how much of the year's profit is available for dividend or for reserve... Here, the expenditure was, in my view, incurred for the purpose of carrying on and earning profits in the trade, for a reduction in the amount of tax does increase the fund in the trader's hands after tax is paid and so promotes the carrying on of the trade and the earning of trading profits."

LORD OAKSEY said (*ibid.*, 377):

"... it is an incident which he may think reasonably necessary for the purposes of his trade to engage in litigation as to the amount of his taxes. If he succeeds in either case he increases the profits arising from his trade, and it appears to me to be no straining of language to say that a trader who increases his profits by incurring a certain expense incurs that expense for the purpose of earning the profits".

These expressions of opinion do not appear to me to be very far removed from the admission made for the Crown in *Stevens'* case (6), to which I have already referred, and they would, I think, at least open the door for the respondents' argument that payment of taxes in Eire was a necessary incident of their earning profits in the United Kingdom, and, therefore, a proper deduction. But I cannot reconcile the respondents' contention with the opinions expressed by the majority in *Smith's Potato Crisps* (1929), *Ltd. v. Inland Revenue Comrs.* (5). LORD PORTER said (*ibid.*, 371) with reference to the expense of an appeal for the purpose of discovering the true measure of profits for tax purposes:

"Such expenditure is incurred directly for tax purposes and for nothing else, though it may indirectly affect both the amount available for distribution to the proprietors of the business and that proper to be put to reserve", and, later, he said (*ibid.*, 372) with regard to excess profits tax:

"It is true that a trader only is liable to pay it, but it is not payable by him as a trader. He pays as an individual, like any other individual, the tax on the sum which he has earned as a trader. 'To my mind', said LORD SELBORNE, L.C., in *Mersey Docks & Harbour Board v. Lucas* (7) (8 App. Cas. 905), 'it is reasonably plain that the gains of a trade are that which is gained by the trading, for whatever purposes it is used', and, therefore, what your Lordships have to determine is whether the expense is incurred . . . to earn gain or is the application or distribution of that gain when earned."

LORD SIMONDS said (*ibid.*, 374):

"... neither the cost of ascertaining taxable profit nor the cost of disputing it with the revenue authorities is money spent to enable the trader to earn profit in his trade. What profit he has earned, he has earned before ever the voice of the taxgatherer is heard. He would have earned no more and no less if there was no such thing as income tax . . . Let me suppose that a trader, having been assessed to income tax in the sum of £X in a certain year, disputes the assessment, claiming that his taxable profit is not £X but a lesser sum, say £Y. Suppose further that he succeeds in his claim. I fail to see how he has by the expenditure that he incurred earned profit in his trade. His taxable profit has been reduced, which was the object of his expenditure. But what has this to do with his trading profit?"

LORD NORMAND, dealing with the reason why income tax is not deductible in computing profits for income tax purposes, said (*ibid.*, 376):

"There is the more substantial reason that income tax is an impost made on profits after they have been earned, and that, unless the observations of LORD DAVEY in *Strong & Co., Ltd. v. Woodifield* (1) ([1906] A.C. 453), which have often been referred to and applied in later cases, are to be disregarded, a payment out of profits after they have been earned is not within the purposes of the trade carried on by the taxpayer. But excess profits tax also is levied on profits after they are earned, and, apart from the statutory provision, is *in pari casu* with income tax."

My Lords, I trust that I have not misrepresented the speeches of noble Lords by giving these short extracts from them. I have read and re-read those speeches, and they appear to me to establish conclusively (i) the distinction between money spent to earn profits and money spent out of profits which have been earned, and (ii) the fact that income tax and excess profits tax payments come within the latter category. I have not dealt separately with national defence contribution or its equivalent in Eire, but there was no argument that this can be distinguished from the other two taxes for the purpose of this case. It is true that the payments which the respondents seek to

have allowed as deductions were payments of Eire taxes and not of United Kingdom taxes, but the parties have admitted that the relevant legislation in Eire corresponds to that in the United Kingdom, and I cannot see that there is any distinction in principle between them for present purposes. Certainly no authority for any such distinction was cited. It, therefore, appears to me to be established that there is not and never was any right under the principles applicable to Case I to deduct income tax or excess profits tax, British or foreign, in computing trading profits.

A There remains the question whether the provisions of the Finance (No. 2) Act, 1939, sched. VII, adapting income tax principles for the purposes of excess profits tax, have enacted any such right for the first time. I have said that I think that the terms of para. 5 and para. 8 indicate a belief that some such right already existed under Case I, but for the reasons I have given I am bound to hold that that belief was erroneous. So the question is whether the terms of those paragraphs are such as merely to indicate a belief or whether they can be interpreted as enacting by implication that which Parliament, having its erroneous belief, did not find it necessary to enact expressly. In such circumstances I would not be averse from holding that there was an enactment by implication, but first I must be able to discover precisely what Parliament's belief was. The Finance Act, 1940, s. 30, may well contain such an enactment. It is there made clear that Parliament believed that there was already a right to a certain deduction and the scheme of the section will not work unless there is such a right, so it is not difficult to imply the enactment of that right. But the whole section is limited to cases which are covered by an Order in Council, and it is not possible to imply any enactment which goes beyond the scope of the section. There has been no Order in Council which could apply to the present case; and, therefore, in my judgment, even if s. 30 were held to contain by implication an enactment authorising deductions such as those claimed by the respondents, that would not help them as they are outside the scope of the section.

E Then it was said that an enactment allowing the deduction ought to be implied because without it there will be great injustice. If taxpayers have to pay excess profits tax in two countries without being entitled to such a deduction they may have to pay in taxation much more than their total profits. That is true and I think that it has long been recognised by Parliament that applying the rigour of income tax principles to such cases is unjust. There is a whole series of statutory provisions designed to remove, or at least mitigate, this injustice in particular cases of double taxation. But it is the respondents' misfortune that there is no such provision applicable to them for the years in question. They can only obtain relief if there is some general provision in their favour, and instead of enacting any such provision Parliament had, at least until 1939, preferred to deal with the matter otherwise.

G The question is, therefore, narrowed down to this: Does para. 5 of Part I of sched. VII to the Act of 1939, reinforced by para. 8, contain or require the implication of an enactment that certain Dominion taxes are to be deductible in computing profits for United Kingdom excess profits tax? I think that the question is a difficult one, but I have come to be of opinion that it does not. Paragraph 5 is very misleading, but to mislead a taxpayer is not the same thing as to entitle him to relief. It may well be that these paragraphs show that H Parliament was under a misapprehension as to the existing law at the time, but it does not necessarily follow that if Parliament had been correctly informed it would have altered the law. It is one thing to leave an old deduction untouched, and quite another thing to enact for the first time a new deduction of a new kind. If para. 5 were held to have enacted a new deduction several difficult questions would arise. That paragraph only refers expressly to Dominion income tax. Would the implied enactment be limited to Dominion income tax or would it also extend to excess profits tax at least where that is

assessed on income tax principles? And would it extend also to foreign income tax as does Case IV, r. 1? Moreover, the present case is an example of a puzzling situation which would arise if the respondents were right. It is admitted that tax in Eire is assessable on the same principles as in the United Kingdom. So, if the respondents are right here, they would have been entitled in Eire to a deduction of United Kingdom excess profits tax payable by them. The amount of tax payable in the one country could not be determined until the amount of the deductions allowable there had been determined, but one deduction would be the amount of tax payable in the other country. The amount of tax payable in the other country could not be determined until the deductions allowable there had been determined, but one of those deductions would be the amount of tax payable in the first country. I see no way in which this circle could be broken. Parliament provided for this difficulty in s. 30 (1) of the Act of 1940 which I have quoted; but, as I have said, that section cannot apply to this case, and I cannot see how any appropriate provisions to deal with this matter could be read into the Act of 1939. For all these reasons, I am unable to hold either that there was any provision before 1939 which could entitle the respondents to the relief which they claim, or that there is anything in the Act of 1939 which so entitles them. I, therefore, agree that this appeal should be allowed.

LORD RADCLIFFE: My Lords, I agree that this appeal should be allowed. I would be content to say no more than this, but I will add a few words out of the respect that I feel for any judgment of SOMERVELL, L.J., on this subject.

Two main questions are involved in the respondents' claim to deduct a proportion of the income and profits taxes that they have paid in Eire when computing their trade profits for the purpose of assessment to excess profits tax in this country. The first question is whether such a deduction would be admissible in a computation of profits under Case I of sched. D, apart from any special statutory rules about excess profits tax. The second question is whether there is to be found in the legislation imposing excess profits tax some rule that makes this a permissible deduction, even if it would not be so in an ordinary Case I assessment to income tax.

The first question was answered by the Special Commissioners in the affirmative. They expressed the opinion that the payment of these Eire taxes was a "necessary expense for the respondent company in carrying on part of its trade at branches in England." I think that, on the information available to them and to us, they made an error of law in expressing that opinion. I do not think that such a view was open to them having regard to the established law as to the principles that govern the ascertainment of what is a necessary expense for this purpose. Their view is in conflict with what was said by LORD DAVEY in *Strong & Co., Ltd. v. Woodfield* (1) ([1906] A.C. 453):

"It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

In this case, there is no material that makes it possible to say that these taxes (let alone any particular proportion of them) were paid for the purpose of earning such profits as were earned in the United Kingdom. There is much to be said for the criticism that LORD DAVEY's speech in *Strong & Co., Ltd. v. Woodfield* (1) imposes too limiting a criterion as to what is a permissible deduction by way of trade expenditure, but I do not know a wider one that is not vulnerable in other ways, and the fact is that his criterion has stood for so long and been so often applied that it has become, as it were, part of our income tax language. It led directly to the decision of the Court of Appeal in *Rushden Heel Co., Ltd. v. Keene*. *Rushden Heel Co., Ltd. v. Inland Revenue Comrs.* (8), and to the decision of this House in *Smith's Potato Crisps* (1929), *Ltd. v. Inland*

Revenue Comrs. (5). It is true that both those decisions bore on the question of deducting excess profits tax paid in this country in a computation of profits, and the question before us relates to a deduction of income and profit taxes paid in another country. But, once it is accepted that the criterion is the purpose for which the expenditure is made in relation to the trade of which the profits are being computed, I have been unable to find any material distinction between a payment made to meet such taxes abroad and a payment made to meet a similar tax at home. Certainly *Stevens v. Durban-Roodeport Gold Mining Co., Ltd.* (6) suggests none. I think that it is no authority at all on the point that we are now considering. That point was not even argued.

Now, the Court of Appeal in this case have based their decision mainly on the ground that Parliament has shown a clear intention in its enactments relating to excess profits tax that there should be a deduction in respect of income and profits taxes paid abroad. This intention is said to be shown in one case by para. 5 of Part I of sched. VII to the Finance (No. 2) Act, 1939, which paragraph repealed s. 27 (4) of the Finance Act, 1920, for the purpose of excess profits tax computations, and in the other case by s. 30 of the Finance Act, 1940. I do not think that either of these provisions, on any view, shows an intention to make law or to declare law in any way that bears on the subject of the present appeal, but I will deal with that aspect of the matter later. The first thing that strikes me about this argument as a whole is that if Parliament did really intend that for the purposes of excess profits tax there should be a different rule as to deduction of foreign taxes from that prevailing under Case I of sched. D for the purposes of income tax, they concealed their intention with a more than Baconian obscurity. For, whereas it is explicitly provided by the Finance (No. 2) Act, 1939, s. 18, that excess profits tax is an allowable expense for the purposes of income tax, and it is explicitly provided by para. 8 of Part I of sched. VII that United Kingdom income tax, national defence contribution and excess profits tax are not to be allowable expenses for the purposes of excess profits tax—provisions which, necessary or unnecessary, are at least precise—the allowability of foreign taxes if they are to be allowed is only to be deduced from a devious chain of reasoning based on this para. 5. This consideration alone would lead me to think that the legislature did not intend to enact a new rule for excess profits tax as opposed to income tax on this point, although it may well be that those who framed the excess profits tax legislation supposed that foreign taxes were as much deductible for the purpose of one computation as for the purpose of the other. If they did, they were, as I have said, mistaken.

But I do not think that the repeal of the Finance Act, 1920, s. 27 (4), has any bearing on the present problem. That sub-section did away with the deduction of any sum paid by way of Dominion income tax,

“notwithstanding anything in the Rules Applicable to Case IV or Case V of sched. D or in any other provision of the Income Tax Acts.”

It gave in exchange the relief provided by the rest of s. 27. There can be no doubt what rules of Case IV and Case V were being referred to. They were in each case r. 1 of the rules applicable to those respective Cases (the Case V rule being a mere echo of the Case IV rule), and they did provide for the deduction of income tax paid abroad in respect of income assessable under those Cases, and they also said that such tax could be deducted by the authority of those rules “where such a deduction cannot be made under any other provision of this Act”. But they had been saying that and, in effect, in just those words ever since the Finance Act, 1914, s. 5, had enlarged the area of income assessable under Case IV from a remittance basis to the larger basis of income arising in the place of source. That enlargement had been accompanied by the grant of this right to deduct the foreign tax on that income, if the deduction could not be made under any other provision of the income tax code. The Income Tax

Act, 1918, merely consolidated those enactments. But the "other provision" could only be some provision that authorised a taxpayer in receipt of income "arising from securities out of the United Kingdom, except such income as is charged under sched. C" (I quote the words of Case IV) to deduct tax in computing that income. I do not see how it could possibly authorise the inference that there was some statutory provision which allowed foreign taxes to be treated as allowable expenditure for the purposes of the trade when income has to be computed under Case I of sched. D. In truth, as is well known, allowable expenses under Case I are not so much the product of express provision as inferences from the words "the balance of the profits and gains" or inferences from the prohibited deductions which are listed in r. 3 of the Rules Applicable to Cases I and II.

It remains extremely difficult to say what was actually achieved by para. 5 of Part I of sched. VII to the Finance (No. 2) Act, 1939, having regard to the requirement of s. 14 (1) that the principles of computation that are to be applied are those of Case I of sched. D, subject to the specific modifications laid down by the Act. I think, though I do not come to any final conclusion about this, that para. 5 was put in because of the transfer to Case I for excess profits tax purposes of certain kinds of income, such as those provided for by para. 6, which would normally have been assessed under Cases IV or V. However that may be, I am satisfied that there is no permissible inference to be drawn either from s. 27 (4) of the Finance Act, 1920, or from para. 5 of Part I of sched. VII to the Finance (No. 2) Act, 1939, as to foreign taxes being an allowable expenditure when the profits of a trade are being computed for the purposes of Case I of sched. D. If that is so, I do not think that your Lordships need trouble further with the obscure significance of that paragraph.

The case is different when one turns to the Finance Act, 1940, s. 30. It seems to me very probable indeed that this section was framed on the basis that excess profits tax paid in any part of His Majesty's Dominions outside the United Kingdom would be an allowable expenditure in computing profits for the purposes of excess profits tax in the United Kingdom. Even that is not a certain inference, for all that the section does is to authorise an adjustment which is regulated by a calculation of what the situation would be if overseas excess profits tax were allowed. But suppose that it was in fact the assumption that this allowance could be claimed in the ordinary course so far as overseas excess profits tax payments are concerned, still the section affords no authority for giving the allowance if it is not otherwise permissible. The only authority that it gives is one that comes into existence if an Order in Council has been made, and none has been made that governs this case. If the Order in Council has been made, then the only adjustment which Parliament allows under this section is one that gives effect to "the arrangements" covered by the Order, even though in any particular case the adjustment may have to be larger than the "arrangements" above would justify because of the requirement that it is not to be less favourable to the taxpayer than it would be if the overseas excess profits tax were itself deducted.

What it comes to is this. Parliament has not made any enactment that requires or authorises the making of the allowances now claimed. It has not declared the law to be that such allowances are proper deductions. The most that can be said is that it is fairly certain that those who framed the Finance Act, 1940, s. 30, believed that such allowances ought to be given or were in fact being given (which is not always quite the same thing in this field). But if that is all that can be said it is, with all respect to the Court of Appeal, a misuse of words to say that the Law Courts ought to give effect to the "intention" of Parliament that overseas excess profits tax should be allowed. The beliefs or assumptions of those who frame Acts of Parliament cannot make the law. Section 30 will be just as much effective in those cases when it does operate as it would be if overseas excess profits tax were not, in general, an

allowable deduction, for wherever it operates it operates under the authority given by Parliament in that Act and not otherwise. This is not the first occasion on which a somewhat similar problem has been presented to your Lordships' House, and, in face of the abiding complexity of income tax legislation, I do not suppose that it will be the last. But if the House felt no difficulty in *Inland Revenue Comrs. v. Ayrshire Employers Mutual Insurance Assn., Ltd.* (9), in disregarding the plain, though mistaken, assumption of the legislature as to the prevailing law, I do not think that your Lordships need feel even as much embarrassment in the present case.

LORD TUCKER: My Lords, I concur.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Last, Sons & Fitton*, agents for *Crofton, Craven & Co., Manchester* (for the taxpayer).

[Reported by J. D. PENNINGTON, Esq., *Barrister-at-Law.*]

DUPLEX SETTLED INVESTMENT TRUST, LTD. v. WORTHING BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Parker, JJ.), January 23, 24, 1952.]

Housing—Limitation of rent—Flat constructed under building licence—Breach of condition of licence—Obligation to repair placed on tenant—Consideration other than the payment of a money rent—Expression in terms of money—Modification of rent—Building Materials and Housing Act, 1945 (c. 20), s. 7 (1), (4), (7) (b).

A licence was granted under the Defence (General) Regulations, 1939, reg. 56A, to the predecessor in title of the appellants for the building of a block of flats on the condition that each flat was to be let at a rental not exceeding £85 per annum exclusive of rates, that the owners maintained and kept in repair the buildings free of charge to the tenants, and laid out turf, planted trees, and maintained the gardens and private roadway, these provisions to be incorporated in the tenancy agreement. One flat was let at a rental of £85, and in the tenancy agreement the tenant undertook to maintain and keep the interior of the demised premises in good tenantable repair and condition, to maintain and keep a garden at the rear of the premises in good condition, and to pay, in addition to the rent, a fire insurance premium amounting to £1 4s. 11d. per annum. On a prosecution of the appellants by the respondents, the local authority, under s. 7 (1) of the Building Materials and Housing Act, 1945, for breach of the conditions of the building licence, the justices convicted the appellants, assessed the annual value of the conditions imposed on the tenant at £12, and reduced the rent to £73 per year.

HELD: no question of a claim of right by the appellants arose to oust the jurisdiction of the justices because by s. 7 (1) the question whether the appellants were entitled to do what they did was expressed to be solely for the justices to determine; the flat had been let for a consideration which consisted partly of payments other than the payment of the rent within s. 7 (4) of the Act; the whole consideration was capable of being expressed in terms of money; and, therefore, the justices were entitled to assess the total value of the consideration in accordance with the evidence before them, to convict the appellants of an offence under s. 7 (1), and, under s. 7 (7) (b), to make such modifications of the terms of the letting as were necessary to secure that the rent payable in future did not exceed the permitted rent.

FOR THE BUILDING MATERIALS AND HOUSING ACT, 1945, s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 642.

CASE STATED by Worthing (Sussex) justices.

On June 27, 1951, at a court of summary jurisdiction sitting at Worthing, an information was preferred by the respondents, the local authority, charging that the appellants had unlawfully let flat No. 29, Shirley Close, Worthing, one of a block of flats constructed under the authority of a building licence, dated Dec. 11, 1946, which was granted subject to a condition limiting the rent, at a rent in excess of the permitted rent, contrary to s. 7 of the Building Materials and Housing Act, 1945. The justices found the charge proved, fined the appellants £10, and ordered that the rent payable be amended to the sum of £73 a year and that £6 out of the fine be paid to the tenant. The appellants appealed to the Divisional Court.

Lloyd-Jones, K.C., and *L. F. Sturge* for the appellants.

Glyn-Jones, K.C., and *S. Rees* for the respondents.

PARKER, J., delivered the following judgment of the court. This is an appeal by way of Case Stated from a decision of the justices sitting for the petty sessional division of Worthing, who convicted the appellants of letting a house, namely, flat No. 29, Shirley Close, Worthing, at a rent in excess of the rent limited by a building licence, contrary to s. 7 of the Building Materials and Housing Act, 1945. Section 7 (1) provides:

"Where a house has been constructed under the authority of a licence granted for the purposes of a Defence Regulation (hereinafter referred to as 'a building licence') and the licence, whether granted before or after the passing of this Act, has been granted subject to any condition limiting . . . the rent at which it may be let, any person who, during the period of four years beginning with the passing of this Act . . . lets or offers to let the house at a rent in excess of the rent so limited . . . shall be liable on summary conviction to a fine not exceeding the aggregate of—(a) such amount as will in the opinion of the court secure that he derives no benefit from the offence; and (b) the further amount of one hundred pounds; or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment."

It should be noted that the period of four years mentioned has now been extended by the Housing Act, 1949, s. 43 (1), to eight years. Section 7 (4) provides:

"Where a house is let for a consideration which consists wholly or partly of something other than the payment of a money rent for the house, and it appears to the court that the whole consideration is capable of being expressed in terms of money, the court shall assess the total value of the consideration upon the assumption that the transaction is carried out in accordance with its terms, and shall determine a rent which appears to the court to represent a benefit equivalent to the said total value, and the rent so determined shall be deemed for the purposes of this section to be the rent at which the house was let."

Section 7 (7) provides:

"Where proceedings are taken for an offence against this section, the court shall have the following powers, that is to say . . . (b) where any person is convicted of the offence of letting a house at a rent in excess of the permitted rent, the court may, if the interest created by the letting has not expired at the time of the conviction, make such modifications of the terms and conditions of the letting as in the opinion of the court are necessary for the purpose of securing that the rent payable in respect of periods falling after the date of the conviction does not exceed the permitted rent."

Section 8 (2) provides:

"It shall be the duty of every local authority to take such measures as

they think necessary for securing the enforcement, in relation to houses within the area of the authority, of the provisions of this Act relating to the permitted price and permitted rent for houses."

In passing, it is to be observed that in s. 9 (3), the interpretation section, it is provided that the expression "house" includes a flat.

What happened in this case was this. On Dec. 11, 1946, the Minister of Works granted a licence under reg. 56A of the Defence (General) Regulations to Messrs. S. A. Gregory (Property Investment), Ltd., who were the predecessors in title of the appellants, for the sum of £51,840 for the building of a block of flats at Worthing. The conditions attached to that licence, so far as they are material, were as follows:

"(2) The flats to be let at a rental not exceeding £85 per annum, exclusive of rates. (3) The owners for the time being to maintain and keep in repair the buildings free of charge to the tenants, and to lay out turf and plant with flowering trees and shrubs and maintain the gardens and private roadway, such provisions to be incorporated in the tenancy agreements."

The block of flats was duly built, and at some stage the appellants acquired the property from Messrs. S. A. Gregory (Property Investment), Ltd. By an agreement dated Dec. 18, 1950, the appellants let one of the flats, No. 29, to a Miss Smith for the period of one week from Oct. 23 to Oct. 31, 1950, and thereafter from month to month. The rent payable was a rent of £7 1s. 8d. a month, which is £85 a year, the rent specified in the licence. It is to be observed in passing that, though the period of that tenancy, on the face of it, could be a very short one, the premises are subject to the Rent Restrictions Acts. The agreement provided that the tenant was to maintain and keep the interior of the demised premises and all fixtures and fittings therein in good tenantable repair and condition. It also provided that the tenant was to cultivate, maintain, and keep in good condition a garden at the rear of the demised premises allotted by the appellants, keeping the grass regularly cut and the garden free from weeds. It is provided that the appellants were to keep the demised premises insured against fire, but it was provided also that the tenant was, by way of additional rent, to pay to the appellants a sum equal to the amount paid by him for effectuating and maintaining the insurance.

The justices held that those three obligations on the part of the tenant constituted benefits to the appellants as landlords and formed part of the consideration for the letting of the flat. They further held that that consideration was capable of being expressed in money and assessed such benefits at the sum of £12. Accordingly, the total rent payable was determined by them to be the sum of £97, which exceeded the £85 limited by the licence, with the result that they found the offence proved and fined the appellants £10. Further, in exercise of their powers under s. 7 (7) of the Act, they amended the rent for the future to a rent of £73, being the rent of £85 less the sum of £12.

A number of points have been raised on the part of the appellants before this court. It is said, in the first place, that the acts of the appellants complained of were done in the exercise of a bona fide claim of right, thus ousting the jurisdiction of the justices. It is not necessary to deal in detail with this contention. It is sufficient to say that, in the view of this court, no question of claim of right arises in such a case as this. Whether there is any right in the appellants to do what they did depends solely on the construction of the Act, and that is expressly a matter for the justices to determine. Moreover, it is to be observed that the only provision in this statute for the determination of the matter is that it should be determined summarily, and, if the appellants' argument were correct, it would appear that the matter could never be dealt with at all.

It is further said that the covenant put on the tenant to keep the premises in tenantable repair is a usual covenant to be imposed on a tenant and that condition 3 of the licence applies only to structural, as opposed to decorative

and interior, repair, and itself contemplates that the limit of £85 is to be for a letting under which the tenant is to be responsible for interior repair. In our opinion, however, there is no reason to give condition 3 the limited meaning suggested. Though not very happily worded, it must be remembered that what the licence was dealing with was a block of some forty flats. Bearing that in mind, it would seem that the ordinary meaning of condition 3 is that the owners were to be responsible for maintaining and keeping in repair those flats free of charge to the tenant, including both inside and outside repair. On that basis and on that interpretation it is to be observed that the appellants have not only failed to incorporate those terms in any tenancy agreement, as they were required to do, but they have, in fact, expressly put on the tenant a covenant to keep the interior in tenantable repair, an obligation on him which, in our view, is clearly for the benefit of the appellants.

With regard to the further obligation on the tenant to reimburse the amount of the insurance premium, the matter seems almost unarguable in view of condition 3, because under condition 3 it was a condition of the licence that the landlord himself should bear the cost of repair free of all charge to the tenant. Further, as regards the covenant to maintain in good condition the land in the rear of the premises, while this was, no doubt, primarily for the benefit of the other tenants, it seems impossible to say that it was not of some benefit to the appellants as maintaining the amenities of the premises as a whole.

However, it is said on behalf of the appellants that, even if these obligations which are put on the tenant were part of the consideration of the letting, that part of the consideration applicable to them is not capable of being expressed in terms of money. So far as the obligation to reimburse the insurance premium is concerned, it is clearly impossible to advance such an argument. The obligation is expressed to be the amount of the premium, a liquidated sum, in this case £1 4s. 11d. As regards the other obligations, the consideration, though it may be difficult to assess, is clearly capable of being expressed in terms of money.

Finally, it is said on behalf of the appellants that at any rate the justices have assessed the consideration on a wrong basis. The justices had evidence before them that the insurance premium was £1 4s. 11d. They further had the evidence of a surveyor to the effect that to do the necessary painting, distempering, and the like, and to keep the interior in tenantable repair would cost the tenant £13 7s. a year. He also gave evidence that to maintain the small patch of garden at the rear, the tenant would have to get a labourer or jobbing gardener half an hour a week at a cost of 1s. 6d., a total cost in the year of £3 18s. No evidence was given on behalf of the appellants. If the justices accepted those sums as the measure of the consideration, it may be that some criticism could fairly be levelled at them. Thus, for example, it might be said with some force that the cost of maintaining this little back garden was not necessarily the value of the benefit to the landlord—indeed, the value was probably so little that the principle of *de minimis* would apply. The justices, however, did not accept in full the evidence which was put forward because, although the figures adduced by the surveyor in his evidence were more than £18, they reduced that figure to £12. In those circumstances it is difficult to see how it can be said that they erred in law in fixing such a figure. Finally, the justices amended the rent to £73. It is true that under s. 7 (7) they had power, if they chose, to modify the covenants dealing with repair, but they chose not to do that but merely to modify the rent. It seems to this court that in doing so they were clearly acting within their powers, and, again, it cannot be said that they erred in law. In those circumstances, therefore, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Mead, Sons & Bingham* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *E. G. Townsend*, town clerk, Worthing (for the respondents).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BARCLAYS BANK, LTD. v. BECK AND ANOTHER.

[COURT OF APPEAL (Somervell and Denning, L.J.J., and Roxburgh, J.), February 18, 19, 1952.]

Contract—Merger—Simple contract to repay bank overdraft—Subsequent agricultural charge under seal—Covenant to pay “all moneys now or hereafter due”—Agricultural Credits Act, 1928 (c. 43), s. 5 (1).

In 1948 and 1949 the defendants, who were farmers, had an overdraft with the plaintiff bank which by parol agreement they were jointly and severally liable to repay with interest and charges. On Nov. 2, 1949, the defendants executed in favour of the bank a charge under seal under the Agricultural Credits Act, 1928, s. 5 (1), to secure all moneys then or thereafter owing to the bank, and therein covenanted to pay all such moneys on demand. In 1950, on the completion of a sale of the property charged, the charge was discharged by agreement on the payment of £4,000. On a claim by the bank for payment of an amount of the overdraft in excess of the £4,000,

Held: the merger of a simple contract in a specialty operated only if that were the intention of the parties; on construction the charge did not show that the intention of the parties in the present case was that the simple contract between the bank and the defendants should be merged in the charge; and, therefore, the contention of the defendants that the discharge of the charge discharged their debt in full must fail and they were liable for the balance of the overdraft.

Dictum of MAULE, J., in *Price v. Moulton* (1851) (10 C.B. 573), disapproved.

AS TO DISCHARGE OF RIGHT OF ACTION FOR BREACH OF CONTRACT BY MERGER, see HALSBURY, Hailsham Edn., Vol. 7, p. 254, para. 351; and FOR CASES, see DIGEST, Replacement, Vol. 12, pp. 580-584, Nos. 4468-4520.

Cases referred to:

- (1) *Price v. Moulton*, (1851), 10 C.B. 561; 20 L.J.C.P. 102; 138 E.R. 222; 12 Digest, Replacement, 581, 4480.
- (2) *Stamps Comr. v. Hope*, [1891] A.C. 476; 60 L.J.P.C. 44; 65 L.T. 268; 12 Digest, Replacement, 581, 4481.
- (3) *Twopenny v. Young*, (1824), 3 B. & C. 208; 5 Dow. & Ry. K.B. 259; 107 E.R. 711; 12 Digest, Replacement, 581, 4477.

APPEAL by the defendants from an order of BARRY, J., dated Nov. 6, 1951, allowing the plaintiff bank's claim for £582 19s. 9d. owing by the defendants to the bank. The defendants contended that their simple contract to repay a bank overdraft had merged in a subsequent charge containing a covenant under seal, and, as that charge had been discharged, their liability had ceased to exist. BARRY, J., found that no merger had taken place.

J. G. S. Hobson for the defendants.

Percy Lamb, Q.C., and *Bradburn* for the plaintiff bank.

SOMERVELL, L.J.: The plaintiff bank claim £582 19s. 9d. being the amount of the defendants' overdraft at the bank with interest.

From 1948 until the transactions with which this case is concerned the defendants were farming a holding known as Holtsmere End Farm. They had an account with the St. Albans branch of the plaintiff bank, and they were jointly and severally liable under the ordinary form of contract which had been entered into for any overdraft which might arise. The account ran into debt to a small extent in 1948, and it had become considerably overdrawn in 1949. On Nov. 2, 1949, the defendants executed in favour of the bank a fixed

and floating charge under the Agricultural Credits Act, 1928, Part II. The portion of the long title of that Act which relates to Part II is in these terms:

“An Act . . . to facilitate the borrowing of money on the security of farming stock and other agricultural assets, and for purposes connected therewith.”

Section 5 (1) of the Act which is contained in Part II, provides:

“It shall be lawful for a farmer as defined by this Act by instrument in writing to create in favour of a bank as so defined a charge (hereinafter referred to as an agricultural charge) on all or any of the farming stock and other agricultural assets belonging to him as security for sums advanced or to be advanced to him or paid or to be paid on his behalf under any guarantee by the bank and interest, commission and charges thereon.”

At the time the charge was entered into the overdraft was something over £4,000. The account was operated, and some £4,800 was drawn out. Further sums of about that amount were paid in, and when the charge was paid off the account was again in debit over £4,000. In the latter part of 1950 the bank were pressing the defendants and they appointed a receiver to exercise their right under the charge. The defendants were minded to sell the freehold of the farm, including the livestock, growing crops, and so on, which were charged to the bank. They were anxious that there should not be a forced auction of the property in lots by the bank, but that the whole should be sold together. After one or two suggestions which were not regarded as acceptable, on Dec. 21, 1950, the defendants' solicitors wrote to the bank's solicitors saying that it had been arranged that the purchaser who was going to buy the farm (with other property) would pay £28,000, of which £4,000 was to be regarded as apportioned to the property which was charged to the bank. One paragraph of the letter stated:

“We also confirm that we have our clients' irrevocable instructions to authorise the purchaser to pay your clients, Barclays Bank, direct on completion of the purchase of the farm the sum of £4,000 in respect of the live and dead stock and tenant rights at Holtsmere End Farm against your client's discharge of their agricultural charge.”

The bank's solicitors replied confirming that the agricultural charge would be discharged and handed over on receipt of the sum of £4,000 mentioned in the letter. Payment was to be made by banker's draft, and the defendants' solicitors were asked to make it payable to the receiver who had been appointed. The £4,000 in the bank's books was debited in the account of the defendants with certain charges which the receiver had made and expenses to which the bank had been put, charges which the bank said they were entitled to make under the terms of the charge. Those deductions produced a sum of £3,700 odd, and the difference between that sum and £4,000, added to the amount of the overdraft in excess of £4,000, make up the £582 19s. 9d. which is the claim in these proceedings.

The defence put forward is based on the principle that, if a higher security, for example, a bond or covenant, is given to secure an existing simple contract debt it operates in law as a merger, and the remedy is solely under the higher security. It is said that if one looks at this charge, one finds in it a covenant to pay the overdraft, and, therefore, the right of the bank to claim the overdraft by reason of the ordinary relationship of banker and customer has been merged in the right under the covenant contained in this charge, and, as a result of the letters which I have read and the agreement to which I will come, that deed and all liabilities arising under it have been discharged *in toto*, including the obligation to pay the overdraft, and in those circumstances the bank has no claim.

That depends, in my view, on the construction of the deed. We were referred

to a number of cases—none, I think, directly in point. In *Price v. Moulton* (1) the general principle was discussed on a pleading point, and the opinion was there expressed by MAULE, J., that merger operated irrespective of the intention of the parties. That statement was doubted by the Judicial Committee of the Privy Council in *Stamps Comr. v. Hope* (2). The issue in that case does not matter, but what was said, referring to the judgment in *Price v. Moulton* (1), was this ([1891] A.C. 483):

“The reported language of the court in some places indeed seems to imply a larger and broader meaning; but, if that is to be understood as importing that a merger of a simple contract debt in a debt of a higher nature is effected by law, merely by the existence of an identical covenant, and notwithstanding the plain intention of the parties to the contrary, that is a proposition which their lordships would hesitate to assent to.”

That opinion was in accordance with what BAYLEY, J., had said in *Twopenny v. Young* (3) (3 B. & C. 211):

“... where there is that in the instrument which shows that the parties intended the original security to remain in force, the new one has not the effect of extinguishing it ...”

With that in mind, I will approach the construction of the covenant which is relied on here. In doing so I think one necessarily has to have in mind the purpose of the general terms of the Agricultural Credits Act, 1928, under which this charge was given, and the general nature of the transaction as shown by that Act. It is the familiar transaction of a customer of a bank giving a security in respect of an overdraft. The words of the Act, in s. 5 (5), indicate, as one would expect, that it covers not only a charge to secure an advance of a specified sum which might be made *ad hoc* under some special terms, but also a charge given in respect of a fluctuating amount advanced on current account. The material part of cl. 1 of the charge (in which, by definition, “farmer” includes both defendants and relates to their joint account) reads:

“The farmer hereby covenants with Barclays Bank Ltd. (hereinafter called ‘the bank’) that the farmer will on demand or upon the death of the farmer without demand pay to the bank the balance of all moneys now or hereafter owing by the farmer under any account current or other account with the bank and all other moneys and liabilities now or hereafter due or to become due from the farmer to the bank in respect of any advance made or to be made by the bank to the farmer or upon any account or in any manner whatever and whether owing by the farmer to the bank as principal or surety and whether alone or jointly ...”

The simplest case of merger is, of course, where a simple contract debt is sued for and is merged in the judgment. That case is plain, but the *prima facie* case which, I think, the doctrine of merger contemplates is one in which there is first a debt for a specified amount due under a simple contract and afterwards a bond is entered into between the same parties, no surety being brought in. It may be that the creditor gives time, but gets the advantage of getting a bond or some other advantage such as payment on a certain day with interest. In such a case it is clear that the whole basis of the bond is that it is in substitution for the simple contract debt. It would make nonsense of the transaction if, having entered into that arrangement, by which, possibly, he gives time, the creditor could sue the next day on the simple contract debt. The question, as it seems to me, is whether the ordinary contractual position as between banker and customer, which would be usual in respect of advances apart from this clause, is merged in and destroyed by the covenant in the clause.

In my opinion, the clause, so far from doing that, indicates that the position is the opposite. I would rely, in particular, on the expression “all other moneys and liabilities now or hereafter due or to become due.” It is covering, that

is to say, future advances. Those advances may be on any terms that the customer and the bank agree. The customer may get the bank to agree to grant an advance which shall only be repayable on six months' notice. The form is what I should have expected from the circumstances. The relationship of bank and customer continues, a charge is given, and cl. 1 sets out that the farmer remains liable to pay whatever is due and owing to the bank, according to the terms agreed between them apart from this document, as and when it becomes due and owing. The obligation to pay arises, not under the charge, but under one or more separate transactions with the bank. It may possibly be that, unless some such clause was there, it could be suggested that the bank, having accepted a charge in respect of the overdraft, had precluded themselves from saying they could sue on demand. If the value of the property charged exceeded the amount of the overdraft, it would seem rather unreasonable if repayment of all moneys owing could be demanded the next day, and, no doubt, that would not be done. But cl. 1 seems to me to make it clear that, notwithstanding the acceptance of the charge, the contractual rights of the bank as against their customer are preserved. For these reasons, it seems to me, the argument that there has been a merger fails.

The learned judge was inclined to take that view, but he went on to decide that, even if he was wrong about that, the effect of the later letters was not to discharge the bank's rights, assuming they were the only rights, to sue for the overdraft under cl. 1, but simply to release the property charged. Having come to the conclusion at which I have arrived on the first point, I do not propose to discuss that point because it seems to me one gets into a very artificial position. It is, as a matter of fact, plain from the correspondence that neither party at that stage thought that what was described as the discharge of the agricultural charge completely freed the defendants from any liability. The defendants disputed the bank's right to deduct the receiver's expenses and the solicitors' charges, but they did not dispute their liability to pay whatever was the amount of the overdraft above £4,000, and it, therefore, seems to me a rather artificial point. It is not necessary for the decision of this case to discuss whether a particular phrase meant this or that on the basis that the charge meant something which neither party thought it did.

A last point was raised by counsel for the defendants that in any case he could challenge the receiver's expenses, and, I think, the solicitors' charges. It is plain that the deed made provision for those charges, and, even if one regards it as completely discharged by what happened in December, those charges, as it seems to me, had accrued at the time of the alleged discharge. For these reasons I think that this appeal fails and should be dismissed.

DENNING, L.J.: I agree. The merger of a simple contract debt into a specialty debt depends undoubtedly on the intention of the parties, and their intention is to be gathered from the documents they have signed. In an ordinary case where a defendant who owes an existing simple contract debt gives security for the payment of it by means of a covenant under seal and a charge on his property the simple contract debt is merged in the specialty unless there is an express provision to the contrary. That appears from *Price v. Moulton* (1), as explained in *Stamps Comr. v. Hope* (2). But a running account with a bank stands on a different footing. When security is given for payment of amounts due or to become due on a running account, the doctrine of merger, if it applies at all, would at the most only apply to the indebtedness which existed at the date when the covenant was taken and the charge given. The reason is because merger can only apply to existing debts. Future debts do not merge; they take their colour from the circumstances in which they arise. They are then either specialty debts or simple contract debts, and, as they start, so they go on. If they are created under and by virtue of a deed, they are specialty debts from their commencement, but if they are created by a simple contract outside a

deed, they remain simple contract debts even though there is a deed in existence which gives collateral security for them.

The distinction is clearly shown by considering the difference between a mortgage debt to a building society and a charge to a bank to secure a running account. The mortgage debt to a building society is created under and by virtue of a deed and is a specialty debt from its commencement, but a future debt on a running account is a debt created by parol and it remains a simple contract debt even though the customer has previously given a charge to secure it which includes a covenant under seal. The future debt on running account is not created under the deed. It may be that it would never have been created but for the deed, but that is a different thing. It only means that the deed is collateral security for its repayment. We are not concerned here with the debt which existed when the charge was given, because that existing debt was paid off during the time the account was running and was replaced by future debts. I would like to say, however, that, if the deed was given as collateral security in regard to the future debts, as I think it clearly was, as regards the existing debt also it did no more than to create a collateral security, for there is no reason for supposing that the parties intended to draw a distinction between them.

In my opinion, therefore, the agricultural charge was only collateral security for the running account. When this collateral security was discharged and handed over, the indebtedness on simple contract remained except in so far as it had been satisfied by payment. I would only add that in *Price v. Moulton* (1) MAULE, J., is reported to have said (10 C.B. 573):

“ . . . a man cannot have a remedy by covenant and by assumpsit for the same debt; the two are wholly incompatible and cannot co-exist.”

Having regard to what was said by the Judicial Committee of the Privy Council in *Stamps Comr. v. Hope* (2), I think it must be taken that that statement is incorrect. It does not apply when the covenant is given by way of collateral security. I agree that the appeal should be dismissed.

ROXBURGH, J.: I agree. In such a case as this, which relates to an instrument of charge, the question of merger or no merger is a question of intention as revealed by that instrument, and I also agree that the instrument here in question indicates that there was to be no merger.

Appeal dismissed.

Solicitors: *Glover & Co.* (for the defendants); *Sharpe, Pritchard & Co.*, agents for *Longmores*, Hertford (for the plaintiff bank).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

RAMA CORPORATION, LTD. v. PROVED TIN & GENERAL INVESTMENTS, LTD.

[KING'S BENCH DIVISION (Slade, J.), January 21, 22, 23, 24, February 5, 1952.]

Company—Director—Authority—Ostensible authority—Provision in article permitting delegation of powers to one director—Unauthorised agreement made by director—Ignorance of other party to agreement of provision in article—Company not estopped from setting up director's absence of authority.

By the articles of association of the defendant company the board of directors were empowered to delegate powers to a committee consisting of a member or members of their body. Without the authority of the other members of the board a director of the defendant company purported to enter into an agreement on the company's behalf with an agent of the plaintiff company who had no knowledge of the contents of the articles of association of the defendant company or of the board's right to delegate powers to a committee. On a claim by the plaintiff company arising out of the purported agreement,

HELD: as at the time of the making of the purported agreement the plaintiff company, through their agent, had no knowledge of the defendant company's articles of association and the powers of delegation contained therein, the plaintiff company could not rely on those articles as conferring ostensible or apparent authority on the director of the defendant company to make the agreement on behalf of the defendant company, and, therefore, the defendant company were not estopped from establishing that there was no authority in the director to enter into the agreement on their behalf and so were not liable under the agreement.

Houghton & Co. v. Nothard, Lowe & Wills ([1927] 1 K.B. 246), and *Kreditbank Cassel G.m.b.H. v. Schenkers* ([1927] 1 K.B. 826), followed.

British Thomson-Houston Co., Ltd. v. Federated European Bank, Ltd. ([1932] 2 K.B. 176), not followed.

Mahony v. East Holyford Mining Co. (1875) (L.R. 7 H.L. 869), distinguished.

AS TO CONTRACTS OF COMPANIES IN GENERAL, see HALSBURY, 1949 Edn., Vol. 5, pp. 484-487, paras. 772-775; and FOR CASES, see DIGEST, Vol. 9, pp. 628-634, Nos. 4160-4193.

Cases referred to:

- (1) *Houghton & Co. v. Nothard, Lowe & Wills*, [1927] 1 K.B. 246; 96 L.J.K.B. 25; 136 L.T. 140; *affd.* H.L. [1928] A.C. 1; 97 L.J.K.B. 76; 138 L.T. 210; Digest Supp.
- (2) *Kreditbank Cassel G.m.b.H. v. Schenkers*, [1926] 2 K.B. 450; *reversd.* C.A., [1927] 1 K.B. 826; 96 L.J.K.B. 501; 136 L.T. 716; Digest Supp.
- (3) *Jacobs v. London County Council*, [1950] 1 All E.R. 737; [1950] A.C. 361; 114 J.P. 204; 2nd Digest Supp.
- (4) *Royal British Bank v. Turquand*, (1855), 5 E. & B. 248; 119 E.R. 474; *affd.* Exch. Ch., (1856), 6 E. & B. 327; 25 L.J.Q.B. 317; 119 E.R. 886; 9 Digest 97, 406.
- (5) *Mahony v. East Holyford Mining Co.*, (1875), L.R. 7 H.L. 869; 33 L.T. 383; 9 Digest 642, 4239.
- (6) *Underwood (A. L.), Ltd. v. Bank of Liverpool, Same v. Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; Digest Supp.
- (7) *Biggerstaff v. Rowatt's Wharf, Ltd. Howard v. Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93; 65 L.J.Ch. 536; 74 L.T. 473; 9 Digest 530, 3502.
- (8) *British Thomson-Houston Co., Ltd. v. Federated European Bank, Ltd.*, [1932] 2 K.B. 176; 101 L.J.K.B. 690; 147 L.T. 345; Digest Supp.
- (9) *Fountain v. Carmarthen Ry. Co.*, (1868), L.R. 5 Eq. 316; 37 L.J.Ch. 429; 10 Digest 1178, 8361.

- (10) *Re Land Credit Co. of Ireland*, (1869), 4 Ch. App. 460; 39 L.J.Ch. 27; 20 L.T. 641; 9 Digest 641, 4232.
- (11) *County of Gloucester Bank v. Rudry Merthyr Steam & House Coal Colliery Co.*, [1895] 1 Ch. 629; 64 L.J.Ch. 451; 72 L.T. 375; 9 Digest 98, 410.
- (12) *Midland Bank, Ltd. v. Reckitt*, [1933] A.C. 1; 102 L.J.K.B. 297; 148 L.T. 374; Digest Supp.
- (13) *Clay Hill Brick & Tile Co., Ltd. v. Rawlings*, [1938] 4 All E.R. 100; 159 L.T. 482; Digest Supp.

ACTION for an account of moneys alleged to have been paid by the plaintiff company to the defendant company under the terms of an agreement; alternatively for £1,000 with interest under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934; and alternatively for damages for the alleged fraud of the defendant company's agent.

On Mar. 21, 1949, at 2 and 3 Salisbury Court, in the city of London, the plaintiff company by their director, Mr. A. H. M. Wedderburn, purported to enter into an oral agreement with Mr. G. E. Titley, a director of the defendant company purporting to act on behalf of that company. By the alleged agreement the two companies were to subscribe to the creation of a fund in the proportions of two-sevenths by the plaintiff company and five-sevenths by the defendant company with a maximum subscription of £2,000 by the plaintiff company. The defendant company were to apply the fund on behalf of the two companies to financing the sales of a telephone directory holder manufactured by R.B.K. Products, Ltd., by purchasing R.B.K. Products, Ltd.'s invoices of such sales at a discount of $3\frac{3}{4}$ per cent. The defendant company were to be responsible for administering the fund and were from time to time to account to the plaintiff company for two-sevenths of any repayments of capital or payments of profits arising. In pursuance of the alleged agreement the plaintiff company gave to Mr. Titley, as agent for the defendant company, sums totalling £1,891 5s. 10d., and said they received from him, also purporting to act in that capacity, repayments of capital totalling £891 5s. 10d. and payments of profits totalling £381 2s. 8d., leaving a balance of £1,000 outstanding. The plaintiff company claimed repayment of the £1,000 and any profit in respect thereof. Alternatively, they contended that they had been induced to enter into the agreement and to part with the sum of £1,891 5s. 10d., by the fraud of Mr. Titley, acting within the scope of his authority as a director of the defendant company, in fraudulently holding himself out to the plaintiff company as having been duly authorised by the defendant company to enter into the agreement and to receive the moneys on their behalf. The defendant company denied that they entered into the agreement alleged by the plaintiff company or that Mr. Titley had any authority express, implied, or apparent to enter into it. They also denied that Mr. Titley acted as their agent in receiving moneys from or paying moneys to the plaintiff company. They made no admission that the plaintiff company were induced to enter into the agreement by the fraud of Mr. Titley and denied that he was acting within the scope of his authority as a director of the defendant company in the fraud or holding out alleged. The plaintiff company submitted in reply that the defendant company were estopped from denying that Mr. Titley was authorised to enter into the agreement on their behalf inter alia because their memorandum and articles of association showed that he was capable of being so authorised. Article 119 of the defendant company's articles of association provided: "The directors may delegate any of their powers other than the power to borrow and make calls to committees consisting of such members of their body as they think fit. Any committee so formed shall in the exercise of the power so delegated conform to any regulations that may from time to time be imposed upon them by the board."

Perrett for the plaintiff company.

Eastham for the defendant company.

Curr. adv. vult.

Feb. 5. **SLADE, J.:** For the purposes of my judgment the material facts are (i) that Mr. Wedderburn trusted Mr. Titley completely; (ii) that he had never heard of the defendant company before Mar. 21, 1949; (iii) that the whole bargain was concluded, or believed to have been concluded, in Mr. Wedderburn's office on Mar. 21, 1949, and that neither on that date, nor, indeed, at any time in 1949, had Mr. Wedderburn any knowledge whatever of the contents of the articles of association of the defendant company. I find as a fact that Mr. Wedderburn did not rely on any power contained in the articles of association to delegate the powers of the defendant company's board to a committee of their number, who might in law be a committee of one, and I find as a fact that Mr. Titley never, at any time, disclosed to his fellow members on the board of the defendant company anything whatever about the transaction into which he purported to enter, on their behalf, with Mr. Wedderburn, on behalf of the plaintiff company, on Mar. 21, 1949.

In my judgment I am bound by the decision of the Court of Appeal in *Houghton & Co. v. Nothard, Lowe & Wills* (1) to hold that a person who, at the time of purporting to make a contract with a company registered under the Companies Acts, has no knowledge of the company's articles of association, cannot rely on those articles as conferring ostensible or apparent authority on the agent with whom he dealt, and by the same authority I am constrained to hold that the doctrine of constructive notice of a company's registered documents, such as its memorandum of association, its articles of association, its special resolutions, etc., does not operate against a company, but only in its favour. Put in the converse way, the doctrine of constructive notice operates against the person who has failed to inquire, but does not operate in his favour. There is no positive doctrine of constructive notice, it is a purely negative one. I am also bound by the same authority to hold that a person cannot set up an ostensible or apparent authority unless he relied on it in making the contract or supposed contract.

Although bound to hold that by the decision in the Court of Appeal in *Houghton's* case (1), had the matter been *res integra*, I should still unhesitatingly have come to the same conclusion and have respectfully allied myself with the judgment of SARGANT, L.J., in that case ([1927] 1 K.B. 263). Ostensible or apparent authority, which negatives the existence of actual authority, is merely a form of estoppel and has been termed agency by estoppel, and a party cannot call in aid an estoppel unless three ingredients are present: (i) a representation, (ii) a reliance on a representation, and (iii) an alteration of his position resulting from such reliance.

The decision of the Court of Appeal referred to, *Houghton & Co. v. Nothard, Lowe & Wills* (1) was affirmed by the House of Lords on other grounds, but they made no reference to, and in no way criticised, any of the judgments of the Court of Appeal. *Houghton's* case (1) was followed in the same year by *Kreditbank Cassel G.m.b.H. v. Schenkers* (2), also in the Court of Appeal.

In *Houghton's* case (1) the appellant company were fruit brokers. To reduce competition two companies engaged in the sale of fruit sold through the instrumentality of brokers decided to form a third company, the respondent company. That company had a name very similar to that of one of the two companies (not the appellant company), which was conveniently distinguished as the preserving company. A Mr. Maurice Lowe, a director of both the preserving company and the newly formed company, purporting to act on behalf both of the preserving company, who were badly in need of money, and of the newly formed company, made an arrangement with the appellant company whereby, in consideration of that company's advancing money to the preserving company, the preserving company and the newly formed company would give all the sales of their fruit to the appellant company and would authorise them to retain money out of the proceeds of the sale of that fruit in partial reimbursement of

the sums lent to the preserving company. It followed that, in so far as the appellant company received money from the sales of the newly formed company's fruit, they were purporting to be authorised to use the newly formed company's money to repay the indebtedness of the preserving company which was a wholly different legal entity. The appellant company were apparently sufficiently surprised at this magnanimous offer on the part of the newly formed company through the instrumentality of Mr. Maurice Lowe who, as a director of the preserving company, was anxious to get money, not to accept the *ipse dixit* of Mr. Lowe as being sufficient to bind the newly formed company and they said they would want written confirmation from that company. Unfortunately, the written confirmation received was a letter signed only by the secretary of the newly formed company who had no shadow of authority to make a contract on his company's behalf and the so-called confirmation was not worth, in law, the paper on which it was written.

The headnote, which is abundantly borne out by the judgments, begins:

"The doctrine of constructive notice operates adversely to a person who neglects to inquire; it does not entitle such a person to claim for his own advantage to be treated as having knowledge of the facts which inquiry would have disclosed . . ."

After setting out the facts substantially as I have just recapitulated them it goes on:

"The secretary had no authority to give such confirmation. The defendants [the newly-formed company] subsequently repudiated the agreement as made without their authority. In an action for breach of that agreement, the plaintiffs claim that [Maurice Lowe], or the secretary, had ostensible authority, inasmuch as such an agreement might have been made by the board, and the plaintiffs were entitled to assume that the board had delegated their powers in that behalf to [Maurice Lowe] or to the secretary, under the articles of association. At the time that they made the advance the plaintiffs had no knowledge of the terms of the defendant's articles of association or that they incorporated Table A."

The articles of the defendants in that case incorporated art. 91 of Table A, which as it then existed, was in almost identical terms with the relevant portion of art. 119 of the defendant company's articles of association in the present case. It provided that the board of directors

"may delegate any of their powers to committees consisting of such member or members of their body as they think fit . . ."

The headnote concluded:

"Held, that, whether the agreement was to be treated as having been made by M.L. as an ordinary 'director' of the defendant company, or by the secretary as 'agent', or by the two combined, the plaintiffs were not entitled to assume that any authority to make it had been delegated to them by the board, and for the following reasons: (1) Although a person who contracts with an individual director or servant of the company, knowing that the board of directors has power to delegate its authority to such an individual, may under certain circumstances assume that that power of delegation has been exercised and that he may safely deal with the individual in question as representing the company, he cannot rely on the supposed exercise of such power if he did not know of the existence of the power at the time that he made the contract."

Ground (2) was that in any event the plaintiffs were put on inquiry.

"(3) *Per* SARGANT, L.J. (in whose judgment ATKIN, L.J., concurred). Even if the plaintiffs had known of the existence of the express power of delegation they would not have been entitled to assume that it had been

exercised in favour of M.L. or the secretary to any greater extent than was to be inferred from the positions which M.L. and the secretary respectively occupied or were held out by the company as occupying."

That means that, if the articles authorised the board to give certain powers, e.g., to the office boy, even if some powers had been conferred pursuant to that authority, one would not be entitled to assume, if the office boy purported to make an enormous contract on behalf of the company, that his powers would extend to such an unusual transaction. The only material finding is the first one, but in *Jacobs v. London County Council* (3) the House of Lords decided that a reason given by a court for its decision is not to be regarded as obiter dictum merely because another reason is given: see *per LORD SIMONDS* ([1950] 1 All E.R. 740).

WRIGHT, J., had held ([1927] 1 K.B. 250)

"that the plaintiffs were entitled to deal with Maurice Lowe as the representative and plenipotentiary of the defendant company, and that it was immaterial whether he was actually authorised to make the agreements or not. For they were justified in assuming that Maurice Lowe, although he was only an ordinary director and not a managing director, had authority to bind the defendant company by the bargain which it purported to make, even though they had in fact no knowledge of the terms of the defendants' articles of association or that they empowered the board to delegate their functions to a single director."

WRIGHT, J., was reversed by the Court of Appeal.

The arguments of Mr. A. T. Miller, K.C., of Mr. S. L. Porter, K.C. (now Lord Porter) and of Mr. R. K. Chappell, were as follows. Under the Companies Acts the articles of association are a published document which is open to the inspection of any member of the public, and, accordingly, persons who have dealings with a registered company must be taken to have constructive notice of the articles. It is not essential for the party dealing with the company to prove that he had studied the articles. It is enough that if he had done so he would have been entitled to assume that the board had exercised the power which the articles conferred. The company will be bound if the director could have had the authority to make the contract sued on. This is the basis on which the rule in *Royal British Bank v. Turquand* (4) proceeds. Then, perhaps, even more strongly, the argument proceeds (*ibid.*, 252):

"Indeed in none of the cases in which it was held that the person dealing with a company was entitled to assume that the director or other official of the company had the authority which he purported to have did the judgment proceed on the basis that the party had in fact studied the public documents. The party must for all purposes be treated as if he had read them; and this is what LORD HATHERLEY meant in *Mahony v. East Holyford Mining Co.* (5), when he said that the articles of association and the partnership deed are open to all who are minded to have any dealings whatsoever with the company, and (L.R. 7 H.L. 893) 'those who so deal with them must be affected with notice of all that is contained in those two documents'."

SARGANT, L.J., there intervenes with these words (*ibid.*, 253):

"The doctrine of constructive notice is not a positive doctrine, but a negative one operating against a person who has not inquired."

In his judgment BANKES, L.J., said (*ibid.*, 254):

"The dispute between the parties depended entirely upon whether the defendants were or were not bound by an agreement which was said to have been entered into on their behalf by one of their directors, Mr. Maurice Lowe."

He then sets out the material articles and the material facts and says (*ibid.*, 259):

"The plaintiffs' second ground of claim and the defence to the counter-claim were rested upon the rule of law laid down in *Mahony v. East Holyford Mining Co.* (5) and other similar cases. Upon this part of the case the learned judge decided in the plaintiffs' favour. I should not have been at all sorry if I could have shared the learned judge's view. In my opinion, the facts are too strong to admit of the application of the rule referred to. The rule, and the application of the rule, were recently discussed in this court in the case of *A. L. Underwood, Ltd. v. Bank of Liverpool* (6), where the authorities are collected. Those authorities, I think, make it clear that in order to establish a case which falls within the rule it is essential that the person who claims the benefit of it must (a) prove that he relied upon the ostensible authority which he sets up, and (b) must not have been put upon inquiry as to whether the transaction was in order. In the present case the plaintiffs fail, in my opinion, on both points. . . . Mr. Dart [a partner in the plaintiff firm] in dealing with the defendant company was not relying upon any ostensible authority in Mr. Maurice Lowe, but upon what he unfortunately accepted as a binding written acceptance by the company of the terms negotiated between Mr. Maurice Lowe and himself. This conclusion, once arrived at, is sufficient to dispose of these appeals. As I have mentioned the second point I will deal with that."

That is the point about being put on inquiry which is not material to my decision in this case. ATKIN, L.J., concurs with the reasons given in the judgment of SARGANT, L.J., who says (*ibid.*, 263):

"The decision of WRIGHT, J., in favour of the plaintiffs is founded not on actual authority, but on a wholly different ground—namely, the title of the plaintiffs in the circumstances to assume that such an authority had been given, and to act on that assumption."

WRIGHT, J. relied on the fact that under the articles of association of the defendant company their board of directors might have delegated their power to enter into such a contract to any person, including a single director or their secretary. Thirdly, he drew the conclusion that, although this power to delegate was unknown to Mr. Dart or to any one else acting for the plaintiffs, yet Mr. Dart and the plaintiffs were entitled to treat this as a matter of internal management only and to assume that Mr. Maurice Lowe and the secretary in fact possessed the power to bind the defendant company. The important part of the judgment is (*ibid.*, 266):

"Next as to the power to delegate which is contained in the articles of association. In a case like this where that power of delegation had not been exercised, and where admittedly Mr. Dart and the plaintiff firm had no knowledge of the existence of that power and did not rely on it, I cannot for myself see how they can subsequently make use of this unknown power so as to validate the transaction. They could rely on the fact of delegation, had it been a fact, whether known to them or not. They might rely on their knowledge of the power of delegation, had they known of it, as part of the circumstances entitling them to infer that there had been a delegation and to act on that inference, though it were in fact a mistaken one. But it is quite another thing to say that the plaintiffs are entitled now to rely on the supposed exercise of a power which was never in fact exercised and of the existence of which they were in ignorance at the date when they contracted. No case was cited to us in which a binding obligation has been constructed out of so curious a combination; and I cannot see any principle on which an obligation could be so constructed."

SARGANT, L.J., continues (*ibid.*, 267):

"Perhaps the nearest approach to the present case is to be found in *Biggerstaff v. Rowatt's Wharf, Ltd.* (7). But there the agent whose authority

was relied on had been acting to the knowledge of the company as a managing director, and the act done was one within the ordinary ambit of the powers of a managing director in the transaction of the company's affairs. It is I think clear that the transaction there would not have been supported had it not been in this ordinary course, or had the agent been acting merely as one of the ordinary directors of the company. I know of no case in which an ordinary director, acting without authority in fact, has been held capable of binding a company by a contract with a third party, merely on the ground that that third party assumed that the director had been given authority by the board to make the contract."

SARGANT, L.J., referring to *Biggerstaff's* case (7), and giving the ground which, in his view, underlay the decision in that case, might have fortified the view that he was expressing in his judgment by referring to a passage in the judgment of LINDLEY, L.J. LINDLEY, L.J., said ([1896] 2 Ch. 102):

"It is said that the company are not bound by those orders because Mr. Davy had no authority to give them. Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enable the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bona fide."

I emphasise the last three or four lines.

In *Kreditbank Cassel v. Schenkers* (2) WRIGHT, J., said in the court of first instance, in a judgment given before the judgment in the Court of Appeal which I have just read ([1926] 2 K.B. 459):

"The memorandum and articles are public documents, and everyone dealing in such matters with a limited company is taken in law to be acquainted with their terms. But once it appears that the company has the necessary power, and that the person purporting to bind the company by his signature to the negotiable instrument on the company's behalf falls within the category of persons who under the articles might be properly so empowered if the appropriate steps by way of internal management have been taken, the company will be bound. On any other basis the position of persons dealing with the negotiable paper of a limited company would be very difficult and business could not go on. The rule is subject to the obvious limitation that the person so dealing must have no actual or constructive notice that the professing agent of the company has not authority in fact: *A. L. Underwood, Ltd. v. Bank of Liverpool* (6). I do not find it laid down as a condition that the person so dealing must have actually examined the articles of association. In business he would seldom or never do so, but take the risk. He is bound by the articles if they are adverse to his claim: it seems that if the articles are in his favour he should be entitled to benefit by their terms."

That is the very argument which has been put forward on behalf of the plaintiff company in this case. It was rejected by the Court of Appeal, who held themselves bound by their previous decision in *Houghton's* case (1).

The facts in *Kreditbank Cassel v. Schenkers* (2) are not very material. The Manchester manager of Schenkers, Ltd. in fraud of his employers purported to draw seven bills of exchange on behalf of the company. The bills were duly accepted, they were dishonoured by the acceptors, and the appellant bank who were holders in due course sued Schenkers, Ltd., as the drawers of the bills. Schenkers, Ltd., said that the man who purported to sign those bills on their

behalf was only their Manchester branch manager. He was not a director of the company. I have dealt with the way with which WRIGHT, J., decided the case. The headnote in the Court of Appeal reads:

"Held, (1) applying *Houghton & Co. v. Nothard, Lowe & Wills* (1), *ante*, p. 246 [the Court of Appeal decision and not the House of Lords decision], that as it did not appear that the plaintiffs knew of the existence of the power of delegation contained in the defendants' articles of association they were not entitled to rely upon its supposed exercise."

The Court of Appeal also held that, as the bills of exchange were forgeries, the rule in *Royal British Bank v. Turquand* (4) did not apply in any case and they gave other reasons for their decision. But there is no doubt that, as will be clear when I read the judgment, one of the reasons for the decision was the first one in the headnote, and that the Court of Appeal held they were bound in that respect by their previous decision in *Houghton's* case (1). One of the facts was that ([1927] 1 K.B. 827):

"... by a further resolution the bank was empowered to honour the signature of S. Clarke on all cheques payable only to His Majesty's Customs."

WRIGHT, J., held that (*ibid.*, 828):

"Clarke in drawing the bills on behalf of the defendants was a person acting under their authority within the meaning of s. 77 of the Companies (Consolidation) Act, 1908, and that the defendants were liable inasmuch as by their constitution the Manchester manager might have been authorised to draw the bills, and therefore a person taking them in due course was not prejudiced because Clarke had no authority in fact."

Mr. Pritt, for the defendants, said (*ibid.*, 829):

"*Houghton & Co. v. Nothard, Lowe & Wills* (1) shows that a person who has no knowledge of the existence of the power of delegation in a company's articles of association—and in this case it was not shown that the plaintiffs had such knowledge—cannot rely upon it so as to validate an unauthorised transaction."

ATKIN, L.J., interposed to ask whether it could not have been within the implied authority of Clarke to draw and indorse the bills. BANKES, L.J., in his judgment, said (*ibid.*, 832):

"The plaintiff's case was that the defendants, a limited company, had in their articles of association an article which authorised the delegation of authority to do such an act as drawing or indorsing bills of exchange, and that, in view of that, the rule of law laid down by the House of Lords in *Mahony v. East Holyford Mining Co.* (5) applied, because the plaintiffs had discounted the bills bona fide and without notice of any irregularity attaching to them. Upon that state of facts and upon that contention WRIGHT, J., decided the case. At that time *Houghton & Co. v. Nothard, Lowe & Wills* (1), in this court had not been decided. Mr. Pritt for the defendants relies upon that case as an authority that on the facts and the particular form of the article in this case the plaintiffs fail in substantiating their cause of action. But during the argument another point was taken—namely, that the act of the branch manager was a forgery . . ."

He continued (*ibid.*, 833):

"In *Houghton & Co. v. Nothard, Lowe & Wills* (1) the article empowered the directors to 'delegate to any managing director, local board, head manager, manager, attorney or agent any of the powers . . . for the time being vested in the directors'. The authority there was thus more circumscribed than here, because it indicated by description the persons to whom

the authority might be delegated. In that case all the members of the court came to the conclusion that the plaintiffs were not in a position to rely upon the rule in *Mahony v. East Holyford Mining Co.* (5), because upon the facts the true inference was that they did not rely upon any suggested delegated authority. The true inference from the facts there was that the plaintiffs distrusted the position of the person who was negotiating on behalf of the company, and, distrusting his authority, they required express confirmation of it, and, unfortunately for them, the express confirmation was no confirmation at all. But SARGANT, L.J., in whose judgment ATKIN, L.J., concurred, went further and laid down in terms a proposition of law that, in the circumstances of that case, which I cannot distinguish from those now before us, the rule in *Mahony v. East Holyford Mining Co.* (5) does not apply. If I am correct in that view, that is sufficient to dispose of this appeal."

SCRUTTON, L.J., said (*ibid.*, 836):

"This is not an easy case, and, but for two decisions to which we have been referred, I should have desired to go much more carefully into the various lines of authorities than has been done; but in my view this court is bound by authority to decide that this appeal should be allowed."

He continued (*ibid.*, 837):

"... this action was brought and came before WRIGHT, J., who applied the doctrine of *Royal British Bank v. Turquand* (4). As I understand that doctrine it is this: any person dealing with a company is deemed to have notice of its articles of association—some of the cases go further and say that he must be deemed to understand them, an extensive presumption sometimes—but if, looking at the articles, or being deemed to know their contents, the thing that has been done is one that might have been done, if certain internal arrangements had been made, the person so dealing with the company is not bound to inquire whether those internal arrangements have been carried out, but is entitled to assume regularity in the proceedings. Acting on that decision WRIGHT, J., found that as there was in the articles of Schenkers, Ltd., an article under which power could have been delegated to Clarke, the Manchester manager, the bank was not bound to inquire whether power had in fact been delegated to him and consequently, on *Turquand's* case (4) and the line of authorities following it, the judge held that the bank was excused from inquiring whether the domestic arrangements necessary to delegate to Clarke the power to draw bills of exchange had been complied with. There are two matters which, I think, bind me to say that WRIGHT, J.'s decision is wrong."

I pass over the first and come to the second (*ibid.*, 840). SCRUTTON, L.J., continued:

"The second matter which I think binds me is this. In *Houghton & Co. v. Nothard, Lowe & Wills* (1), which in many of its details is very similar to this, two judgments in effect were given in the Court of Appeal. BANKES, L.J., dealt with the question on the particular facts and declined to express any further opinion, but SARGANT, L.J., in whose judgment ATKIN, L.J., concurred, took a further point. He there said that although there is a power of delegation contained in the articles of association, and although a person dealing with a company is deemed to know it, he cannot be heard to say: 'I am deemed to have known of the power to delegate and I acted upon it', unless it is proved that he had knowledge of the existence of the power. I hope it is not disrespectful to express the wish that SARGANT, L.J., who is thoroughly conversant with this branch of the law, had explained to those not equally familiar with it, how this fits in with the doctrine enunciated in a line of cases of which *Mahony v. East Holyford Mining Co.*

(5) is an instance, that a person is deemed to know of the company's articles of association. But whether SARGANT, L.J., has explained his reasons or not, there is no doubt about what he said, nor is there any doubt that ATKIN, L.J., agreed with the reasons given. In those circumstances, I am bound by the decision given by the majority of the court in that case, and that decision precludes the plaintiffs saying: 'We are deemed to know that there was a power of delegation and we are excused in those circumstances from inquiring into the company's internal management'."

Although I say anything which differs from what SCRUTTON, L.J., says only with trepidation, I think that SARGANT, L.J., did give his reason, and it was that the doctrine of constructive notice was a purely negative one and not a positive one. When he says that a party is affected with notice, he means that, if the party fails to inquire, he will be imputed with notice. There the doctrine operates in the company's favour. But it does not operate in a party's favour so as to enable him to say he relied on something of the existence of which *ex hypothesi* he says he had no knowledge. Secondly, with even greater trepidation, I have no difficulty in reconciling SARGANT, L.J.'s judgment with the decision of the House of Lords in *Mahony v. East Holyford Mining Co.* (5), for the reasons which I am about to give.

ATKIN, L.J., said (*ibid.*, 844):

"The true limits of the doctrine as to the effect of an article which empowers a company or its directors to nominate a person to have authority to do a particular act on behalf of the company are, I think, made quite plain in the judgments in *Houghton & Co. v. Nothard, Lowe & Wills* (1). It is therefore unnecessary to consider further the doctrine as to the knowledge of the articles of association of a company."

I emphasise the word "knowledge". ATKIN, L.J., continued:

"I may say this, however, that the doctrine is as to the knowledge of the articles; that is to say, the person is to be in the same position as if he had read them, and if he had, all that he would see would be that the directors had power to nominate a particular individual who could sign bills of exchange. In such a case a person reading the articles would be in no better a position unless he went further and inquired whether or not the directors had, in fact, nominated that particular individual to sign the bills. There are cases where that inquiry need not be made. When, for example, you find power given to do a certain thing, and the act can be done by the company in board meeting, and there purports to be a resolution authorising it, you are not obliged to inquire whether or not the forms of the company required by the articles as to the constitution of the board, the quorum and so forth, have been actually complied with. If you are dealing with a director in a matter in which normally a director would have power to act for the company, you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power. Those are matters of internal management which an outsider is not obliged to investigate."

I have gone so minutely into those two decisions of the Court of Appeal because I am quite unable to reconcile them with the reasons given in the judgment in a third decision of the Court of Appeal, *British Thomson-Houston Co., Ltd. v. Federated European Bank, Ltd.* (8). Those passages were relied on in the judgment of the Court of Appeal in that case, so far as I can see, as suggesting that ATKIN, L.J., was saying in the *Kreditbank Cassel* case (2) that one need not always have actual knowledge of the articles of association and of the fact that they contain a power to delegate, and that there are cases when one need not know them at all, and need not inquire. I do not read ATKIN, L.J.,

as saying anything of the kind and I do not see how he could hold himself to be bound by *Houghton's* case (1) if that is what he meant.

Before turning to this third decision of the Court of Appeal I am going to resolve the difficulty which SCRUTTON, L.J., said confronted him, by referring shortly to the decision of the House of Lords in *Mahony v. East Holyford Mining Co.* (5). In my judgment, the decision there proceeded on the footing that the bank had actual knowledge of the company's articles of association. The appellant was the public officer of the National Bank of Dublin. The East Holyford Mining Co. had been promoted by a number of persons who had obtained subscriptions and who, without having been regularly appointed as directors of the company as required by the company's articles of association, described themselves as directors, and acted as directors. Under the company's articles of association they could have been validly appointed as directors though, in fact, the necessary machinery had not been gone through for that purpose. That applied also to the person who was appointed and described as the secretary of the company. The National Bank of Dublin were appointed the company's bankers and a formal notice signed by a person describing himself as the secretary of the company required them to pay cheques signed by any of the following three directors—the word directors being used in the notice—and countersigned by himself as secretary in accordance with what was stated to be “a resolution passed this day”. The bankers from time to time received cheques signed and countersigned as provided for in the mandate, and duly honoured and paid them. When practically the whole of the company's funds had been drawn out, the company went into liquidation and it then appeared that there never had been meetings of shareholders, nor any appointment of directors, nor any appointment of secretary, but that the persons who had promoted the company had treated themselves as directors and secretary and appropriated the money obtained from the subscriptions. It was held that the official liquidator could not recover from the bankers the amount of the cheques which they had bona fide paid. The case was originally tried with a jury, and the important point appears to me to be this. KELLY, C.B., stated that at the trial counsel had asked the judge to give the jury certain information. The report continues (L.R. 7 H.L. 880):

“This the judge declined to do, but, by consent, reserved liberty to enter the verdict for the defendant, ‘if the jury should have found in his favour on any questions that I ought to have submitted to them. The court to be at liberty to draw any such inferences of fact as in their opinion the jury ought to have done’.”

In other words, the matter came before the House of Lords not only on the facts as found by the jury, but on any inference of fact which in the House of Lord's opinion the jury ought to have drawn had those matters also been left to them. It seems to me to be clear that one of the inferences of fact on which the opinions of the House of Lords proceeded was that the bank by their public officer and servants had actual knowledge of the articles of association of the Holyford Mining Co.

This view is supported, I think, by the opinions of LORD CHELMSFORD and LORD HATHERLEY, and LORD HATHERLEY's opinion was referred to in the argument before the Court of Appeal, in *Houghton & Co. v. Nothard, Lowe & Wills* (1) ([1927] 1 K.B. 259). LORD CHELMSFORD said (*ibid.*, 889):

“We have a right to assume that the bankers, acting with proper caution, before they commenced transactions with the company, referred as they were bound to do, to the articles of association, to ascertain in what manner the account which had been opened was to be drawn upon. Beyond the particulars of the objects of the company, and information as to the mode in which the account was to be dealt with, which alone the bank was concerned to know, I do not consider that any more preliminary

inquiries were necessary. Upon referring to the articles of association they would have found, by the 58th clause, that every sum paid on behalf of the company amounting to £10 or upwards, was to be paid by cheques to be signed and countersigned as might from time to time be directed by the board. *With this information* the bankers must have been prepared to receive a communication on behalf of the company as to the persons who were to sign and countersign the cheques. And on July 26 they received the expected letter from Wall, the person already introduced to them through the prospectus as the secretary of the company . . . ”

LORD HATHERLEY said (*ibid.*, 898):

“ On the other hand, on the part of the bankers, I see no possible mode by which they might have pursued their inquiries in the manner contended for at the Bar without requiring all the minute books of the company to be produced to them, and without conducting a detailed investigation into all the transactions of the company as to the appointment of directors and the like—a duty they were not called upon to perform, and a duty which, if it was objected to, they could not have insisted upon performing. I apprehend, my Lords, that the bankers having done all that was strictly their duty to do, *having made themselves acquainted with the articles of the company*, and having seen the offices of the company, with persons there affecting to perform all the duties of directors according to those articles, and having seen those who had the power of appointing them continually present there, witnessing their performance—there can be no doubt that in this state of circumstances the bankers are not in any default whatsoever, and that the cheques must be taken, as between them and the company, to have been properly drawn, and the shareholders must be held liable to the loss.”

It seems clear to me from those two passages alone that one of the inferences that the House of Lords drew was that the bank had made themselves acquainted with the articles and the powers contained in the articles, and relied on those powers having been, as they supposed, duly exercised. There it was a question of the appointment of directors. The persons concerned had not been appointed at all. They might have been appointed by a board meeting when there was no quorum present, or not a disinterested quorum. Those are all matters of internal management of the company's affairs which a person, knowing of the existence of the power in the articles and relying on it, is entitled to assume have been observed when the power has been exercised. He has no power to demand production of the minute book of the company. Moreover, the question in *Mahony's* case (5) was whether the bank were entitled to treat the persons who signed the cheques as directors. They were described as directors in the mandate of the bank and they were directors *de facto*. Whether they were also directors *de jure* depended on whether the provisions in the articles relating to the appointment of directors had been complied with, and this was a matter of interior management of the company into which the bank were not, according to *Turquand's* rule (4), bound to inquire. Their apparent position was that of directors, they had the apparent authority of directors and there was nothing in the articles restricting that apparent authority. In my view, therefore, there is nothing whatever in the decision of the House of Lords in *Mahony v. East Holyford Mining Co.* (5), which is inconsistent with the judgment of SARGANT, L.J., in *Houghton & Co. v. Nothard, Lowe & Wills* (1) in the Court of Appeal.

In the last decision of the Court of Appeal, *British Thomas-Houston Co., Ltd. v. Federated European Bank, Ltd.* (8), which I have said I am unable to reconcile with their decisions in *Houghton's* case (1) and in *Kreditbank Cassel v. Schenkens* (2), the headnote reads:

“ By the articles of association of a company the directors had power to delegate to one or more of their own body such of the powers conferred on

the directors as they might consider requisite for carrying on the business of the company, and to determine who should be entitled to sign contracts and documents on the company's behalf. A document purporting to be a guarantee was given to the plaintiffs executed by the company in this form: 'The F.E.B., Ltd., signed N.P.' N.P. was a director of the company. During the negotiations for the giving of the guarantee he had written to the plaintiffs, signing the letter 'For and on behalf of' the company, 'N.P., Chairman'. On these facts, in an action on the guarantee:—*Held*: that the plaintiffs were entitled to presume that the directors of the company had authorised N.P. to sign contracts on behalf of the company and that the company was liable on the guarantee."

I find this, to me, astonishing statement in the headnote:

"*Houghton & Co. v. Nothard, Lowe & Wills* [1927] 1 K.B. 246; [1928] A.C. 1, considered; *Kreditbank Cassel v. Schenkers* [1927] 1 K.B. 826, followed. Judgment of MACNAGHTEN, J., affirmed."

The significant point about the *British Thomson-Houston* case (8) is that at the trial before MACNAGHTEN, J., neither party put in either the memorandum or the articles of association and they were called for by SCRUTTON, L.J., in the course of the hearing before the Court of Appeal. It was, apparently, admitted at the trial that N. Pal was the chairman of the board of directors of the defendant bank and it appeared that he had offered the plaintiffs a form of guarantee signed by himself for and on behalf of the defendants as chairman. The plaintiffs would not accept the guarantee in that form and subsequently the form referred to in the headnote was sent by the plaintiffs and signed as I have indicated. When SCRUTTON, L.J., called for the articles of association it appeared that art. 106 gave power to the directors to delegate to any managing director, local board, committee or agent, or to one or more of their own body or to any manager or other officer such of the powers and authorities thereby conferred on the directors, with one exception, as the board considered requisite for carrying on the business of the company. According to a footnote to the report ([1932] 2 K.B. 177) it appeared from the articles of association that two directors should form a quorum.

It is possible to have ostensible or apparent authority apart from the articles of association, though not where it is inconsistent with or beyond the articles of association. A company can hold out by correspondence and so on to third parties dealing with a person in good faith that that person holds authority which he does not, in fact, possess. It may be that that was the ground of the decision in the case of the managing director in *Biggerstaff's* case (7). It is not for me to say whether the principle would have applied to the act of a chairman in the present case. I am dealing only with the grounds which were given by the Court of Appeal for their decision in the *British Thomson-Houston* case (8), and it is sufficient to repeat that the articles were not even before MACNAGHTEN, J., at the trial. There was no suggestion that the British Thomas-Houston Co. or any one acting on their behalf had ever seen the articles and still less that he, or they, relied on them. That was the basis on which the case came before the Court of Appeal. How, in those circumstances, *Kreditbank Cassel v. Schenkers* (2) could have been followed, I find myself quite unable to understand. Although the articles are not set out in the full report, I should have thought from the fact that the quorum of directors was two and that, presumably, the articles contained the orthodox clause entrusting the management of the company's affairs to their normal or ordinary directors, unless the authority conferred by art. 106 had been conferred by a disinterested quorum of the board on Mr. Pal, the chairman, he would have had no greater authority under the articles than any ordinary director. He may have been chairman, but under the articles, apart from the exercise of the power conferred by art. 106, it required a board meeting consisting of a minimum of two directors to bind the company.

In his judgment SCRUTTON, L.J., says ([1932] 2 K.B. 180):

"One defence raised is that the defendant bank have not executed [the guarantee] because by their articles of association any guarantee of the bank requires to be executed by two directors. At the trial neither party put in the articles of association. Mr. Turrell for the defendants took the point that one director had no authority to pledge the credit of the company. In view of the decision of the House of Lords in *Mahony v. East Holyford Mining Co.* (5), that those who have dealings with a company are affected with notice of all that is contained in its memorandum and articles of association, we asked to see the articles of association of the defendant company. Now we have seen them, and we find that they confer upon the directors two powers: (i) to delegate to one or more of their number any of the powers of the board of directors, and (ii) to decide who shall sign contracts and other documents on the company's behalf. Then *Royal British Bank v. Turquand* (4) and *Mahony v. East Holyford Mining Co.* (5) decide that, if the articles of association give a power, persons dealing with the company, though they are deemed to have notice of the extent of the power, are not bound to inquire into what is called the 'indoor management' of the company to see whether the power has been properly and regularly exercised with all the prescribed formalities, and if they find an officer of the company openly exercising an authority which the directors have power to confer upon him, they are relieved from the duty of further inquiry and are entitled to assume that the power has been regularly and duly conferred."

For myself, and I speak with the utmost diffidence in dealing with a judgment of so learned a judge as SCRUTTON, L.J., I find it difficult to understand the words:

"if they find an officer of the company openly exercising an authority which the directors have power to confer upon him."

How can they find that if they do not know that the articles confer such a power? SCRUTTON, L.J., continues (*ibid.*, 180):

"A difficulty in the way of the plaintiffs is raised by the judgment of SARGANT, L.J., in *Houghton & Co. v. Nothard, Lowe & Wills* (1), where one director of a company purported to pledge certain future profits of the company by a contract which was said to be beyond his powers. It was a question whether his act was or was not within the powers conferred by one of the company's articles of association. SARGANT, L.J., held, and ATKIN, L.J., agreed with him, that, assuming that the articles enabled the directors to delegate to the particular director power to perform the act, it was not enough for the pledgees to rely upon their constructive knowledge of the effect of the articles where the power of delegation had not in fact been exercised and where the pledgees had no actual knowledge that the power existed, and did not rely on its existence. This case was considered in *Kreditbank Cassel v. Schenkers* (2), where, besides the decision in *Houghton's* case (1), there were other good reasons disentitling the plaintiffs from recovering . . ."

Then he says there were three reasons (*ibid.*, 181):

" . . . thirdly, they held themselves bound to follow the decision in *Houghton's* case (1)."

I pause there to repeat that, even if there were other good reasons for the decision, the House of Lords has held in *Jacobs v. London County Council* (3) that that is no ground for treating one of the grounds of the decision as a mere *obiter dictum*. It binds me, and, in my view, it bound the Court of Appeal in this case that I am now reading.

SCRUTTON, L.J., continues (*ibid.*):

" But ATKIN, L.J., held that in certain circumstances the inquiry, whether directors have in fact nominated one of their number to do the act relied on, need not be made—namely, where directors have power to nominate one of their number to do acts on their behalf, and a director is found acting in a matter in which normally a director would have power to act for his company. In that case, in the view of ATKIN, L.J., a person dealing with the company would not be obliged to inquire whether the director had been formally invested with authority to do the act. Assuming that to be correct, in the present case we have a director acting in matters which are normally entrusted to directors."

I think it is clear that GREER, L.J., in his judgment decides this case on the footing that there was an actual holding out of Mr. Pal, the chairman, apart from the articles, i.e., the chairman was within his apparent authority as chairman, just as in *Biggerstaff's* case (7) the act was in the apparent authority of the person who was acting as managing director apart from the articles. GREER, L.J., says (*ibid.*, 182):

" If it were necessary for the decision of this case to apply the first ruling, as stated in the headnote to *Houghton & Co. v. Nothard, Lowe & Wills* (1), I should find myself in some difficulty. One of the propositions of law there stated is: ' Although a person who contracts with an individual director or servant of a company, knowing that the board of directors has power to delegate its authority to such an individual, may under certain circumstances assume that that power of delegation has been exercised and that he may safely deal with the individual in question as representing the company, he cannot rely on the supposed exercise of such power if he did not know of the existence of the power at the time that he made the contract '. If I rightly understand the decision in that case, it proceeds upon that proposition as good law."

I respectfully assent to that statement. That was the basis, or one of the bases, underlying the decision in *Houghton & Co. v. Nothard, Lowe & Wills* (1), which was expressed to be followed in the *Kreditbank Cassel* case (2).

GREER, L.J., continues (*ibid.*):

" But it is not necessary for me to inquire whether it was an essential element in the *ratio decidendi*, because there are in this case adequate grounds upon which we can rest a decision apart from *Houghton's* case (1). In the case before us the guarantee was signed by a person who was the chairman of the board of directors. Someone must represent the company for the purpose of conducting correspondence, it may be a secretary, or the managing director, or some other officer; and he must have authority to bind the company by letters written on its behalf. The person chosen by the defendants for this purpose was the chairman of the board, and the defendants have represented by their chairman that the plaintiffs could rely on the guarantee of the defendants as the act of the defendants and are responsible for those acts which they have held him out as having authority to perform. That is enough to decide this case; I reserve for further consideration the question how the first ruling in *Houghton's* case (1) is to be reconciled with *Mahony v. East Holyford Mining Co.* (5)."

SLESSER, L.J., says (*ibid.*, 183):

" I agree. Speaking generally of the articles of association of the company and of the powers of the Manchester manager in *Kreditbank Cassel v. Schenkers* (2), ATKIN, L.J., says: ' The person ' (who relies on the articles) ' is to be in the same position as if he had read them, and if he had, all that he would see would be that the directors had power to nominate the particular individual who could sign bills of exchange. In such a case a person

reading the articles would be in no better a position unless he went further and inquired whether or not the directors had in fact nominated that particular individual to sign the bills'. But the lord justice points out, as an exception, a case where this further inquiry need not be made, as follows: 'If you are dealing with a director in a matter in which normally a director would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power'. Here we are dealing with a company having four directors, of whom N. Pal describes himself as the chairman and, in one case, signs a document as 'N. Pal, Chairman'. In my opinion the plaintiffs were dealing with N. Pal in a matter in which normally a director would have power to act. The difficulty arising on the decision in *Houghton & Co. v. Nothard, Lowe & Wills* (1), therefore, does not press me in the present case, where, in the circumstances, the plaintiffs were entitled to assume that they were dealing with a person who had the authority of the defendant company to execute the contract sued on."

If that case had been decided on the basis on which it was decided by GREER, L.J., there is, of course, nothing inconsistent in that with the first ground of the decision in *Houghton's* case (1), but I understand this case to have been decided by SCRUTTON, L.J., and SLESSER, L.J., on the footing that ATKIN, L.J., in his judgment in the *Kreditbank Cassel v. Schenkers* case (2) had said that there were cases in which one could rely on the articles of association and a power conferred by the articles even when one did not know of the existence of the articles or power, and *ex hypothesi* could not have relied on them, provided one found someone like a director dealing with the matter which would normally be dealt with by a single director. I respectfully think that ATKIN, L.J., said nothing of the kind in the *Kreditbank* case (2) and that the whole of his judgment, where, indeed, he held himself bound by the previous decision of the Court of Appeal in *Houghton's* case (1), proceeded on the footing that the person dealing with the company had actual and not merely constructive notice of the company's articles of association.

There is a footnote to the report of the *British Thomson-Houston* case (8) in which the learned reporter says (*ibid.*, 183, 184):

"The authorities seem to warrant the following propositions: If in an action against a limited company the plaintiff relies upon an act of an officer of the company, then (i) if the company has only a limited power to do the act, e.g., a power to borrow up to a certain amount, the plaintiff is affected with notice of the limitation: *Fountaine v. Carmarthen Ry. Co.* (9) ((1868) L.R. 5 Eq. 316). (ii) if the articles of association of the company give the officer authority to do the act provided certain directions are observed, and the officer purports to do the act; the plaintiff is entitled to assume that the directions have been followed: *Royal British Bank v. Turquand* (4), (1855) 5 E. & B. 248; (1856) 6 E. & B. 327; *Re Land Credit of Ireland, Ltd.* (10) (1869) L.R. 4 Ch. 460; *Mahony v. East Holyford Mining Co.* (5) (1875) L.R. 7 H.L. 869; *County of Gloucester Bank v. Rudry Merthyr Steam & House Coal Colliery Co.* (11) [1895] 1 Ch. 629."

I agree with (i), but disagree with (ii). The statement of the law there set out requires to be qualified by the addition of the requirement of actual knowledge and reliance on the existence of the power of delegation conferred by the articles. The note continues:

"(iii) It is submitted that actual knowledge on the part of the plaintiff of the contents of the articles of association is irrelevant except to an issue raised as to his bona fides."

I disagree and I say that is quite inconsistent with the decision of the Court of Appeal in *Houghton's* case (1).

It is not uninteresting to refer to a short passage from the speech of LORD LORD ATKIN in the House of Lords in *Midland Bank, Ltd. v. Reckitt* (12). I need not refer to the facts of the case. He said ([1933] A.C. 17):

"It remains to deal with contentions of the bank based upon the terms of the power of attorney. The bank never in fact asked for or saw the terms of the document; and, for my part, I venture to doubt whether in such circumstances they could ever rely on any other than an actual authority. Ostensible authority appears to be excluded when the party averring it cannot show that any appearance of authority other than the actual authority was ever displayed to him by the principal. He neither shows a representation nor that he relied on it."

In my view, that passage is quite inconsistent with the construction put on ATKIN, L.J.'s judgment in the *Kreditbank* case (2) that one can have agency by estoppel when there is no representation, no reliance on it, and no alteration of position in consequence of such reliance.

In *Clay Hill Brick & Tile Co., Ltd. v. Rawlings* (13) the defendant purchased bricks from the plaintiff company, dealing at all times with one Barber who was the chairman of the directors and acted as managing director of the company, though he had not been properly appointed to the office of managing director. Thinking that the company was a one-man company, the defendant handed to the chairman cheques made payable to the chairman personally, or his order, in payment for the bricks. The chairman cashed the cheques and did not pay the money over to the company. The articles of the company provided that the directors might delegate powers or authorities and discretions, and might annul or vary such delegation, but that no one dealing in good faith and without notice of such annulment or variation should be affected thereby. It was held that there was a power under the articles to authorise B. to receive payments in cash, and, so far as the defendant was concerned, it must be taken that B. had in fact such authority. The other point decided does not matter. It was merely that payment by cheque to a person who was authorised to receive payment in cash is as good as payment in cash. It may well be said that a person who is authorised to sell a company's goods is impliedly authorised to receive payment for them, just as a shop assistant who is authorised to sell his employer's goods is impliedly authorised to receive payment for them. I use the implied authority as the actual authority, not, of course, ostensible or apparent authority. As I read it, that is the ground on which TUCKER, J., decided this case in favour of the defendant when, the chairman having misappropriated the money, the company who had duly delivered the bricks sued the buyer for the money over again, saying that the chairman was incapable of giving him a proper discharge for the payment. TUCKER, J., said ([1938] 4 All E.R. 104):

"As I have already said, at this time, although Mr. Barber did not hold in the company quite the position that Mr. Rawlings thought he held, he was none the less, during the time when the cheques were given, the chairman of the directors, and acting as managing director, and, at the time the last cheque was paid, he was actually acting as manager, pursuant to his appointment as such . . . I think that it cannot be said that to receive payment in cash is beyond the power of a managing director or chairman of a company. It may be true that he is not the usual person to receive such sums. They may be received by a woman sitting in an office. However, that is a very different thing from saying that he has not the power to receive them. I think that Mr. Barber, in the position which he held in this company, was an officer who would not be ordinarily empowered to receive a payment of cash, but that, as a result of art. 12 of the articles of the company, which have been put in, as between himself and Mr. Rawlings, he might be so empowered. By art. 12, the directors may delegate to any one of their number or ' . . . to any manager, attorney or agent any of the

powers, authorities and discretions for the time being vested in the directors . . . any such appointment or delegation may be made in such terms and subject to such conditions as the directors may think fit, and may include a power to sub-delegate, and the directors may at any time remove any person so appointed, and may annul or vary any such delegation, but no person, dealing in good faith and without notice of such annulment or variation shall be affected thereby'. I think that the result of that article, the law being as I understand it, is that there being in fact power to confer that authority upon Mr. Barber, so far as Mr. Rawlings was concerned, it must be taken that he in fact had the authority which he was purporting to exercise . . . "

To that I can only say that there was no evidence that Mr. Rawlings ever knew of the existence of the power conferred by art. 12, and there was no evidence that he ever relied on such a power having been exercised by a proper delegation to the chairman and acting managing director.

If the decision of that case proceeded on that footing, namely, the application of the rule in *Royal British Bank v. Turquand* (4) where there was no actual knowledge or reliance on the company's articles of association, then I can only respectfully say I think the decision inconsistent with the decisions of the Court of Appeal in *Houghton's* case (1) and in the *Kreditbank Cassel* case (2). If, on the other hand, it proceeds on the footing that a chairman of a board taking orders for the sale of the company's bricks, the company's bricks being duly delivered by the company to the buyer on the faith of those orders, and the chairman of the company having implied, i.e., actual though not express, authority, as being reasonably incident to the power of selling bricks which he had, to receive payment for them, there is nothing inconsistent with those decisions or, indeed, anything in the case to deal with ostensible or apparent, as opposed to actual, authority at all.

I desire to acknowledge my indebtedness to a most illuminating analysis of the apparent authority of an agent of a company written by PROFESSOR J. L. MONTROSE in the *LAW QUARTERLY REVIEW*, 1934, at p. 224. But quite apart from that, I hold that I am bound by the decision of the Court of Appeal in the *Houghton* case (1). If I had not been bound I should have arrived independently at precisely the same conclusion. I agree with the conclusions of PROFESSOR MONTROSE and disagree with the contrary conclusions arrived at by the late SIR ARTHUR STIEBEL in an article entitled "Ostensible powers of directors" which is contained in the *LAW QUARTERLY REVIEW*, 1933, at p. 350. I find in the present case that there was no actual authority, expressed or implied, and I find, in so far as it is a question of fact, as a question of fact, and in so far as a question of law, as a matter of law, that there was no apparent or ostensible authority on which the plaintiff company, or Mr. Wedderburn, was entitled to rely. Ostensible or apparent authority must, of course, be something emanating from the company and not from the person who seeks to defraud it and the other party. In the result, there will be judgment for the defendant company, with costs.

Judgment for the defendant company.

Solicitors: *Biddle, Thorne, Welsford & Barnes* (for the plaintiff company); *Kingsley, Napley & Co.* (for the defendant company).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

UNITED STATES OF AMERICA AND ANOTHER *v.* DOLLFUS
MIEG ET COMPAGNIE S.A. AND ANOTHER.

[HOUSE OF LORDS (Viscount Jowitt, Lord Porter, Lord Oaksey, Lord Radcliffe and Lord Tucker), December 10, 11, 12, 13, 17, 18, 19, 1951, February 25, 1952.]

Conflict of Laws—Impleading foreign sovereign States—Gold bars belonging to French company seized by Germans and carried off to Germany—Discovery by allied forces—In possession and under control of governments of United States, United Kingdom and France—Deposit with Bank of England for purpose of applying agreement by allied governments on restitution of monetary gold—Action by French company against bank claiming delivery of bars or damages for conversion.

Before the outbreak of the war in 1939 a French company purchased sixty-four identifiable bars of gold and stored them in a bank at Limoges in a special vault hired for that purpose. In 1944 the bars were seized by the Germans and taken to Germany where they were found by the United States forces in 1945 after the invasion of Germany by the allied armies. In September, 1946, to implement the terms of the Paris Agreement on Reparations, dated Jan. 14, 1946, the governments of the United Kingdom, the United States of America and France (into whose possession the sixty-four gold bars had passed) set up a Tripartite Commission for the Restitution of Monetary Gold to deal on their behalf with gold taken from Germany. In March, 1948, the Bank of England was requested by the Treasury to open a gold set-aside account in the name of the Treasury on account of "the governments of the United States, the United Kingdom and France," the account to be operated by the representatives of those three governments on the Tripartite Commission "for the deposit and eventual distribution of a portion of the gold looted by Germany from the occupied States of Europe and recovered by the allied occupation forces". Under the terms of the contract the bank was to make charges in connection with the account. In July, 1948, under the orders of the Tripartite Commission, the sixty-four gold bars were conveyed to England and deposited in the gold set-aside account which had been opened by the bank pursuant to the request of the Treasury. After 1940 it was the normal practice of the bank, when gold bars were deposited by a customer, to ascertain the gold content of the bars deposited and to credit the customer with the quantity of ounces of fine gold discovered on assay, but not thereafter to treat the specific bars deposited as segregated in any way to the particular contract of deposit. When the sixty-four gold bars were sent to the bank it was known that the French company had, or might have, an interest in them, and on July 16, 1948, the Tripartite Commission wrote a letter to the bank saying that it had received a request from the French government that the bars should be set aside and that "the commission would be grateful, providing such action does not present insuperable technical or administrative difficulties, if you could see your way to having these bars set aside intact on arrival, if they can be identified, pending receipt of a further communication from the commission on the subject." On July 19 the bank replied, agreeing to the commission's proposal provided that, at the time it received the commission's authority to hold the gold at the disposal of the Bank of France, it also received instructions from the commission to ship the gold from London. On receiving the bars, the bank had them segregated to the account of the commission by placing them in two trucks, away from its other gold. A warning notice was placed on each truck indicating that the bars were not to be dealt with in any way without reference to higher authority. A similar warning notice should have been attached to the cards relating to the bars which constituted the

records of the bank's bullion office, but this was not done. On Oct. 25, 1948, the bank wrote to the commission informing it of the fine gold content of the bars, "which amount has accordingly been set aside today for account of H.M. Treasury o/a the governments of the United States, the United Kingdom and France," and adding, "in view of the circumstances outlined in your letter . . . these bars have been temporarily segregated pending the receipt of instructions as to their disposal." As a result of the failure to place the warning notice on the bullion office cards relating to the bars, thirteen bars were removed from one of the trucks without the authority of any responsible official of the bank and were inadvertently sold between Dec. 30, 1948, and Jan. 26, 1949. In an action by the company against the bank claiming (inter alia) delivery of the bars, and, alternatively, damages for their conversion, the governments of the United States of America and France obtained leave of the court to be added as defendants. They contended, inter alia, (a) that the bars were held by the bank under a bailment from them and from the government of the United Kingdom, and were, accordingly, in the possession or under the control of the three governments, (b) that the disposal of thirteen of the bars by an employee of the bank in breach of the bank's duty to the three governments did not affect the three governments' control of the remaining bars, and, therefore, fifty-one bars were still in their possession or under their control, and (c) that, as they were foreign sovereign States who declined to submit to the jurisdiction of the court, all further proceedings in the action should be stayed, or, alternatively, all further proceedings relating to the fifty-one bars should be stayed.

HELD: (i) the relationship between the bank and the three governments created by the correspondence and the delivery of the sixty-four gold bars was that of bailee and bailors, the bailment being for safe custody and immediately determinable at the will of the bailors; the failure of the bank to take all possible or reasonable precautions to ensure that the arrangement which had been made for the segregation of the bars was carried out was not effective to destroy the conditions on which the bank held the bars; and, therefore, the relationship of bailee and bailors still existed in regard to the fifty-one bars remaining with the bank, notwithstanding the fact that, by some error of internal management on the part of the bank, thirteen of the bars had been sold.

(ii) the doctrine of the immunity of a foreign sovereign from process in a municipal court in respect of property which was in his possession or under his control was not confined to cases in which the foreign sovereign was either directly in possession of the property himself or indirectly in possession by his servants, but applied also where bailment of the property was made by or on behalf of the foreign sovereign and action was brought against the bailee, and, therefore, the court had no jurisdiction to order the bank to deliver to the company the fifty-one gold bars which were still subject to the contract of bailment.

Per VISCOUNT JOWITT and LORD TUCKER: "possession", within the meaning of the doctrine of immunity as explained by LORD ATKIN in *The Arantzazu Mendi* ([1939] 1 All E.R. 722), included a right to immediate possession.

(iii) if damages were awarded against the bank for conversion of the bars, the bank would, on payment, acquire the company's title to the gold and could set up that title against its bailors, the three governments; such a course would interfere with the right of the governments, vis-à-vis the bank, to immediate possession of the bars, and, if they wanted to recover them, they would be obliged to submit to the jurisdiction of the courts as plaintiffs in an action; and, therefore, damages could not be awarded against the bank in regard to the fifty-one bars still subject to

the contract of bailment and all further proceedings in regard to those bars should be stayed; but, as the bank had itself put an end to the bailment in regard to the thirteen bars which it had sold, the action against the bank for damages for conversion of the thirteen bars should be allowed to proceed.

Decision of the COURT OF APPEAL ([1950] 1 All E.R. 747) reversed in regard to the fifty-one gold bars still with the bank and affirmed in regard to the thirteen bars sold.

AS TO IMMUNITY OF FOREIGN GOVERNMENTS, see HALSBURY, Hailsham Edn., Vol. 1, p. 27, para. 30; and FOR CASES, see DIGEST, Vol. 1, pp. 48-50, Nos. 384-400.

Cases referred to:

- (1) *Compania Naviera Vascongado v. Cristina S.S.*, [1938] 1 All E.R. 719; [1938] A.C. 485; 107 L.J.P. 1; 159 L.T. 394; Digest Supp.
- (2) *The Parlement Belge*, (1880), 5 P.D. 197; 42 L.T. 273; 11 Digest 537, 394.
- (3) *The Arantzazu Mendi*, [1939] 1 All E.R. 719; [1939] A.C. 256; 160 L.T. 513; *sub nom. Spain Republic Government v. Arantzazu Mendi*, 108 L.J.P. 55; Digest Supp.
- (4) *Ancona v. Rogers*, (1876), 1 Ex.D. 285; 46 L.J.Q.B. 121; 35 L.T. 115; 37 Digest 158, 34.
- (5) *The Jupiter*, [1924] P. 236; 93 L.J.P. 156; 132 L.T. 624; Digest Supp.
- (6) *The Gagara*, [1919] P. 95; 88 L.J.P. 101; 122 L.T. 498; Digest Supp.
- (7) *The Broadmayne*, [1916] P. 64; 85 L.J.P. 153; 114 L.T. 891; 1 Digest 109, 131.
- (8) *Lariviere v. Morgan*, (1872), 7 Ch. App. 550; *affd.* H.L. *sub nom. Morgan v. Lariviere*, (1875), L.R. 7 H.L. 423; 44 L.J.Ch. 457; 32 L.T. 41; 1 Digest 48, 390.
- (9) *Brunswick (Duke) v. Hanover (King)*, (1848), 2 H.L. Cas. 1 (9 E.R. 993); 6 Beav. 1 (49 E.R. 724); 1 Digest 50, 403.

INTERLOCUTORY APPEAL from an order of the Court of Appeal (SIR RAYMOND EVERSHERD, M.R., SOMERVELL and COHEN, L.J.J.), dated Jan. 11, 1951, affirming an order of ROMER, J., dated Nov. 3, 1950, whereby he refused an application by the defendants, the United States of America and the Republic of France, for an order to set aside the writ and all subsequent proceedings in an action by the plaintiff, a French company, relating to sixty-four bars of gold, or, alternatively, all such further proceedings as related to fifty-one of the bars which were still held by the defendant, the Bank of England.

The French company was the owner of the sixty-four gold bars which were seized and removed to Germany by the Germans during their occupation of France. In 1948, with the object of carrying out the provisions of an agreement by the Allied governments dated Jan. 14, 1946, the bars were deposited by the governments of the United States, the United Kingdom, and France in a gold set-aside account which had been opened on their behalf at the Bank of England at the request of the Treasury. On Oct. 18, 1948, the company commenced an action against the bank claiming (a) delivery of the gold bars, or, alternatively, damages for their conversion; (b) an injunction to restrain the bank from dealing or parting with possession of the bars; and (c) damages for their detention. On Mar. 10, 1949, by motion in the action, the bank moved before JENKINS, J., to have the writ and all subsequent proceedings in the action set aside on the grounds that the sixty-four bars were in the possession or under the control of the governments of the United Kingdom, the United States of America, and France and that the action impleaded two foreign sovereign States, viz., the governments of the United States of America and France, who declined to submit to the jurisdiction of the court. By an order, dated Apr. 6, 1949, and reported [1949] 1 All E.R. 946, JENKINS, J., granted the bank's application.

The company appealed, and, at the conclusion of the argument before the Court of Appeal, the court were informed that further investigations had shown that the bank had inadvertently sold thirteen of the sixty-four bars which were the subject-matter of the action. Evidence was given that since 1940 it had been the practice of the bank not to segregate bars deposited with it to the particular contract of deposit, but to credit the customer with the quantity of ounces of fine gold discovered on assay. It had, however, intended to depart from its regular practice in the case of these particular bars as the result of a request made by the representatives of the three governments when depositing them. The bars had been segregated by being placed in two trucks separate from the bank's other gold and a warning notice was placed on them indicating that they were not to be dealt with without reference to higher authority. To make the segregation effective a warning notice should also have been attached to the cards which constituted the records of the bars in the bank's bullion office, but this was not done. By an order dated Mar. 6, 1950, and reported [1950] 1 All E.R. 747, the Court of Appeal (SIR RAYMOND EVERSHED, M.R., SOMERVELL and COHEN, L.JJ.), allowed the appeal on the further evidence which was now before them, on the ground that, as the bank had failed to take one of the steps necessary to create an exception to its general rule of not segregating bars to the particular contract of deposit, the sixty-four gold bars were not at any relevant date in the possession or under the control of the three governments. But for the new evidence which was before them, SOMERVELL, L.J., and COHEN, L.J., would have affirmed the decision of JENKINS, J. SIR RAYMOND EVERSHED, M.R., held that, assuming that the bars had remained segregated, they were nevertheless not in the control of the three governments.

The United States of America and the Republic of France then presented a petition to the House of Lords for leave to appeal against the order of the Court of Appeal notwithstanding that they were not parties to the action, and, alternatively, for an order adding them as defendants to the action with leave to appeal against the order. The petition was heard by the Appeal Committee on May 8, 1950, when the petition was ordered to stand over generally with liberty to any party to apply to restore it, but on the footing that, if the United States of America and France should within fourteen days apply to the court to be joined as defendants to the action, the petition should not be restored until such action had been finally disposed of.

By an order of WYNN-PARRY, J., dated July 20, 1950, and reported [1950] 2 All E.R. 605, the United States of America and the Republic of France were added as defendants in the action. On Oct. 17, 1950, the writ of summons in the action was amended accordingly, and on Oct. 27, 1950, the two governments entered conditional appearances to the writ. They then applied, by motion in the action, for a stay of all further proceedings in the action, or, alternatively, of all such proceedings as related to the fifty-one bars still with the bank. On Nov. 3, 1950, the motion was dismissed by ROMER, J., without hearing argument, on the authority of the judgment of the Court of Appeal dated Mar. 6, 1950.

On an appeal by the two governments from his decision, the Court of Appeal considered certain additional evidence, contained in affidavits filed by officials of the bank on June 19, 1950, and July 24, 1950. The affidavit of June 19, 1950, sworn by the deputy chief cashier of the bank, exhibited instructions, dated Sept. 14, 1948, to the bank's bullion office that the sixty-four bars should be "temporarily segregated . . . pending the receipt of instructions from the Tripartite Commission", and contained (inter alia) a statement that the thirteen gold bars were removed in error and "without the authority of any official of the bank competent to revoke or override the instructions" of Sept. 14, 1948. The Court of Appeal held that the additional evidence did not affect the *ratio decidendi* of their decision of Mar. 6, 1950, and dismissed the appeal. Leave was given to appeal to the House of Lords. In the circumstances of the case,

the bank considered, and the three governments agreed, that it would be more appropriate for the appeal to be brought by the two foreign governments and for the bank to be a respondent to it. The bank did not, however, oppose the appeal.

Sir Hartley Shawcross, Q.C., and *Denys B. Buckley* for the appellants, the United States of America and the Republic of France.

Sir Andrew Clark, Q.C., and *R. O. Wilberforce* for the first respondent, the French company.

Cross, Q.C., and *J. R. C. Lee* for the second respondent, the Bank of England.

The House took time for consideration.

Feb. 25. The following opinions were read.

VISCOUNT JOWITT: My Lords, *Dollfus Mieg et Compagnie S.A.*, the respondent to this appeal, is a French company which before the outbreak of war in 1939 had acquired as its property sixty-four bars of gold. These bars of gold were stored in a bank at Limoges in a special vault which the company had hired. When the German armies overran Limoges they captured the sixty-four bars in question and carried them off to Germany, and, when the American armies occupied that part of Germany at which the bars had been stored by the Germans, they were taken possession of by the Americans and brought to Frankfurt where they remained for some time in American custody. Negotiations followed between the various allied governments as to the course to be followed with gold captured by the allied armies in Germany and finally a treaty was signed between eighteen allied governments. Nothing, I think, turns for present purposes on the precise terms of that treaty. It is sufficient to say that the sixty-four gold bars in question, together with other gold bars, passed into the possession of the American, British and French governments. These governments established a Tripartite Commission for the Restitution of Monetary Gold to deal with gold taken from Germany on their behalf. In March, 1948, a gold set-aside account was opened at the Bank of England in accordance with the terms of a letter from His Majesty's Treasury dated Mar. 9, 1948, and the bank's reply dated Mar. 11, 1948. The trial judge set out the terms of these letters in his judgment and came to the conclusion that the effect of such letters was to create a contract between the Bank of England and the American, British and French governments. He regarded the Treasury as a mere intermediary acting on behalf of the governments who were to operate the account ([1949] 1 All E.R. 959). I think he was amply justified in reaching this conclusion.

The terms of the contract must be construed in the light of the course of business which was well-known to all the contracting parties. Ever since 1940 the Bank of England, in operating a gold set-aside account, had not kept separate the gold belonging to one customer from the gold belonging to another customer, though the customers' gold, considered globally, was kept separate from gold belonging to the bank itself. Under the gold set-aside account, as managed in 1948, the bank, on receiving gold in whatever form from a customer, would weigh the gold and assay it and, if necessary, bring it up to the standard of fineness for good delivery in the London Bullion Market. Until the completion of weighing and assay the particular gold would be kept separate in the name of the depositor, but once these operations were completed there would be recorded in the books of the bank the number of ounces of fine gold comprised in the deposit, and the depositor would be entitled to receive from the bank the number of ounces of fine gold so ascertained, less charges. The customer would, however, no longer be entitled to receive any particular bars of gold in satisfaction of his contract. The contract, in short, once weighing and assaying had been completed, created a relationship between the depositor and the bank closely resembling that of debtor and creditor, except that the

bank's obligation was to be discharged by the handing over of the requisite number of ounces of fine gold.

During the hearing in your Lordships' House we had produced for our inspection the bank's account. This is headed "Bar Gold set aside o/a His Majesty's Treasury o/a the governments of the United States, the United Kingdom and France". The account opens under date May 20/April 19, 1948, with an item "imported from B.N. Suisse Berne" and this is entered as "578700 oz. fine". The sixty-four bars, the subject-matter of these proceedings, were dealt with on a different basis. By a letter of July 10, 1948, a Monsieur Rueff, who was acting on behalf of the French delegation of the Inter-Allied Reparations Agency, wrote to the Secretary-General of the Tripartite Commission asking that the sixty-four bars should be preserved in their present form, and, as a result of this request, the Secretary-General of the Tripartite Commission, in a letter dated July 16, and addressed to the Bank of England, asked if the bank would be able and willing to have "these bars set aside intact on arrival . . . pending receipt of a further communication from the commission . . ." By a letter of July 19, 1948, the Bank of England answered as follows:

"The proposal which you make is acceptable to the Bank of England provided that at the time we receive the authority of the commission to hold the gold at the disposal of the Bank of France we also receive instructions from them to ship the gold from London."

Shortly after these letters the bank received the sixty-four bars and, as requested, set them aside. The weighing and assaying of the sixty-four bars were not completed until shortly before Oct. 25, 1948, and their gold content was on that day entered in the gold set-aside account as 25,679.605 fine ounces. This entry was, however, plainly not intended to terminate the bank's obligation to hold the specific sixty-four bars, for the letter of Oct. 25, 1948, from the bank to the Tripartite Commission recording the above facts concludes with this sentence:

"I would mention that in view of the circumstances outlined in your letter under-reference, these bars have been temporarily segregated pending the receipt of instructions as to their disposal."

In these circumstances I think that the correct view is that the letters of July coupled with the sending of the sixty-four bars to the bank constituted a bailment of the sixty-four bars "pending receipt of a further communication from the commission", and that the contract of bailment continued, notwithstanding the entry of Oct. 25. If there had been no special arrangement constituted by the July letters, I should have been of opinion that the bailment of the individual bars had been terminated when the account was credited with the fine gold content.

The writ in the action, in which the French company was the plaintiff and the Bank of England was the defendant, was issued on Oct. 18, 1948, and claimed delivery of the sixty-four bars and an injunction restraining the bank from parting with the bars. On the same day the company gave notice of motion for an interim injunction restraining the defendant bank from selling or parting with the possession of the sixty-four bars until the trial of action. On Nov. 2, 1948, the bank served notice of motion asking the court to set aside the writ on the ground that the sixty-four bars were in the possession or control of the governments of the United States of America, the Republic of France and the United Kingdom and on the further ground that the two foreign governments who declined to submit to the jurisdiction were directly or indirectly impleaded. On Mar. 8, 1949, the writ was amended by the insertion of a claim for damages for detention and conversion of the sixty-four bars. The company, by an affidavit sworn on its behalf by Frédéric Engel on Oct. 16, 1948, asserted that the sixty-four gold bars in question had been

purchased by it and remained its property at all material times, and an affidavit sworn by Mr. Rootham, an assistant chief cashier in the employment of the Bank of England, set out the terms of the letters of Mar. 9 and 11, 1948, and was relied on by the bank in support of its application to stay all further proceedings. It is the fact that this latter affidavit made no reference to the July correspondence. Further affidavits were put in establishing the fact that the governments of the United States of America and of the Republic of France were not willing to submit to the jurisdiction. Mr. Engel made a further affidavit, dated Dec. 17, 1948, referring to and exhibiting the letter from Mr. Rueff of July 10, 1948, and this produced a further affidavit by Mr. Rootham exhibiting the two letters of July 16 and 19, 1948, respectively.

I have briefly referred to all the evidence that was available to JENKINS, J., when the case was heard before him in March, 1949. Unfortunately, the fact that by some mistake thirteen of the sixty-four bars had been delivered to purchasers outside the bank between Dec. 30, 1948, and Jan. 26, 1949, had not then been discovered, so that the case before the trial judge proceeded on the basis, which everyone believed to be the fact, that the sixty-four bars were still intact in the bank's possession. If discovery had been ordered, it is possible that this fact would have been brought to light, but, whether this would have been so or not, it seems to me desirable that in a case of this sort an order should be made for full disclosure of documents before the hearing. In the present case, as is apparent from the judgment of SIR RAYMOND EVERSHED, M.R., documents were produced before the Court of Appeal which had not been produced before the trial judge, and in your Lordships' House still further documents were produced which had not been available to either of the courts below. This would have been avoided if full discovery had been given.

JENKINS, J., delivered his reserved judgment on Apr. 6, 1949, setting aside the writ. He regarded the three governments as being in possession or control of the sixty-four bars of gold, which were held for their public purposes, and regarded the action against the Bank of England as being an attempt to sue indirectly the three governments, two of whom he treated as foreign sovereign States. He decided that, so long as property is in the possession or control of a foreign sovereign State, no court in this country can entertain proceedings which, if successful, would result in any interference with the foreign sovereign State's exercise of such possession or control whether directly (as by removing the property from the custody of an agent to whom the foreign sovereign State has entrusted it) or indirectly (as by casting in damages for wrongful possession an agent through whom the foreign sovereign State is exercising its possession or control). The company appealed to the Court of Appeal and before the conclusion of the hearing in that court the fact that by some error thirteen of the sixty-four bars had been delivered on the market was revealed. I have not overlooked the fact that the disposal of the thirteen bars did not take place until after the issue of the writ. This difficulty could have been surmounted by the issue of a further writ after Jan. 26, 1949, and all the parties have asked us to treat the case as though the writ had been issued on the later date.

My Lords, it is, I think, clear that, so treating the date of the writ, the action in regard to these thirteen bars must be allowed to proceed, for in regard to them it may well be argued that no question any longer arises of interfering with the possession or control of a foreign sovereign State. I do not think it would be proper for us to come to any final conclusion as to this matter. It is not for us to try the case. We have merely to decide at this stage whether the action should or should not be allowed to go for trial, and, in so far as the thirteen bars are concerned, I certainly think that the action should be allowed to go on. All the members of the Court of Appeal thought, however, that the disposal of the thirteen bars made it inevitable that the action should be allowed

to proceed as to the entire sixty-four bars. SIR RAYMOND EVERSHED, M.R., thought ([1950] 1 All E.R. 751) that the disposal of the thirteen bars had "destroyed at a single blow the whole premise on which the judgment below proceeded". SOMERVELL, L.J., would have agreed with the judgment of JENKINS, J., but for the disposal of the thirteen bars. He states his view as follows (*ibid.*, 763):

"The sixty-four bars for all relevant purposes at all material dates were in the pool. Thirteen of them were disposed of and the whole sixty-four might have been disposed of without instructions from or reference to the Tripartite Commission. In these circumstances it seems to me impossible to hold that the sixty-four bars were in the possession or under the control of the three governments."

COHEN, L.J., agreed with SOMERVELL, L.J.

My Lords, I cannot agree with this reasoning. If the bars were in the possession or control of the governments, I cannot think that the fact that by some error of internal management thirteen bars were disposed of alters the position except as to those thirteen bars. For the question of possession or control must depend on the terms of the contract under which the bars in question came to the bank. If possession or control was retained by the governments, that position is not altered by the fact that through an error thirteen bars were disposed of in breach of the contract. Unless the disposal of the thirteen bars throws some light on the terms of the contract, it seems to me to be irrelevant in regard to the remaining fifty-one bars. I have already stated my view that in regard to the sixty-four bars there was a contract of bailment and an obligation was thereby imposed on the bank to keep these bars separate and intact and not to allow them to become merged in the general pool of customer's gold pending the receipt of further instructions. The Master of the Rolls, differing in this respect from the other judges in the Court of Appeal, thought that JENKINS, J., had come to an erroneous conclusion on the facts as presented to him. He thought that from and after the time at which the sixty-four bars were delivered to the bank the governments no longer had such a degree of possession or control as would justify them in asking to have the action stayed. After the decision of the Court of Appeal had been given, and in view of the then contemplated appeal to your Lordships' House, the two foreign governments applied to be added as defendants to the action. An order was made that they should be so added with the result that we have had the advantage of hearing counsel on their behalf as well as counsel for the Bank of England in support of the appeal.

My Lords, I think that the question for our decision is whether the foreign governments, notwithstanding the delivery of the sixty-four bars to the Bank of England, still retained such an interest in the bars as to entitle them to have the action stayed. The decided cases which illustrate the way in which the principle of immunity has been applied by our courts are largely concerned with ships and actions in rem. In *Compania Naviera Vascongado v. Cristina S.S.* (1) LORD WRIGHT refers with approval ([1938] 1 All E.R. 734) to the observation of Sir H. S. Giffard, S.-G., in his argument in *The Parlement Belge* (2) (5 P.D. 202):

"The privilege depends on the immunity of the sovereign, not on anything peculiar to a ship of war, though it seldom arises as to anything else, because hardly anything belonging to a sovereign in his public capacity, except a ship of war, ever goes wandering into the jurisdiction of foreign courts."

Delivering the judgment of the court in *The Parlement Belge* (2), BRETT, L.J., deduces the following principle (*ibid.*, 214) from the decisions of the English and United States cases:

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

In that case the Belgian government was the owner of the ship. In the *Cristina* case (1) LORD WRIGHT said ([1938] 1 All E.R. 732):

"The rule is not limited to ownership, however. It applies to cases where what the government has is a lesser interest, which may be not merely not proprietary but also not even possessory."

LORD ATKIN stated the principle in the following terms (*ibid.*, 720):

"The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted on to our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle, as to whether it extends to property used only for the commercial purposes of the sovereign or to personal private property. In this country, it is, in my opinion, well-settled that it applies to both."

My Lords, I think it probable that LORD ATKIN inserted the words "or control" in his second proposition so as to make it wide enough to cover those cases which had been cited to him in argument in which the foreign government had requisitioned or directed a ship without depriving the owners of their possession. This is, I think, merely an illustration of one of those interests "lesser than a proprietary interest or even than a possessory interest" to which LORD WRIGHT referred. There is, I think, no special doctrine applying to ships which does not equally apply to gold bars.

We were pressed in argument with the difficulty which might arise if it were alleged that a foreign sovereign while in this country seized goods in this country without any legal justification and then made a bailment of such goods to a private person within the jurisdiction. We are not dealing with any such case at present and I should prefer not to make any pronouncement in regard to such a case. In the present case the foreign governments had, undoubtedly, been in possession of the gold bars before they were sent to this country. They decided in the public interest to send these gold bars to the Bank of England in London. In my view, the bank became bailee of these bars and was bound to keep them intact pending further instructions.

In the case now before us the action is an action in personam and not an action in rem. I do not think that the foreign governments can be said to be directly impleaded. Neither do I think that they are being indirectly impleaded, for the present action is an action in personam brought against the Bank of England. The word "control" in the second limb of LORD ATKIN's proposition is a word of vague import, and I think it fallacious to treat LORD ATKIN's words as though they were the words of a statute. I do not think

that the word "control" is apt in the present context. The bars of gold did not require any treatment or anything in the nature of management. All that was required was that they should be left intact and undisturbed in the vaults of the bank.

In these circumstances, I think we should consider whether the foreign governments had such a possessory right in relation to the gold bars as to entitle them to ask that this action should be stayed. Under English law, where there is a simple contract of bailment, the possession of the goods bailed passes to the bailee. The bailor has in such a case the right to immediate possession and by reason of this right can exercise those possessory remedies which are available to the possessor. The person having the right to immediate possession is, however, frequently referred to in English law as being the "possessor"—in truth, the English law has never worked out a completely logical and exhaustive definition of "possession". We are bound to decide this case in accordance with the English law and we have no evidence of any other system of law. Yet it is germane to remember that the English law has incorporated the doctrine of State immunity from international law. It would be an unsatisfactory position if the extent and ambit of this doctrine were to depend on the special and peculiar doctrine of each jurisdiction in relation to "possession" with the result that differing results might be arrived at according to whether the case was governed by English law or, for example, by Scottish law. The basis of the rule was explained by LORD ATKIN ([1939] 1 All E.R. 722) in *The Arantzazu Mendi* (3), as being intended either to secure reciprocal rights of immunity, or to avoid the risk of injured pride if jurisdiction was sought to be exercised, or to avoid the risk of belligerent action if government property is seized or injured, and the distinction between "possession" and the immediate right to possession would have no bearing on these considerations. I agree with JENKINS, J., in thinking that the fact that the foreign governments had the immediate right to possession of the sixty-four bars made it possible consistently with the established principle of English law relating to State immunity for relief to be given in this action by ordering the delivery up of the bars or by granting an injunction restraining the bank from parting with their possession, for, if either of these courses were taken, it would be necessary for the foreign governments to take proceedings in this country if they wanted to recover the gold here. The doctrine of immunity should not, I think, be confined to those cases in which the foreign sovereign was either directly in possession of property by himself or at least indirectly by his servants, but, if it were so confined, the doctrine would not be applicable to the case of simple bailment. I can find nothing in any decided case to support any such limitation. We have been referred to certain American cases which I have considered with care, but I do not think that any of these cases affords any justification for such a limitation of the doctrine of sovereign immunity as is here sought to be introduced. JENKINS, J., in the course of his judgment, which I would desire to express my indebtedness, expresses the matter as follows ([1949] 1 All E.R. 960):

"A foreign sovereign State (unless embodied in a personal sovereign visiting this country) cannot, so far as I can see, be in actual physical possession of property here otherwise than by its servants. Accordingly, if actual physical possession by a foreign sovereign State were essential to immunity on the score of possession by such State, immunity on that ground could only be claimed in respect of property in this country in the actual physical possession either of some personal sovereign or of a person who could be shown to be in the strict sense a servant of a foreign sovereign State (so as to make his possession that of his master) or else to be himself entitled to diplomatic immunity. The application or exclusion of the principle of immunity would thus be made to depend on nice distinctions

respecting the particular mode in which a foreign sovereign State might happen to exercise dominion over property brought by it to this country in its possession or control. For instance, if gold was brought to this country by a foreign sovereign State to be applied in the purchase of goods for the public purposes of that State and placed in the hands of a servant of the State concerned to be applied in making such purchases in accordance with its directions, the gold would be protected by the principle of immunity on the score of possession by the foreign sovereign State, irrespective of any immunity from process the servant might be entitled to claim in his own person. If, on the other hand, gold brought to this country by a foreign sovereign State for similar purposes was deposited by it with a banker or other agent for safe custody and disposal in accordance with its directions, the gold would at once become exposed in the hands of the banker or other agent to any adverse claims there might be, and the principle of immunity would afford no protection from actions brought by third parties against the banker or other agent for the purpose of establishing such claims. I cannot think that it would be right to make the application or exclusion of the principle of immunity (based as it is on substantial reasons of policy) turn on nice distinctions of this kind."

Although I agree with the observations of LORD MAUGHAM in the *Cristina* case (1) that the doctrine of immunity should not be extended, yet I think that we should unduly limit the doctrine if we were to decline to apply it to any bailment which might be made by or on behalf of the foreign sovereign in which the action is brought against the bailee. If it were so limited, the result would be that, if the foreign sovereign deposited his bag or his jewellery with the railway or with the hotel or with the bank, proceedings could be taken against the bailee claiming the delivery of the article which had been deposited by or on behalf of that sovereign.

It remains to consider whether the fact that the writ, by reason of the amendment, claims damages for conversion should be allowed to make any difference. The only act of conversion in respect of the fifty-one gold bars which can be relied on is the fact that the Bank of England refused to deliver any of the gold bars which it was holding for the three governments to the company. If the bank were ordered to pay damages representing the value of the gold bars, then, on payment, it would acquire the title of the company to the gold and could set up that title against its bailors, the three governments. This would result in an interference with the rights of the three governments who would be obliged, if they wanted to recover the gold, to submit to the jurisdiction by starting proceedings as plaintiffs in our courts. Moreover, if the court cannot order the bank to deliver the gold bars to the company, it is difficult to see how the court can order the bank to pay damages for not so delivering the gold bars. On the whole, therefore, I come to the conclusion that the action should be allowed to continue as to the thirteen bars only. With regard to the question of costs, I think that all orders already made as to costs should be allowed to stand and that in relation to any steps in these proceedings in which orders as to costs have not already been made, including this appeal and the previous application by the governments to be joined as defendants, each party should pay their own costs.

LORD PORTER: My Lords, in this action the French company sued the Bank of England in detinue for the recovery of sixty-four bars of gold which were at one time the property of the company but were seized by the Germans in the course of the late war, taken by them to Germany and found and taken possession of by the Allies. The bars were then transferred to a Tripartite Commission set up by the French, American and English governments for the purpose of recouping the losses suffered by their countrymen as a result of the

predation of the Germans. For the purpose of the present appeal the appellants, the United States of America and the Republic of France, are prepared to accept the view that the property in the bars remains where it originally was, viz., with the company. Undoubtedly, the bars were at one time in the possession of the three governments and were entrusted by them to the Bank of England. The question for your Lordships is whether the company can sue the bank or whether that body can rely on the immunity accorded to a sovereign State on the ground that the bars are still in the possession or under the control of the governments which deposited them, and whether the result of allowing the case to proceed would be to implead such a State or States. The Crown of this country is not a party to the appeal inasmuch as, since the Crown Proceedings Act, 1947, the British government can claim no greater protection than that accorded to a private individual, but the United States of America and France are still protected by the doctrine of State immunity where that doctrine applies.

The facts have been set out by JENKINS, J. ([1949] 1 All E.R. 949), in the Court of first instance, by COHEN, L.J. ([1950] 1 All E.R. 763), in the Court of Appeal, and by VISCOUNT JOWITT in your Lordships' House. I need not repeat them. JENKINS, J., stayed the action, but when he gave his judgment he was unaware that after action brought the bank had delivered thirteen of the sixty-four bars to third parties. The majority of the Court of Appeal, as I understand them, would have reached the same conclusion as the learned Judge if they had had to depend on the same material, but thought that the disposal by the bank of the thirteen bars destroyed the argument for staying the proceedings in respect of the whole of the sixty-four, the view of SOMERVELL, J., being that the bank had ceased to keep them separate because, though it had stacked them in two special trucks and placed a notice that they were for disposal, it had failed to enter a warning note on the cards relating to the consignment in question, and that the entry of the note was a precaution which must be observed if the bars are to be regarded as separated from the rest. SIR RAYMOND EVERSHED, M.R., went further and thought that, even without the additional evidence, a case had been made for allowing the action to proceed against the bank. In his view it was not established that the bank was ever under a duty to keep the bars separate, and, even if it was, he agreed with the other members of the court in thinking that it had not done so. This portion of the case involves a question of fact or inference from fact, and, in my view, the inference drawn by the Court of Appeal is not justified. The correspondence and affidavit evidence show that, though since 1940 it has not been the practice of the bank, except as the consequence of a special arrangement, to keep a customer's gold separate from that of other customers, that in this special case it agreed to do so and took steps to carry out its agreement. I cannot read the letter dated Oct. 25, 1948, from the bank to the Tripartite Commission as bearing any other meaning. The suggestion that it means: "We have in fact, but without obligation, held the bars separate, but that separation ceased once we had assayed" is inconsistent with the final letter of Oct. 25 and, indeed, with the general import of the correspondence. The entry in the account crediting it with the value of the bars and the charges made for assaying do not conflict with this view. It is but an account-keeping device and it would be odd if the bank, knowing that an action had been brought against it and, indeed, as a result of that fact, were to change the whole relationship between itself and its customer. But it is said that the Treasury was the customer and the Tripartite Commission was merely empowered to draw on the account through certain specified persons nominated by the Treasury. I cannot take that view. The Treasury was, no doubt, the instrument by means of which the relationship between the bank and the Tripartite Commission was brought about. The commission, however, was the only body

entitled to deal with it and, in fact, through its secretary, gave instructions to the bank and was informed by the bank's officials of the action taken. It is true that instructions as to the operation of the account are, in the words of Sir Edward Rowe Dutton, in his letter of Mar. 9, 1948 [from His Majesty's Treasury to the Bank of England] entrusted to certain named representatives, but this arrangement is limited to instructions for the operation of the account and leaves the commission to make arrangements through its secretary as to the disposal of the bars. In fact, the commission gave such instructions and the bank accepted them.

Had, then, the sixty-four bars remained intact, I find myself in agreement with the original judgment of JENKINS, J. Does it, then, make a difference that in error thirteen bars were treated as if they were part of the pool from which gold could be drawn for customers generally, instead of being treated as confined in use to one particular customer? The reason for the decision of the majority in the Court of Appeal is, perhaps, most clearly exemplified in the words of SOMERVELL, L.J. He says ([1950] 1 All E.R. 763):

"The authorities of the bank responsible for the correspondence with the Tripartite Commission intended that these bars should be kept apart from the pool and held as individual bars for the three governments. Some steps were taken to this end, but, as the facts show, and as is admitted, one necessary step was not taken. The sixty-four bars for all relevant purposes at all material dates were in the pool."

My Lords, with all due respect, I am unable to concur with this view. In fact, the bars were kept separate in two trucks and a notice was placed on them to indicate that they were to be used only for a particular purpose. It is true that one precaution, viz., an entry on the cards, which would have been helpful in avoiding a misuse of the bars and might have prevented it, was not taken, but that neglect did not cancel the instructions of the Tripartite Commission or the bank's acceptance of them. So long as the bars remained in the possession of the bank, a failure to take all possible precautions, or, indeed, even a failure to take all reasonable precautions to prevent the bars being dealt with in the ordinary course, is not effective to destroy the conditions on which the bank was instructed to hold and agreed that the bars should be held. Misdelivery may in certain cases put an end to a claim to possession, though it will not in the normal case destroy a right of property. On the other hand, negligence in failing to take all possible steps to see that an arrangement which had been made is carried out does not alter the fact that all bars in the possession of the bank remained in its possession subject to the terms on which they were deposited. In such a case, however, misdelivery does, in my view, affect the position, since, as regards the thirteen bars, it can no longer be asserted that they are in the possession of the three governments through their bailees, the bank.

That the bank is a bailee, is, I think, not open to doubt, but that fact leaves undecided the difficult and interesting question: Can those who assert a possessory title to goods, but make no claim to the property in them, be said still to retain possession after they have entrusted those goods to a bailee to hold on their behalf? There is no direct English authority which decides the point, much less is there one binding on your Lordships. The nearest, I suppose, is *Ancona v. Rogers* (4), a decision on the words "apparent possession" contained in s. 7 of the Bills of Sale Act, 1854. In delivering the judgment of the court in that case, MELLISH, L.J., said (1 Ex.D. 292):

"... there is no doubt that a bailor, who has delivered goods to a bailee to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrongdoer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods, and that in the Bills of Sale Act,

the word 'possession' was used in a popular sense, and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the Pantechnicon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession."

It is urged, however, that these dicta are obiter and wrong, that, in any case, the judgment was not concerned with "possession" as opposed to property, and that the true view is that the rule applies only in a case where the bailor has the property and the bailee has the possession. In such a case it is maintained that the bailor can sue in right of his property but that an action in right of possession belongs to the bailee only. This contention may be true where the bailor has no right to demand an immediate return of the article at his will, but the better opinion is, I think, that, where the bailor can at any moment demand the return of the object bailed, he still has possession: see POLLOCK AND WRIGHT ON POSSESSION IN THE COMMON LAW (1888), p. 166, BEAL ON BAILMENTS (1900), p. 40, and HALSBURY'S LAWS OF ENGLAND (Hailsham ed.), vol. 1, p. 775, sub. tit. Bailment. In each of the authorities referred to, the right of the bailor is limited to a case of gratuitous bailment, a requisite which, in my opinion, is fulfilled in the present case. The bank held the bars, without any right of lien, at the will of the commission.

The commission being, in my opinion, as I have indicated, still in possession of the fifty-one of the bars, it has to be determined whether the commission or the bank is entitled to immunity from suit instituted by the company. Such an action, it is argued on behalf of the latter, can be brought and determined without in any way impleading the two governments or affecting their rights. It is accepted by both parties that the principles to be considered are those laid down by LORD ATKIN in the *Cristina* case (1). He says ([1938] 1 All E.R. 100), in regard to those principles:

"The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control."

As, in the view which I have expressed, the three governments are in possession of the fifty-one bars, it is not necessary to inquire what is the exact meaning contributed to the word "control". It is enough that they are in possession and an attempt is being made to interfere with that possession. It is said, however, that the decision in the *Cristina* case (1) is not of universal application but applies only to an action in rem and that, in other cases, retention in the hands of the possessor himself is required to bring its principles into force. It is true that the matter then under consideration was a ship and that a decision in respect of a ship is an action in rem and would, therefore, bind all the world and not the parties only, but the observations of those members of your Lordships' House who sat to decide the case were by no means confined to actions in rem. They extended to the case of all chattels: see, in particular, the observations of LORD MAUGHAM and LORD WRIGHT. The principle, in my opinion, is a wider one and embraces any chattel, whether the subject of an action in rem or not. No doubt, the doctrine should, as LORD MAUGHAM suggested in the *Cristina* case (1), be narrowly watched, but it has always to be remembered that governments must act through servants or agents and often through bailees, and it would destroy the efficacy of the doctrine if it were strictly confined to personal possession. I do not find any light or enlightenment in the American cases on the subject under discussion.

They all, I think, turn on the question who was in possession at a particular time and depend on their own facts.

So far, I have dealt with the claim of the company to recover the gold bars themselves and with its claim to an injunction. Counsel on behalf of the company, however, expressed himself as willing to give up that claim and rest on his right to recover damages for conversion. Such a claim, he maintained, neither impleaded the sovereigns nor involved a seizure of their property. It was merely a claim for damages against the bank. But, if the bank were ordered to pay damages to the company, it would in law be entitled to the company's right of property on paying the damages awarded and it would follow that, if the Tripartite Commission required the bank to return the bars, the bank could refuse to do so, relying on the title acquired by the payment of the damages, and thereby compel the governments either to bring an action or forego their rights. The object of the doctrine of immunity, it has been said, is that a sovereign may not be compelled either to submit to a foreign jurisdiction or be compelled to go to law to obtain or preserve his right. Such an object might be defeated if this action were permitted to proceed, since the bank is in possession of the bars and could refuse to surrender them and so compel the governments, if so minded, to take action in an endeavour to recover them.

One other point of substance has been mentioned. It was suggested that immunity would only be granted where the country claiming it granted reciprocal immunity to other nations. I can find no authority for this proposition and, in any case, it was not taken either before JENKINS, J., or in the Court of Appeal, and no material fact has, therefore, been presented to your Lordships to enable them to deal with the argument or to ascertain whether the two governments concerned grant reciprocal immunity or not. In my view, the argument is not established. The question is: What is the law of nations by which civilized nations in general are bound, not how two individual nations may treat one another: see per LORD MAUGHAM ([1938] 1 All E.R. 739) in the *Cristina* case (1).

I would only add that, in my opinion, it might have been possible for the Court of Appeal to refuse to stay the action and allow it to proceed against the bank, and in the course of that proceeding to ascertain the true relationship between the bank and the Tripartite Commission. If, as a result of those proceedings, it should have been held that the commission was in possession or control of the gold bars, the claim to immunity would have succeeded and the action against the bank would have failed. But, in fact, a different course was taken. The two governments, whose interest, it was contended, took away the jurisdiction of the court to hear the case, applied to your Lordships' House either to be permitted to attend and argue the case before your Lordships or to be added as parties. On this application they were given leave to be added in order that they might enter a conditional appearance and claim immunity from the jurisdiction of the courts of this country to deal with the matter. The two governments concerned then applied to WYNN-PARRY, J., to be added. They were given leave and were so added. Thereupon they filed further evidence and again applied that the action might be stayed. Both the learned judge and the Court of Appeal refused to stay, and from that refusal the two governments appeal to your Lordships' House. Had the action continued to be carried on against the bank only, it might have been possible to ascertain all the facts more fully and accurately, and, if it was found, after further steps had been taken, that the bank had rightfully claimed immunity on the ground that the foreign governments would be implicated or their rights invaded, the action could then have been stayed. As it is, the two governments are parties, and it is, therefore, incumbent on your Lordships here and now to stay or refuse to stay the action. In these circumstances and on the material before your Lordships I would agree

with VISCOUNT JOWITT in staying the action as to the fifty-one bars but allowing to proceed in respect of the thirteen.

LORD OAKSEY: My Lords, I agree.

LORD RADCLIFFE: My Lords, I do not think that the difficulty of this case lies in deciding what relation the Bank of England bore to the Tripartite Commission in respect of the sixty-four gold bars that were delivered to the bank. No doubt, it was difficult to establish the facts on which this relation depended, primarily because the bank itself seems to have known less than it might have about the real nature of its own proceedings. It was this uncertainty that led the Court of Appeal to take what I regard as a mistaken view of the facts. But, when those facts are finally established and can be surveyed in their proper setting, it seems to me reasonably clear that both at the date of the issue of the writ and at the dates of the launching of the relevant motions in this action the bank was holding such of the bars as it then retained as a mere deposit on behalf of the commission. These bars were held for the time being in specie to the order of the commission, subject to the stipulation that instructions placing them at the disposal of the Bank of France were not to be given unless accompanied by instructions from that bank to ship at once from London. This deposit amounted to no more than a bailment at will. I think that this view of the facts is the one which in substance commends itself to all your Lordships, and I do not think it necessary to say anything more about it. It follows that I do not attach to the disposal of the thirteen bars of the original consignment which disappeared from the vault the same significance as was attached to it by all the members of the Court of Appeal. That incident can mean only one of two things. Either the fact that it happened at all is itself such cogent evidence that the bars were not held in specie that it might to outweigh all other evidence that they were, or the removal of the bars was merely something which ought not to have been done and the doing of which was contrary to the arrangement which the bank had come to. If the latter was all that the incident amounted to, it is of no importance for our purpose. In my opinion, the latter was all that the incident did amount to. The important and difficult question is whether, on that basis of fact, anything ought to be done to arrest the company's action. For the time being I will confine myself to the action so far as it relates to the fifty-one gold bars which are now all that the bank retains. Does that action offend against the rule of immunity of independent sovereigns which forms part of our municipal law? I treat the commission as no more than three sovereigns joined in a particular relation. It is, of course, beyond question that there is some such rule and that it has been expounded or applied in a number of decisions in our courts. But I do not feel confident that it can be, or that it ought to be, expressed in any very precise language, and I do not at all share the view, which rather dominated the argument of this appeal, that a definition of the rule has now become, as it were, graven on tables of stone and that those tables consist of the speech of LORD ATKIN in *Compania Naviera Vascongado v. Cristina S.S.* (1). For myself, I think that the range and purpose of our rule is expressed as well as may be in DICEY'S *CONFLICT OF LAWS*, 3rd ed., p. 215:

"The court has . . . no jurisdiction to entertain an action or other proceeding against (1) any foreign sovereign . . . An action or proceeding against the property of [a foreign sovereign] is . . . an action or proceeding against such person."

This is the rule which SCRUTTON, L.J., quoted with approval ([1924] P. 243) in *The Jupiter* (5). The rule, so expressed, leaves open the question what is an action "against the property of a foreign sovereign" in any particular case. But I am afraid that the abundant argument that we had in this case as to the application of the words "of which he is in possession or control",

as used by LORD ATKIN ([1938] 1 All E.R. 721), in the *Cristina* case (1), shows that even his summary leaves open as many questions as it settles. In fact, this is not a field in which the law can be set at rest by any neat combination of words. But the rule as expressed in DICEY'S CONFLICT OF LAWS has this advantage. It does make clear that the property of a sovereign enjoys no immunity in legal proceedings except so far as those proceedings amount in one way or another to a suit against the sovereign. If the sovereign is actually named as a party to a suit, the proceedings identify themselves. Even then, I think that it is going too far to say that such a suit must necessarily be arrested. It may depend on the purpose for which the sovereign is made a party. But certainly a special difficulty begins when he is not actually named, but the suit is one which may result in a judgment or order that will affect his interest in some piece of property. Even to say that much begs one important question, for it assumes that he has a valid interest in that property, whereas a stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and, indeed, to require him to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do. *The Parlement Belge* (2) is a leading case on this branch of the law, but it does not offer much help on the particular aspect of it with which your Lordships are now concerned because it was common ground throughout the case that the ship was the public property of the kingdom of Belgium. What the plaintiffs objected to in that case was the staying of an action in rem about the ship, having regard to the uses to which she was put by her sovereign owner. Once it was settled that those uses did not disqualify the owner from taking advantage of the general rule, it was easy to show that the court's order for the arrest of the ship, if made, would be in substance an order against the sovereign.

But the principle recognised in *The Parlement Belge* (2) has been carried much further since then. It has been applied even when the sovereign had not claimed, let alone proved, that he was the owner of the property which was the subject of the action. It has been regarded as sufficient to stay the proceedings (i) that he had de facto possession of the property (*The Gagara* (6), *The Jupiter* (5), the *Cristina* case (1)), or such rights of direction and control, without possession, as arise from requisitioning (*The Broadmayne* (7)), and (ii) that the nature of the proceedings is such that, if successful, they would result in an order of the court affecting that possession or those other rights. The *Cristina* case (1) is, of course, a decision of this House. In it the other decisions that I have referred to, all unanimous decisions of Courts of Appeal, were reviewed and, as I think, approved. In my opinion, they constitute a principle wide enough in application to be conclusive of the present appeal.

The special feature that we have to deal with is that the company's action is not an action in rem. It does not come from the Court of Admiralty, but it is an action for trover or detinue, the basis of which is our common law of tort. Decisions of our courts as to how to apply the principle of immunity to such a case are curiously lacking. Apart from the Admiralty cases, of which I have noticed a few, the other line of authority is to be traced in decisions of the Court of Chancery. These decisions depend essentially on the existence of a trust fund or other item of trust property within the area of jurisdiction of the Chancery courts. Given the trust fund or property, there is a trust to be administered by the court, and it was evidently the belief of the judges who were responsible for the equity jurisdiction that they had a responsibility for administering, and in due course determining, the rights to such property, even though a foreign sovereign might be known to be a possible or certain claimant to an interest in it. I do not see any other explanation of the decision of LORD HATHERLEY, L.C., in *Lariviere v. Morgan* (8) that does not to some

extent threaten the principle that has been well established in the Admiralty cases, and it is, in effect, the explanation of it that was given by LORD CAIRNS, L.C. (L.R. 7 H.L. 430) when the same case (*Morgan v. Lariviere* (8)) was before your Lordships' House. Perhaps there is no real analogy between the actual possession or rights that existed in the Admiralty cases and the possible claim or interest envisaged by the Chancery cases. Perhaps it is enough to say that the Courts of Chancery treated trust property within their jurisdiction as a domestic responsibility to an extent that would not have commended itself to the Court of Admiralty when dealing with a ship which was found to be within the reach of its process. The Chancery decisions are well known and of long standing, and it is, I think, easier to treat them as a separate branch of our general law of sovereign immunity, or as an exception from the main principle, than to accept the cogency of the explanation of LORD LANGDALE, M.R. (6 Beav. 39) in *Duke of Brunswick v. King of Hanover* (9) that to make a foreign sovereign a party to administration proceedings does not "compel" him to take part in them, for it merely gives him "an opportunity to come in to . . . establish his interest." But I do not think that this line of authority is of any direct relevance in this appeal. Here there is no trust property and no trust. In my view, the Admiralty decisions and the principles to be extracted from them have much more bearing on the present case.

Now, what is the situation of fact here and what does this suit seek to get the court to do? We know that the bars of gold entered this country from the possession of the Tripartite Commission and that the bank hold them merely to the order and at the disposition of that commission. In those circumstances, I regard the gold as in the possession of the commission for the purpose of the rule that we are considering. The property of a sovereign State, which is an abstraction, must be in the physical possession of some actual person, and I do not see any distinction of substance in a matter of this kind between the possession of a servant of the State and the possession of its bailee when the bailment is of such a nature as that of the bank in this case. Indeed, I think that the commission's "possession and control" of the gold bars in the hands of the bank amounted to a form of property more substantial than that which His Majesty's government acquired by requisitioning the Broadmayne. Yet the Broadmayne was held to be exempt from arrest by virtue of His Majesty's immunity: see *The Broadmayne* (7).

The suit began as a claim in detinue. That means that the court was going to be asked, or, at any rate, could be asked, to make an order on the bank to hand over the bars to the company. Such an order would unquestionably interfere with the commission's possession of them and compel the commission, if it wished to recover possession, to come to court and try to get them back from the company. I cannot feel any doubt that such a suit offends against the principle of sovereign immunity. But then the company, through its counsel, has said that it is willing, if necessary, to drop its claim in detinue and proceed with its action on the basis that it is a claim for conversion only, with the result that the company will seek to obtain a judgment for damages against the bank and no more. The company says that no principle of immunity can be offended merely by mulcting the bailee in damages. How far this argument goes I am not clear. Every servant who insists on his master's title to property in his physical possession is liable to be sued for damages for conversion by the rightful owner, and there would be no such thing as the immunity of a foreign sovereign from suits "against his movable property" in this country except suits in rem against ships. I have found much more difficulty than the learned judges in the courts below in dealing with this point. They felt it to be an obvious proposition that, if the court could not make a direct order on the bank to hand over the bars (and I agree that it could not), it was impossible that it could have any jurisdiction to award damages for a failure

to do that very thing. I do not feel altogether satisfied that this is convincing logic, but, when I consider the real nature of a claim for damages for conversion, I come to the same conclusion. Subject to the payment of costs and special damages (if there are any), an action for damages for conversion can always be stayed if the defendant offers to hand over the property in dispute. In that sense a suit for damages for conversion is an attempt to use the court's process to interfere with the existing possession of the chattel, the title to which is in dispute. If the defendant continues to resist and damages are awarded against him, he may keep the chattel and pay the damages, but, if he does, he becomes entitled, if he is a bailee, to set up the plaintiff's title to the goods, which he has thus paid for, against his own bailor. In other words, the court's judgment in the personal action against him would materially affect the existing right of his bailor in respect of the possession and disposal of the chattel. The result of a judgment in damages has thus some analogy to a sale by the court of a chattel which is in the possession or under the requisition of a foreign sovereign. If the sale cannot be ordered in the one case because to order it would be to use the court's process against the sovereign, then the judgment cannot be rendered in the other. It is for that reason that I am of opinion that the action must be stayed so far as it seeks to impose liability on the bank in respect of the fifty-one gold bars which it still retains. This reasoning does not apply to the thirteen bars which have been disposed of. This is an accidental feature of the case which can only be attributed to the bank's own error. But your Lordships must, I think, take the facts as you find them, and, so far as they are known to us, no reason appears why an action against the bank for damages for conversion of these thirteen bars should be regarded as trenching on the sovereign immunity of the governments which the commission represents. I agree, therefore, that, as to these thirteen bars, the action ought to be allowed to proceed.

LORD TUCKER: My Lords, there can be no question but that a foreign sovereign who is cited to appear in the courts of this country either directly, as where he is made a party, or indirectly, as in the case of a writ in rem against a ship, where in the absence of appearance a judgment in rem good against all the world will result, must take the earliest opportunity to challenge the jurisdiction by entering a conditional appearance and moving to set aside the writ. Where, however, as in the present case, a properly constituted action disclosing a cause of action against a defendant within the jurisdiction is launched, the foreign sovereign cannot be prejudiced by the defendant entering an appearance and defending the action. As soon, however, as it is made to appear to the court that by such action it is being asked to exercise its territorial jurisdiction over property in the possession or under the control of a foreign sovereign, the court will decline jurisdiction and stay the proceedings. Before this stage is reached, it will often be necessary for discovery to be had, and the present case is, in my opinion, one in which discovery was much to be desired. I mention this as the procedure adopted in this case should not, in my opinion, be regarded as a precedent to be followed in future cases of a like nature. Your Lordships, however, having been supplied with a copy of the bank account and certain further correspondence, are now fully seized of all the materials necessary to a proper decision on the present appeal.

My Lords, I agree that the relationship between the Bank of England and the three governments created by the correspondence and the delivery of the sixty-four gold bars was that of bailee and bailors, the bailment being for safe custody and immediately determinable at the will of the bailors. I further agree that as regards the fifty-one bars remaining in the hands of the bank this relationship still exists unaffected by the disposal of the thirteen bars which were sold or by any errors by the bank's subordinate officials in the manner in which the remaining bars were dealt with. The case—so far as the fifty-one

bars are concerned—is accordingly restored to the position in which it was when it came before JENKINS, J., when it was assumed by both sides that the relationship was that of bailor and bailee. On this basis both SOMERVELL, L.J., and COHEN, L.J., would have reached the same conclusion as JENKINS, J.

There has, I think, been a tendency in argument on this appeal to approach LORD ATKIN's second proposition ([1938] 1 All E.R. 721) in the *Cristina* case (1), which was not necessary to the actual decision of that case, as if it was a statutory definition limiting the circumstances in which the courts of this country would refuse jurisdiction in cases where a foreign sovereign is not directly or indirectly impleaded. I think that LORD ATKIN's language must be considered and interpreted in the light of previous authorities and of the speeches of the other members of your Lordships' House in the *Cristina* case (1) and of LORD ATKIN himself ([1939] 1 All E.R. 722), in *The Arantzazu Mendi* (3). The principle being based on the avoidance of the exercise of a jurisdiction which would offend the dignity or impinge on the independence of a foreign sovereign, I cannot think it would be right to place on the word "possession" as used by LORD ATKIN ([1938] 1 All E.R. 721) any specially narrow or restricted meaning or to confine it to actual physical possession by the sovereign himself or his servants. The particular subject-matter involved in this case could hardly have been placed anywhere else than in a bank, save possibly in the vaults of an embassy. Such considerations as this, viewed in the light of the principle underlying the doctrine of immunity, lead me to the conclusion that in this context the word "possession" must include the right to immediate possession of chattels which have been in the actual physical possession of a foreign sovereign or his servants and are deposited for safe custody with a bailee in this country.

The part of the case which has given me most difficulty, but as to which none of the judges in the courts below appears to have felt any doubt, is that which relates to the precise form of relief for which the company is now asking, viz., damages only for detainue or conversion based on the failure to return the bars on demand. The company has now abandoned all claim to the return of the specific goods or for an injunction and is content to rely only on the claim for damages. It is said that this relief can be afforded to the company without in any way affecting the rights of the three governments to possession of the gold bars and that the doctrine of immunity was designed for the benefit of foreign sovereigns and not for the protection of persons resident within the jurisdiction who choose to enter into contractual relations with foreign governments. Sharing, as I do, the disinclination expressed by LORD MAUGHAM in the *Cristina* case (1) and by SIR RAYMOND EVERSHED, M.R., in the present case to extend the doctrine of immunity beyond the limits already recognised, this is an argument which has seemed to me to require anxious consideration. I have, however, been persuaded to the view that—attractive as this submission is—to accede to it would really be an infringement of the principle of immunity. A defendant who satisfies a judgment in damages representing the value of goods detained, or in damages for their conversion, acquires thereby such title to the goods as was vested in the plaintiff whose judgment has been satisfied. Such a judgment in the present case would, accordingly, require the bank to do that which would materially alter the rights of the three governments, vis-à-vis the bank, to the gold bars and enable the bank in its own right to do that which it otherwise could not have done, i.e., to contest its bailors' title. The fact that any such action by the bank in the present case might be highly improbable cannot affect the question of principle involved, and it seems to me that a judgment which would have this effect must be an infringement of the foreign sovereign's right to immediate possession of the bailed chattels and thus amount to a violation of the right to immunity.

As to the thirteen gold bars which the bank has sold, wholly different considerations apply. It is conceded that the doctrine of immunity would not extend to afford any protection to the purchasers of the bars. The bank by its own act has put an end to the bailment which alone afforded the protective umbrella of immunity. No case has, therefore, been made out for staying the company's action in so far as it is confined to a claim for damages for conversion of the thirteen bars sold by the bank since the issue of the writ—the bank being content to treat such sale as if it had occurred before action brought and not requiring the company to issue a fresh writ. For the reasons previously stated I would stay all further proceedings with regard to the remaining fifty-one bars. My Lords, save that I prefer to base myself on the three governments' right to immediate possession rather than on their control of the bars, I find myself in complete agreement with the reasoning of the judgment of JENKINS, J.

Appeal allowed in regard to the fifty-one bars still with the bank and dismissed in regard to the thirteen bars sold by the bank.

Solicitors: *Treasury Solicitor* (for the appellants); *Slaughter & May* (for the French company); *Freshfields* (for the bank).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

BURGESS v. JARVIS AND OTHERS.

[COURT OF APPEAL (Somervell, Denning, L.J.J., and Roxburgh, J.), February 11, 19, 1952.]

Town and Country Planning—Enforcement notice—Need to specify both date on which notice takes effect and period within which restoration must be carried out—Town and Country Planning Act, 1947 (c. 51), s. 23 (2) (3).

In 1936 the first defendant built a block of sixteen houses in contravention of existing planning control and let one of them to the plaintiff. In 1951 the planning authority served on the first defendant, on the plaintiff, and on the other occupiers of the houses an enforcement notice which was purported to be given under s. 23 (1) of the Town and Country Planning Act, 1947, as applied by s. 75 (1) of that Act, requiring the demolition of the houses and restoration of the land to its original condition "within five years after the date of the service of this notice." On a claim by the plaintiff against the first defendant and the local authority for a declaration that the enforcement notice was invalid and an injunction,

HELD: on the true construction of s. 23 (2) and (3), the enforcement notice should specify both the period (not less than twenty-eight days) at the expiration of which the notice took effect, and the period within which the particular steps for restoring the land had to be taken, and, as the latter period only had been specified, the notice was invalid.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 23 (2) (3), see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 525.

APPEAL by the first defendant from an order of PARKER, J., in chambers, made on Oct. 12, 1951, whereby he granted an injunction restraining the first defendant from demolishing a house, of which he was owner and the plaintiff was tenant, until an order under s. 289 of the Public Health Act, 1936, as applied to an enforcement notice under s. 23 (1) of the Town and Country Planning Act, 1947, had been made.

In 1951 the local planning authority served on the first defendant an enforcement notice requiring him to demolish the house, which, with fifteen other houses, had been built in 1936 by the first defendant in contravention of planning control, and to restore the land to its former condition within five years of the service of the notice. On receipt of the notice the first defendant gave the plaintiff notice to quit, stating that he intended to demolish the house.

The Court of Appeal allowed the plaintiff to join the local authority as a defendant and to amend his writ so as to claim against both defendants that the enforcement notice was invalid on the ground that it did not specify any period of the expiration of which it should take effect as required by s. 23 (3) of the Town and Country Planning Act, 1947, and, alternatively, that the notice specified only one period as that at the expiration of which the notice should take effect and within which the notice should be complied with, which was contrary to the requirements of s. 23 (2) and (3) of that Act.

P. M. O'Connor for the first defendant.

MacKenna, Q.C., and *King Anningson* for the plaintiff.

Thesiger, Q.C., and *H. J. Baxter* for the local authority.

SOMERVELL, L.J.: This appeal raises an important point, but, as I have come to a clear conclusion on it, no useful purpose will be served by not giving judgment now.

The plaintiff was the tenant and the first defendant was the landlord of one of a block of sixteen houses built by the first defendant in 1936. Those houses were erected in contravention of an interim development scheme. We are not concerned with the precise state of the law before the Town and Country Planning Act, 1947, on the construction of which Act this appeal depends and which, by s. 75 (1), gave power to issue enforcement notices in respect of development before the Act in contravention of previous planning control provided that they were served within three years of the appointed day (July 1, 1948). Therefore, as is argued, the enforcement notices issued in this case were bad, it may be that that matter cannot now be put right.

On May 19, 1951, the Sevenoaks Rural District Council, who have been joined as defendants, served an enforcement notice under s. 23 (1) of the Act of 1947 on the first defendant and on the occupiers of these houses. The first defendant did not challenge that notice, nor did he exercise the right, though a limited right, of appeal which exists under the Act of 1947. Instead he served notices to terminate the tenancies, and notified all the tenants that he intended to demolish the houses at the end of July, 1951. The plaintiff then issued the writ in these proceedings claiming an injunction against the first defendant to restrain him from demolishing the house which the plaintiff was occupying under a weekly tenancy protected by the Rent Acts. The matter came before PARKER, J., in chambers who granted an injunction to restrain the first defendant from demolishing the house unless and until an order was made pursuant to s. 289 of the Public Health Act, 1936, as applied by regulations made under s. 24 (5) of the Act of 1947. When the case came on before us it was intimated on behalf of both the first defendant and the plaintiff that it was desired by the plaintiff to take a new point which had not been argued before the judge, and which, if successful, would decide the issue. That was that the enforcement notice served on the first defendant was invalid in that it did not contain the provisions and terms required by the Act of 1947. We were told that everyone desired the court to decide the point. This court does not, generally speaking, encourage points being taken here which have not been taken below, in particular when they involve the adding of a new party, in this case the Sevenoaks Rural District Council. We came to the conclusion, however, that, as this raised an important point on the construction of a statute and it was obviously of interest to everyone that a decision should be obtained on it so far as this case and other cases are concerned, we should adopt the procedure which we were asked to adopt.

By s. 75 (1) of the Act of 1947 the provisions of the Act with respect to enforcement notices are made applicable, subject to the limitation period to which I have referred, to breaches of planning legislation committed before the Act. Section 23 provides:

“(1) If it appears to the local planning authority that any development

of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section. (2) Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be; and in particular any such notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations. (3) Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein: Provided that—(a) if within the period aforesaid [the period to be specified under sub-s. (3)] an application is made to the local planning authority under this Part of this Act for permission for the retention on the land of any buildings or works, or for the continuance of any use of the land, to which the enforcement notice relates, the notice shall be of no effect pending the final determination of that application, and if such permission as aforesaid is granted on that application, the notice shall not take effect; (b) if within the period aforesaid an appeal is made to the court under the following provisions of this section by a person on whom the enforcement notice was served, the notice shall be of no effect pending the final determination or withdrawal of the appeal. (4) If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing sub-section, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court (a) if satisfied [on certain matters] . . . shall quash the notice to which the appeal relates; (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly; (c) in any other case shall dismiss the appeal: Provided that where the enforcement notice is varied or the appeal is dismissed, then, without prejudice to the provisions of para. (a) of the proviso to sub-s. (3) of this section, the court may, if they think fit, direct that the enforcement notice shall not come into force until such date (not being later than twenty-eight days from the determination of the appeal) as the court think fit."

Sub-section (5) provides for an appeal to quarter sessions. Section 24, which deals with sanctions, provides by sub-s. (1):

"If within the period specified in an enforcement notice, or within such extended period as the local planning authority may allow, any steps required by the notice to be taken (other than the discontinuance of any use of land) have not been taken, the local planning authority may enter

on the land and take those steps and may recover . . . any expenses reasonably incurred by them on that behalf . . . ”

Section 24 (3) provides that where, by virtue of an enforcement notice, any use of land is required to be discontinued, any person who without permission uses the land or permits the land to be used in contravention of the notice is guilty of an offence.

In my opinion, the effect of s. 23 is that there are two periods, each of which has to be specified in the notice. The first in point of time, though it comes later in the section, is the period under s. 23 (3), that is, the period at the expiration of which the enforcement notice takes effect. The second, which arises under s. 23 (2), is the period, also to be specified, within which the specified steps for restoring the land, and so on, have to be taken. It is plain that the second of those periods does not start until the first has expired and the notice has taken effect. That seems to me the plain meaning of the words, and, if one considers them in their context, the reason for the first period is obvious. The first period is that during which the notice can be challenged, permission can be asked for, and any person aggrieved can appeal. The owner or occupier or both may want to appeal, and one, therefore, would expect a period for appeal during which the notice is ineffective. That period must be not less than twenty-eight days. It may be prolonged if there is an appeal under the provisions which I have read, and the date of taking effect is suspended. If the appeal is dismissed, the notice takes effect subject to a power in the proviso to s. 23 (4) enabling the court to say that it shall not come into force until a further date, not being later than twenty-eight days. It is unnecessary to consider for what precise purpose that proviso was inserted, because it does not, to my mind, affect the general construction.

That being, as I think, the general effect of these provisions, I turn to the notice. After recitals which are not disputed we come to the point on which the argument arises:

“ Now therefore the rural district council of Sevenoaks do hereby give you notice in pursuance of their powers as local planning authority under s. 23, s. 24 and s. 75 of the Town and Country Planning Act, 1947, to:—Demolish the aforementioned sixteen houses and restore the land to its condition before the aforementioned operations took place within five years after the date of the service of this notice.”

It will be seen that only one period is specified. Counsel for the local authority submits that the Act does not require two periods to be mentioned; that the words “ take effect ” in s. 23 (3), when the section is looked at as a whole and read in conjunction with s. 24, mean the moment of time after which sanctions can be taken. He said that in the case of the present notice no offence is committed by anyone until after the expiration of five years, which, therefore, is the date when the notice takes effect, and that it is wrong to treat the taking effect as on the expiration of a preliminary period for the purpose of appeal. In that view it follows that, as he submits, an appeal could be brought, or remission sought, under sub-s. (3) at any time up to the end of the five years. Having given what I think is the natural meaning of these words, I will give other reasons why I find it impossible to accept that argument. One reason why the period within s. 23 (2) is different from the period within s. 23 (3) is that the period in sub-s. (3) is qualified by the words “ not being less than twenty-eight days ”. If there was only one period one would expect that qualification to appear in the earlier sub-section. If the period intended to be specified under sub-s. (3) was the same as the period to be specified under sub-s. (2), under ordinary drafting principles it would be referred to in sub-s. (3) by reference so as to make it clear that there was only one period to be specified. For another reason one would need very strong words to produce the result to which the argument of counsel for the local authority leads. It is obvious that

the period of five years is the period within which the demolition is to take place. I agree there is no sanction unless there has been a failure to do it within that period. In a case where both an owner and an occupier are involved, one gets a most anomalous state of affairs if the right of appeal (say) by the occupier remains available right up to the end of the period within which the landlord is called on to demolish, because, on this construction, when the house was half demolished there would still be notionally a right of appeal.

For these reasons, in addition to what, after all, is the guide in these matters, namely, the meaning of the words in their ordinary significance, I think the submission of counsel for the local authority fails. The section requires two periods, and, in particular, it requires the period to be specified at the expiration of which the notice is to take effect. It is at the end of that period, which is an uncertain date because of the possibility of an appeal, that the period, conveniently referred to as the "period for compliance", should begin. As the notice given in the present case did not comply with the provisions of s. 23, as construed, I think it is invalid and inoperative.

For these reasons I think the order made by the learned judge must be varied, and the appeal allowed in the respect which I have indicated.

DENNING, L.J.: I agree. In my opinion, s. 23 (3) of the Act of 1947 clearly imports that an enforcement notice must allow at least twenty-eight days after service before it takes effect. It must not be so framed as to take effect at once. The reason is so that the owner or occupier may be given time to apply to the planning authority for permission to retain the house or to appeal to the justices. If he makes his application or appeals within twenty-eight days, the notice does not take effect until the matter is determined. The question is whether the present notice satisfies the requirements of the Act. Counsel for the local authority argued that this notice only takes effect at the end of five years after service, viz., on May 19, 1956. I cannot take that view. The notice requires the owner to demolish sixteen houses "within five years after the date of service of this notice." A similar notice was served on each of the occupiers of the houses. Looking at the wording of the notice, it is clear that it took effect at some time before the expiration of five years, because the owner was required to act within that time. If the notice takes effect before the end of five years, when does it take effect? The only possible date is the date on which it is served, because, unless it took effect then, the owner would not have the benefit of the full five years allowed to him to do the work. The result is, therefore, that this notice took effect at once. It did not allow the occupier the minimum of twenty-eight days before it took effect. It ought to have specified from which date it took effect, and that period should be a minimum of twenty-eight days after service of the notice. It did not specify any period. It was, therefore, invalid.

ROXBURGH, J.: I agree that this enforcement notice is invalid, because it does not specify the date on which it is to take effect. Counsel for the local authority submitted that, if the notice specified a period within which the work required was to be done, then no further date need be specified, because the notice took effect at the moment of the expiry of the period within which the work was to be done. Such a conclusion seems to me impossible if the work required to be done is other than a metaphysical operation, with which this Act is not concerned.

Order varied.

Solicitors: *Light & Fulton*, agents for *W. H. House & Son*, Sevenoaks (for the first defendant); *Hewitt, Woollacott & Chown* (for the plaintiff); *Knocker & Foskett*, Sevenoaks (for the local authority).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

GARRARD v. SOUTHEY & CO. AND ANOTHER. DAVEY
ESTATES, LTD., Third Parties.

[QUEEN'S BENCH DIVISION (Parker, J.), February 18, 19, 20, 1952.]

Master and Servant—Duty of master—Provision of safe appliances—Servant “lent” by employers to occupiers of factory—Materials, tools and equipment provided by occupiers—Work controlled by factory foreman.

Electrical contractors agreed with the occupiers of a factory that two of their employees should work at the factory on certain electrical installations. The contractors continued to employ the men, paying their wages, stamping their insurance cards, and retaining the sole right to dismiss them. The electricians worked exclusively at the factory, used the canteen there, and conformed to the hours of work observed in the factory. They were supplied by the occupiers of the factory with all materials, tools, plant, and equipment, except for certain special tools which were their own property, and their work was supervised by a foreman employed by the occupiers, who required the men to follow practices customary at the factory instead of those of the contractors. One of the electricians was injured through a piece of defective plant.

HELD: the occupiers of the factory and not the electrical contractors owed the injured electrician the common law duty of a master to his servant to provide proper plant and equipment, and, therefore, were liable to him for breach of that duty.

AS TO THE EXISTENCE OF THE RELATION OF MASTER AND SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, p. 112, para. 191; and FOR CASES, see DIGEST, Vol. 34, pp. 22-27, Nos. 23-61.

Cases referred to:

- (1) *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.
- (2) *Holt v. Rhodes (W.H.) & Son, Ltd.*, [1949] 1 All E.R. 478; 2nd Digest Supp.

ACTION for damages (against both defendants) for negligence and/or breach of their duty at common law to take reasonable care to provide proper plant and equipment for the plaintiff to work with, (against the first defendants) for breach of the Building (Safety, Health and Welfare) Regulations, 1948, and (against the second defendants) for breach of duty under the Factories Act, 1937. The first defendants brought in the second defendants as third parties, and the second defendants counterclaimed against the first defendants for an indemnity and brought in the third parties against whom also they claimed an indemnity.

Early in 1949 the second defendants took over a factory and workshop at Boreham Wood, Elstree, with the intention of converting it into an assembly shop. This entailed, inter alia, re-wiring the factory for electric light and power to bring electricity to the benches and plant which were to be installed. In March, 1949, Mr. Hamley, their plant engineer, being averse from employing temporary staff, approached Mr. Southey, a partner in Southey & Co., the first defendants, who carried on business as contractors installing electrical installations, with a view to obtaining two electricians and their mates to assist in the reconstruction. On Mar. 23, 1949, Mr. Southey gave Mr. Hamley a written quotation setting out the basis on which he would let the second defendants have the men, and on or about Mar. 27 Mr. Hamley by telephone accepted the terms, asked for the men as soon as possible, and promised a formal order in due course. There had been a similar arrangement between the parties in 1948. On Mar. 28 two of the first defendants' employees began work with the second defendants and early in April the plaintiff and his mate also began work. On Apr. 20 the second defendants issued a formal order to the first defendants and on Apr. 26 the first defendants accepted the order.

The plaintiff and the other electrician and their mates remained in the employment of the first defendants, who paid their wages, stamped their insurance cards, and had the sole right to dismiss them from the employment, but they worked exclusively at the second defendants' factory except on one or two occasions when Mr. Southey required them for an urgent job. They booked in (they did not "clock in") at the second defendants' office in the mornings and booked out in the evenings, used the canteen, fell into the ways of the second defendants' employees, and conformed to their hours of work. They were to be supplied by the second defendants with all the materials, tools, plant, and equipment they required, but they took certain of their own tools. They were put in charge of Mr. Forrester, the second defendants' head foreman of the maintenance department. Mr. Forrester was a highly skilled electrician who had under him electricians employed by the second defendants engaged on maintenance work in the other shops and about thirty other tradesmen including a carpenter and a gasfitter doing reconstruction work. The plaintiff and the other electrician from the first defendants were skilled electricians, but they had no experience in installing power in factory premises so Mr. Forrester supervised their work. He was not there all the time because he had to act as foreman in charge of other workmen, but he told them what to do, and went a long way in telling them how to do it and he kept a strict eye on them. He left them to do the lighting installation, a matter of tubing and wire, with standard fittings, but he told them how to carry out the power installation and what wire, switches, and fuses to use. He made them employ the second defendants' practice and method of wiring, in particular in joining cables in boxes instead of looping from one point to another which was the practice of the first defendants. On one occasion he required a fuse board to be fastened by bolts into the wall instead of being fixed by plugs. He checked over their work and made them re-do it if it did not conform to his ideas. A

On Apr. 20, 1949, at 9.30 a.m. the plaintiff took a pair of builder's trestles which he found in the middle of the factory premises and which, without his knowing it, belonged to the third parties, a firm of building contractors working at the factory, and used them to get some electric tubing and wire along a girder. In getting down he held on to the top rung of the trestle. The tenon of the rung had completely rotted away at one end and it came away in his hand and he fell backwards and was injured. The first defendants contended that the duty of a master to his servant to provide proper plant and equipment was owed to the plaintiff by the second defendants, while the second defendants contended that it was owed to him by the first defendants. D

Jukes for the plaintiff.

D. J. L. Fitzgerald for the first defendants.

Marven Everett for the second defendants.

A. M. Lee for the third parties.

PARKER, J., stated the facts, said that the first question to determine was who, at the time of the accident, was the master of the plaintiff and the person who would owe him the duty to provide proper plant and equipment, and continued: The question has arisen many times, usually where an employee who has been lent has negligently injured a third party. The question is, then: Who is liable for his negligence—the general employer or the person to whom he has been lent? In *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.* (1) a crane and a driver had been lent and the driver in operating the crane had injured a third party. **VISCOUNT SIMON** said ([1946] 2 All E.R. 348): G

"It is not disputed that the burden of proof rests upon the general or permanent employer—in this case the board—to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such H

employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances."

He lays down the test which he thinks should be applied in those circumstances, thus (*ibid.*):

"I would prefer to make the test turn on where the authority lies to direct, or to delegate to, the workman, the manner in which the vehicle is driven. It is this authority which determines who is the workman's *superior*."

LORD PORTER says (*ibid.*, 351):

"Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed—all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping."

LORD UTHWATT says (*ibid.*, 354):

"To establish the degree of control requisite to fasten responsibility upon him [the hirer] the hirer must in some reasonable sense be shown to have authority to control the manner in which the workman does his work, the reason being that it is the manner in which a particular operation (assumed for this purpose to be in itself a proper operation) is carried out that determines its lawful or wrongful character. Unless there be that authority the workman is not serving the hirer, but merely serving the interests of the hirer, and service under the hirer in the sense I have stated is essential. Whether there is or is not such service in any particular case is a question of fact, the object being to ascertain the broad effect of the arrangement made."

A case in which the workman himself was injured was *Holt v. W. H. Rhodes & Son, Ltd.* (2). A crane and a workman were lent to stevedores for the discharge of a ship, and, while working for those stevedores, the workman was injured. In an action against both his general employers and the stevedores to whom he had been lent, he claimed that there had been a breach of the duty of master to servant to provide a safe system of working. That case is of little assistance because the county court judge did not make any findings with regard to the relationship between the plaintiff and the stevedores, but it does show that the Court of Appeal, who sent the case back for a new trial, thought that on the evidence there might possibly be a finding that at the material time the relationship of master and servant existed between the plaintiff and the stevedores.

I am not altogether convinced that the approach is necessarily the same in a case where a workman who has been lent has injured a third party as in a case where, as here, the workman has himself been injured. As LORD SIMONDS

pointed out in the *Mersey Docks & Harbour Board* case (1) where, as in that case, a workman and a crane have been supplied, it is the duty of the general employers to provide a proper crane and a skilled driver, and, that being their duty, it would require exceptional circumstances to fix the responsibility for the accident caused by the unskilful act of the driver on to some other person. On the other hand, in a case like this it would be strange if the person to whom the employee was lent, who was himself the occupier of the factory and was himself providing all the tools and equipment and advising on the system of working, could, as it were, fix the responsibility for providing safe plant and equipment on the general employer, who would have no control over the workman. Again, it seems to me that a distinction is to be drawn between cases such as the *Mersey Docks & Harbour Board* case (1) where a complicated piece of machinery and a driver are lent, and cases where labour only, and labour not necessarily of a highly skilled character, is lent. In the former case it is easy to infer that the general employer does not intend to permit the hirer to have control over his valuable bit of machinery in the sense of being able to tell the workman how to work it. On the other hand, when it is a matter of not very highly skilled labour, it seems to me much more easy to infer that the hirer should have control not merely in the sense of being able to tell the workman what he wants doing, but also of deciding the manner of doing it. However that may be, applying the strict test laid down in the *Mersey Docks & Harbour Board* case (1) and recognising the heavy burden, referred to in that case, which rests on the general employer to shift the responsibility to the particular employer, it seems to me that what Mr. Forrester did went far beyond a matter of general control. He was entitled to tell, and did tell, the plaintiff how to do the work.

I should have added that it was argued on behalf of the second defendants that the conclusive test in these cases was who had the power to dismiss, which, undoubtedly, in this case remained solely in the first defendants, but, as I read the cases, it is nowhere suggested that that is the conclusive test or sole test. All the matters referred to by LORD PORTER in the *Mersey Docks & Harbour Board* case (1) have to be taken into consideration.

HIS LORDSHIP held that the second defendants were in breach of the duty which they owed to the plaintiff as a master to his servant, but not in breach of any duty under the Factories Act, 1937, because on the evidence no persons were employed on manual labour on any of the manufactures and processes the carrying on of which, by s. 151 (1), would have made the premises a factory. He assessed the damages at £682 12s. 6d. and gave judgment for the plaintiff against the second defendants for that sum. He held that the first defendants were not liable to the plaintiff for breach of any duty owed by a master to his servant, and that, assuming that electrical installation came within the operations to which the Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), applied, the first defendants were not undertaking such an operation. He, therefore, dismissed the plaintiff's action against the first defendants. He also dismissed the first defendants' claim against the second defendants. He held further that the second defendants were not entitled to any indemnity in respect of their liability to the plaintiff from the first defendants or from the third parties by virtue of conditions in their agreements and dismissed the second defendants' counterclaim and third party proceedings.

Judgment accordingly.

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiff); *Elliot & Macvie* (for the first defendants); *Carpenters* (for the second defendants); *Nelson Baldwin & Co.* (for the third parties).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BURNELL v. DOWNHAM MARKET URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), January 17, 18, 21, February 22, 1952.]

Rates—Rateable occupation—Playing field vested in local authority—Acquisition by deed—Trust for perpetual use by public—Restriction on user by public ancillary to management—Cricket and football pitches and tennis courts let to clubs—Temporary exclusion of public.

A A playing field was purchased by moneys provided by public subscription and a grant from the Ministry of Education and was conveyed to the local authority by deed on trust "for the perpetual use thereof by the public for the purposes of exercise and recreation pursuant to the provisions of the Open Spaces Act, 1906." The conveyance was recorded by the Charity Commissioners under the Settled Land Act, 1925, s. 29 (4). The field, which was managed by the authority, consisted of football and cricket pitches, tennis courts and a garden of remembrance. In consideration of a yearly rent a federation of football and cricket clubs was granted permission to use the pitches for organised matches. Access was open to the public at all times, subject to the closing of the entrance during the first part of football matches for about forty hours per year. The tennis courts were available to the public at a charge, during the season, until 6 p.m., after which hour they were let by the season to clubs the members of which had exclusive use of them. The cost of the upkeep exceeded the total receipts, the excess being paid out of rates. On the question whether the local authority were liable for rates in respect of their occupation of the field,

D HELD: (i) the powers of disposal of land given to local authorities by s. 29 of the Settled Land Act, 1925, and s. 42 of the Town and Country Planning Act, 1947, were exercisable as trustees and could, therefore, only be exercised, if at all, in conformity with the trusts on which the local authority held the land, and, accordingly, the local authority could not be regarded as otherwise than bound for the foreseeable future to hold the field on the trusts declared in respect of it in the conveyance.

E (ii) although the trusts were imposed by deed they were, in effect, statutory trusts inasmuch as the conveyance, by virtue of s. 10 of the Open Spaces Act, 1906, operated to impose on the land the statutory obligations specified therein, and, having regard to these restrictions, the real occupiers were the public for whom the local authority were merely custodians or trustees.

F *Carnegie Dunfermline Trustees v. Dunfermline Assessor*, 1909 S.C. 678, criticised and not followed.

Lambeth Overseers v. London County Council ([1897] A.C. 625), applied.

G (iii) the question whether there was free and unrestricted use by the public was one of degree, and, therefore, a matter of fact to be determined and, in the absence of some misdirection, conclusively determined, by the Lands Tribunal; on the facts the tribunal was entitled to hold that such limited exclusion of the public as the council's arrangement with the clubs involved was properly ancillary to their management of the field as an open space within the meaning of the Open Spaces Act, 1906; and, therefore, the council were not in such occupation of the field as rendered them rateable in respect of it.

H *London Playing Fields Society v. Essex (S.W. Area) Assessment Committee* (1930) (144 L.T. 233), distinguished.

AS TO RATING OF PROPERTY VESTED IN LOCAL AUTHORITY SUBJECT TO THE EXERCISE OF RIGHTS BY THE PUBLIC, see HALSBURY, Hailsham Edn., Vol. 27, p. 367, para. 796; and FOR CASES, see DIGEST, Vol. 36, pp. 247, 248, Nos. 11-22, and Digest Supps.

Cases referred to:

- (1) *Lambeth Overseers v. London County Council*, [1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795; *sub nom. St. Mary, Lambeth (Churchwardens & Overseers) v. London County Council*, 61 J.P. 580; 36 Digest 247, 12.
- (2) *London Playing Fields Society v. Essex (S.W. Area) Assessment Committee*, (1930), 144 L.T. 233; 94 J.P. 241; Digest Supp.
- (3) *Carnegie Dunfermline Trustees v. Dunfermline Assessor*, 1909 S.C. 678; 46 Sc. L.R. 451; 1 S.L.T. 286; 38 Digest 575 (b). A
- (4) *Liverpool Corpn. v. West Derby Assessment Committee*, [1908] 2 K.B. 647; 77 L.J.K.B. 1032; 99 L.T. 435; 72 J.P. 397; 36 Digest 248, 20.
- (5) *North Riding of Yorkshire County Valuation Committee v. Redcar Corpn.*, [1942] 2 All E.R. 589; [1943] K.B. 114; 112 L.J.K.B. 97; 168 L.T. 81; 106 J.P. 11; 2nd Digest Supp.
- (6) *West Bromwich School Board v. West Bromwich Overseers*, (1884), 13 Q.B.D. 929; *sub nom. R. v. West Bromwich School Board*, 53 L.J.M.C. 153; 52 L.T. 164; 48 J.P. 808; 38 Digest 470, 319. B

CASE STATED by Lands Tribunal.

The respondent council owned a hereditament comprising a playing field at Downham Market, Norfolk, which was assessed at £10 gross value, and £9 rateable value. On Feb. 25, 1951, a local valuation court of the West Norfolk (No. 2) Local Valuation Panel directed that the assessment should be deleted from the list, holding that the hereditament was not rateable because there was no rateable occupation by the council. The valuation officer appealed to the Lands Tribunal which, on Aug. 28, 1951, dismissed the appeal. The valuation officer appealed. C

Sir Arthur Comyns Carr, Q.C., Maurice Lyell and P. R. E. Browne for the valuation officer. D

Rowe, Q.C., and D. G. A. Lowe for the respondent council.

Cur. adv. vult.

Feb. 22. **SIR RAYMOND EVERSLED, M.R.**, read the following judgment of the court. By a conveyance dated Dec. 31, 1946, and expressed to be made between Radio Garage Co., Ltd., of the one part, and the urban district council of Downham Market (hereafter referred to as "the council"), of the other part, after reciting that the council was desirous of buying the premises expressed to be thereby conveyed to hold the same in trust for the perpetual use thereof by the public for exercise and recreation pursuant to the provisions of the Open Spaces Act, 1906, or some or one of them, there was conveyed to the council in fee simple the piece of land, rather more than seven acres in extent, called "the cricket field", which is the subject of the present appeal. By cl. 3 of the conveyance the council declared that they "will hold the premises hereby conveyed on the trusts following, that is to say, on trust for the perpetual use thereof by the public for the purposes of exercise and recreation pursuant to the provisions of the Open Spaces Act, 1906." The question is whether the council ought properly to be rated in respect of this field on the ground that they are in beneficial occupation of it, or, at least, are in occupation of it for rating purposes. E

The Lands Tribunal answered the question negatively. As appears from the Case Stated, the tribunal found that the land in question was acquired at the end of the 1939-45 war as a war memorial. The decision to acquire it was made at a public meeting at which it was proposed that a suitable form of memorial would be a recreation ground for the use of the public, part of which would be laid out as a garden of remembrance. Subscriptions were called for, and, with the aid of a grant from the Ministry of Education, the sum of £6,000 was raised. This sum of money was spent on buying the land, laying it out, and equipping it as a playing field. The findings of the tribunal also recited that it was decided that the playing field should be owned and managed by the council and that the F
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land was conveyed by the then owners to the council by the conveyance already mentioned, such conveyance being in fact recorded in the books of the Charity Commissioners for England and Wales pursuant to the provisions of the Settled Land Act, 1925. According to further findings, the way in which the field is laid out and used is as follows. At the western side there is a football pitch. During the winter season the pitch is roped off, becoming, in the summer, part of the cricket out-field. There is a cricket table of special turf, roped off except when used. There is a separate concrete practice wicket, and, in the north-eastern corner, a wooden pavilion thirty-six feet by seventeen feet. Near thereto is a gravel car park which can be used free of charge by persons using the playing field. In the northern part of the field are two hard tennis courts wired off, and there is also a putting green, which, however, is falling into disuse. Finally, at the southern end of the field, separated by an evergreen fence, is the garden of remembrance, less than half an acre in extent, where members of the public can sit quietly. As regards management, the tennis courts are let by the season to nine clubs, each having the exclusive use of a court for so many hours after 6 p.m. during the season. At all other times the courts are available to the public at a rate of 2s. 6d. per hour for each court. On Feb. 6, 1951, the council also made an agreement with a body known as the Federation of Downham Town Football and Cricket Clubs, and this agreement has, naturally and properly, assumed considerable importance during the present case. By the agreement the council granted to the federation permission to use the cricket and football pitches and the dressing rooms in the pavilion for the purpose of organised matches according to a fixture list submitted to and approved by the council during a term of two and a half years from Feb. 1, 1951, the federation paying for such privilege a sum of £85 per annum. The agreement contained the following clause:

“The federation may close the entrance to the field on such dates as are set out in the list of fixtures for the purpose of making a charge for admission to the field and may also make collections on the field on these dates, the closing of the entrance to be subject, however, to granting rights of access to users of the tennis courts, putting green and any other amenities provided by the council on the field.”

The practical effect of this clause is found to be as follows in the Case:

“Access is open to the public at all times subject to the exercise by the federation of the rights contained in para. 3 of the agreement of Feb. 6, 1951. In practice, the entrance is closed during the first half of football matches, but not during cricket matches. The closure lasts for about an hour and a quarter for each football match, a total of about forty hours in any year.”

It is finally found in the Case that a groundsman is permanently employed by the council and paid by the council, that the expenditure on the field for the year ended Mar. 31, 1950, amounted to £427 17s. 6d. (including the groundsman's wages) and that the income for the same year amounted to £189 18s. 6d., the excess being paid out of the rates, but that the intention is to restrict the amount of the excess to what can be covered by a rate of 4d. or 5d. in the £. On these facts the conclusion of the tribunal was that “the council in the circumstances of the present ownership and use of the land was not in beneficial occupation of the land and was not liable to any rate.”

The question for determination may be briefly and conveniently stated by reference to the decision of the House of Lords in the well-known *Brockwell Park* case, *Lambeth Overseers v. London County Council* (1). In that case the park in question had been acquired by the respondent council pursuant to powers in a local Act which laid on them the duty, after acquisition, to hold the park and every part thereof as a park for the perpetual use thereof by the public for

exercise and recreation. The House of Lords held that the respondent council was not rateable in respect of it. At the beginning of his opinion LORD HALSBURY, L.C., said ([1897] A.C. 629):

"I do not think there is here a rateable occupation by anybody. The 'public' is not a rateable occupier . . ."

He had already referred to the private Act of the London County Council (*ibid.*, 629)

" . . . which cast upon them the perpetual obligation to maintain and preserve it [the park] when purchased, as a park for the perpetual use of the public for exercise and recreation."

At the end of his speech LORD HALSBURY, L.C., summed the matter up in these words (*ibid.*, 630):

"Once it has been found, as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question. I say as a matter of law, because that it does not give a beneficial occupation as matter of fact is nothing to the purpose. Here there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it."

LORD HERSCHELL's opinion was to the same effect (*ibid.*, 632):

" . . . I am not satisfied that the county council are occupiers of this park for rating purposes, though the legal possession is, no doubt, vested in them. They seem to me to be merely custodians or trustees to hold it and manage it for the use of the public."

The question before this court is whether on its facts the present case falls within the principle of the *Brockwell Park* case (1), and, in particular, the statement of that principle which we have quoted from the speeches of LORD HALSBURY, L.C., and LORD HERSCHELL. We have not so far referred to the terms of the Open Spaces Act, 1906, pursuant to the provisions of which, as will be recalled, the council declared themselves trustees of the field for its perpetual use by the public for the purpose of exercise and recreation. The relevant sections are those numbered 7, 9, 10 and 15, together with the definition of "open space" in s. 20. Section 7 contains a power for corporations and other persons to convey to any local authority any land for the purpose of the same being preserved as an open space for the enjoyment of the public under the Act. Section 9 contains corresponding power for local authorities to acquire open spaces, and to undertake the care, management and control thereof. By s. 10 it is provided that a local authority who have acquired any estate or interest in an open space shall hold and administer the open space in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of the Act and under proper control and regulation and for no other purpose, and shall also maintain and keep the open space in a good and decent state. By s. 15 a local authority may, with reference to any open space, make bye-laws for the regulation thereof and of the days and times of admission thereto and for the preservation of order and prevention of nuisances therein. Finally, by s. 20, the expression "open space" is defined to mean any land

"whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied."

Before stating our conclusion on the main argument presented to us (which involves some consideration of the scope and effect of the *Brockwell Park* case (1) and which, as we think, turns very largely on the effect of the manner in

which the field is in fact used and managed by the council) it is convenient first to deal with two other grounds on which, according to counsel for the valuation officer, the present case is distinguishable from that of the *Brockwell Park* case (1). The first turns on the use by LORD HALSBURY, L.C., of the word "perpetual". In the *Brockwell Park* case (1) the London County Council was enjoined by the relevant local Act to hold such land and every part thereof as a park and preserve the same for the "perpetual" use thereof by the public for exercise and recreation. It does not appear that there was any power under the local Act or otherwise for the London County Council in any circumstances to dispose of the park or otherwise change its use, and there is no doubt that LORD HALSBURY, L.C., in his speech expressly referred to and relied on this obligation of permanence. We find it, however, impossible to think that LORD HALSBURY, L.C., intended to lay it down that this characteristic of permanence, as an obligation for all eternity, was essential to the conclusion that the London County Council was not rateable in respect of the park. As appears in subsequent cases, it has always been recognised that any statutory power or duty is liable to be altered by Parliament itself by some later Act, general or special. So much, of course, counsel for the valuation officer conceded. He contended, nevertheless, that the general powers of disposition conferred on local authorities by modern statutes in respect of all land held by them is something altogether different in kind from the possibility of change by future legislation and have, as it were, swept away any characteristic of permanence in cases otherwise comparable with the *Brockwell Park* case (1) whatever may have been the sense in which LORD HALSBURY, L.C., used the word "perpetual". Though he referred to s. 163, s. 164 and s. 165 of the Local Government Act, 1933, counsel did not rely on that statute. He did, however, rely on the tenant for life's powers of sale and other disposition under the Settled Land Act, 1925, vested in local authorities by virtue of s. 29 of that Act, and he relied more particularly on the wide terms of s. 42 of the Town and Country Planning Act, 1947. Having regard, however, to the general tenor and purpose of the Town and Country Planning Act and to the safeguards introduced by s. 42 (2) of that Act, the general powers in that Act cannot, in our judgment, fairly be regarded for present purposes as doing more than applying the modern method of bringing about changes in the use of land vested in local authorities and dedicated in their hands to purposes of the kind here in question in substitution for the older method of special amending legislation. Nor can the Settled Land Act powers be regarded, in our judgment, for present purposes as doing more than providing appropriate conveyancing machinery if and when a local authority, in the proper exercise of its duties, comes to dispose of its land. For, in any case, such powers are powers to be exercised as trustees and can, therefore, only be exercised, if at all, in conformity with the trusts upon which the local authority may hold the relevant land. Notwithstanding these modern statutory powers, therefore, we feel no doubt that the council cannot now be regarded as otherwise than bound for the foreseeable future to continue to hold this field on the trusts declared in respect of it under the deed of 1946. Certainly we think there is no ground on which it can be said (as was said by LORD HEWART, C.J., in *London Playing Fields Society v. Essex (S.W. Area) Assessment Committee* (2)) that the present trusts and uses affecting the field might be merely transitory.

The second point is of the same character, and rests on the fact that in the present case the trusts declared, albeit by reference to the Open Spaces Act, 1906, are declared and established only in, and by the terms of, a voluntary deed. Counsel for the valuation officer did not suggest that any distinction could be drawn between a case where a public body acquired or held land for public uses pursuant to a statutory duty so to do and a case in which such a body held land similarly under a mere statutory power. He contended, however, that the principle of the *Brockwell Park* case (1) has never been, and should not now be,

extended to a case where, as here, the trusts arose out of, and only out of, the deed of the parties to it, and in support of this proposition he relied on *London Playing Fields Society v. Essex (S.W. Area) Assessment Committee* (2) and *Carnegie Dunfermline Trustees v. Dunfermline Assessor* (3). The present case is, we think, entirely different from *London Playing Fields Society v. Essex (S.W. Area) Assessment Committee* (2) where the obligations of the society as to the user of the land rested only on its covenant with the other parties to the deed which those other parties could at any time release. In the present case the council declared themselves trustees in perpetuity, and they could not by any means, otherwise than by a statute or by the exercise of statutory power, be effectively released from their obligations under the trust, either by the other party to the deed of conveyance or by other person or combination of persons. It is true that in *Carnegie Dunfermline Trustees v. Dunfermline Assessor* (3) a comparable trust created by deed as distinct from statute was held on this ground not to exclude liability to assessment. We are by no means satisfied that this Scottish decision should be followed in England, as we have difficulty in appreciating why the reasoning in the *Brockwell Park* case (1) should not be equally applicable to the trustees of land held for like purposes under a valid charitable trust irrevocably created by deed. We find it unnecessary, however, to express any concluded opinion as to the validity or scope of the distinction sought to be drawn by counsel for the valuation officer, for it is, in our view, plain that the trusts here in question are in effect statutory trusts, inasmuch as the conveyance in the present case operated by virtue of s. 10 of the Open Spaces Act, 1906, to impose on the land the statutory obligations prescribed by that Act to which we have already referred—in short, the duty of allowing it to be used by the public for the purposes of recreation.

We turn, then, to the main question in the case. As appears from the passages from the opinions of LORD HALSBURY, L.C., and LORD HERSHELL which we have quoted, the basis of the decision of the House of Lords in the *Brockwell Park* case (1) was clearly, in our judgment, that, having regard to the restriction imposed on the land by the special Act and to the facts of the case, the real occupiers were the public and the sole interest of the London County Council was as “custodians or trustees” for the public. We have already stated our view that the present case is not distinguishable from the *Brockwell Park* case (1) on the ground of any impermanence in the uses and trusts now affecting the playing field in question. Nor, in our opinion, are the restrictions imposed by the Open Spaces Act, 1906, materially different from those imposed by the special Act in the *Brockwell Park* case (1) and there held to have the effect of excluding the London County Council from rateable occupation. If, therefore, the matter is judged solely by reference to the terms and legal effect of the statutory restrictions, this case is in effect concluded in favour of the council by the *Brockwell Park* case (1).

It remains, however, to consider whether the facts regarding the actual user of the land in the present case involve such a departure from the obligation succinctly described by LORD HALSBURY, L.C., in the phrase “they must allow the public the free and unrestricted use of it” as to justify the conclusion that, whatever their legal obligations in the matter may be, the council have in fact assumed the character of rateable occupiers of the land in question. It is not suggested that “free and unrestricted use” by the public means that the public, that is, any member of the community who chooses so to do, must be free to go on the land at any time of the day or night. A right for a local authority, or for any other body charged with the duty of holding and managing an open space or park for the public use, to close such a place at night, for example, must clearly be ancillary to, if not, indeed, essential for, good regulation. The terms of the Open Spaces Act, 1906, themselves indicate that a right of closure as such is not inconsistent with dedication for public recreation. In the *Brockwell*

park case (1) itself there were certain portions of the land from which the public was necessarily excluded—those portions occupied by a keeper's lodge, the bandstand, and a refreshment building. These exclusions are the manifestations of the duty and exercise of management, and their total area compared with that of the whole park was negligible. In the later case of *Liverpool Corpn. v. West Derby Assessment Committee* (4), a similar question of rateability arose as regards the plaintiff corporation's occupation of a park of eighty-nine acres. By their local Act and bye-laws made thereunder the corporation were empowered to close the park for not more than seven days in any year, and, on these occasions, to make charges for admission. The power had, in fact, been exercised from time to time, though rarely, for the purpose of fetes in aid of a local hospital. On these occasions the corporation did not themselves make any charge for admission, but the persons who were permitted to use the park did so. It was argued that these facts distinguished *Liverpool Corpn. v. West Derby Assessment Committee* (4) from the *Brockwell Park* case (1), but this court found no difficulty in concluding that the Liverpool Corporation's power of exclusion and its exercise were merely ancillary to the dedication of the land as a public park: see per FLETCHER MOULTON, L.J. ([1908] 2 K.B. 667).

In the present case it is said that, whatever be in strictness the trusts and duties imposed on the council, they are, in fact, so managing the field that the public is to a substantial extent excluded from its use for the purposes of recreation. If he may, perhaps, have deliberately over-stated it, yet counsel for the valuation officer put his case effectively and not unfairly when he said that the council was using the field to all intents and purposes for the benefit of a number of athletic clubs. And if that summary of the situation is justified, then, according to the argument, the case falls outside the scope of the *Brockwell Park* decision (1) and becomes analogous to the *London Playing Fields Society v. Essex (S.W. Area) Assessment Committee* (2), and to *North Riding of Yorkshire County Valuation Committee v. Redcar Corpn.* (5), where it was held that a local authority, who owned a considerable area near the foreshore and used and managed it substantially as an amusement park, were rateable in respect of their occupation of it.

It cannot, we think, be denied that the incidents of the council's management of the field in question involve a somewhat greater degree of exclusion of its free and unrestricted use by the public than was the case of the park occupied by the corporation in *Liverpool Corpn. v. West Derby Assessment Committee* (4). Still, in our judgment, the question is one of degree and, therefore, a matter of fact to be determined, and, in the absence of some misdirection, conclusively determined, by the Lands Tribunal. We accept the submission of counsel for the council that in modern times provision for some form of organised athletics, the spectacle of which may be enjoyed by the public, is not inconsistent with a duty to provide for recreation by the public, and in the present case the sum total of the extent to which members of the public are excluded from free entry into the field forms a minute fraction of the total hours of daytime throughout the year. As we have already stated, we do not think the use by LORD HALSBURY, L.C., of the words "free and unrestricted use" involve the proposition that any member of the public can at all times, when the field or open space is not wholly closed in accordance with proper regulation and good management, gain access to the field at his will without payment. Put another way, we think that the tribunal was entitled on the facts of this case to conclude that such limited exclusion as the council's arrangements with the cricket and football clubs and the tennis clubs involved is properly ancillary to their management of the field as an open space within the meaning of the Open Spaces Act, 1906. We will assume in favour of the valuation officer that the matter should be decided by reference to the user in fact rather than by reference to the trusts imposed on the council, but we think that the same conclusion results. We add,

however, that, in our judgment, the arrangements which the council have made do not involve any departure from strict compliance with the trusts to which they are subject.

There remains one further question. In the course of their speeches in the *Brockwell Park* case (1) both LORD HALSBURY, L.C., and LORD HERSCHELL undoubtedly expressed themselves as basing their conclusions not only on their view that the London County Council were mere trustees and custodians for the public, but also (applying a recognised test for rateability) on the fact that, having regard to the statutory restrictions attaching to that park, no tenant would in any circumstances give anything at all for the privilege of an occupation which could not provide the capacity to earn more than the rent which such a tenant would be called on to pay. In the present case it was argued alternatively on behalf of the council that, even though the council could not be regarded as mere custodians for the public, still, in the circumstances, no tenant could ever be found to pay a penny piece for the privilege of a tenancy of the field in question, and, accordingly, that its rateable value must be nil. This argument is but an expansion of the forceful phrase of BOWEN, L.J., in an earlier case—*West Bromwich School Board v. West Bromwich Overseers* (6) (13 Q.B.D. 943)—“struck with sterility”. For our part, we agree with the view expressed by DARLING, J., in *Liverpool Corpn. v. West Derby Assessment Committee* (4), that, however attractive and apposite such language may have been on the occasion that it was used, it is somewhat dangerous to rely on it, at least without a careful consideration of its true significance. In the *Brockwell Park* case (1), having regard to the terms of the relevant statute, we think that LORD HALSBURY, L.C., and LORD HERSCHELL, in referring to the fact that no tenant would pay anything for the right of occupying the land, were really expressing in a different way the same point involved in their conclusion that, in truth, the public were the occupiers, for the absolute duty to use and manage the park for the “free and unrestricted use of the public” attached in whatever hands the estate or interest in the land was vested. If, however, it is once conceded in the present case that the council are not mere trustees or custodians for the public, and once it is also conceded that they are not bound to hold and manage the field for the purposes of recreation by the public, it seems to follow that the restrictions affecting the land must be regarded as so qualified that we are not for ourselves satisfied that it could be fairly said “no one would pay a penny piece for the privilege of becoming its tenant”. It must now be taken as well settled to be no answer to a claim to rateability that land is held on such terms that its owner cannot in fact derive any pecuniary benefit thereout. We prefer, therefore, to express no view on this branch of the council’s argument, but to rest our conclusion on the view we have earlier expressed, namely, that on the facts of the present case the tribunal was entitled to conclude, as it did, that the council were mere trustees or custodians for the public, and, accordingly, that the real occupiers for present purposes are the public themselves.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Peacock & Goddard*, agents for *Reed, Wayman & Walton*, Downham Market (for the council).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re NORTH (deceased). NORTH *v.* CUSDEN.

[CHANCERY DIVISION (Wynn-Parry, J.), February 27, 1952.]

Will—Joint tenancy or tenancy in common—Gift of specified property to testator's two sons "on condition that they agree to pay in equal shares" to testator's widow "for the remainder of her life . . . 10s. per week."

By a home-made will, made on Mar. 31, 1936, the testator gave to his two sons, W.L.N. and J.H.N., certain specified property " (or if sold during my lifetime such balance of the proceeds of such sale as is in my possession at the date of my death) . . . on condition that they agree to pay in equal shares to my wife . . . for the remainder of her life after my decease the sum of 10s. per week." The testator died on May 21, 1937, being survived by his wife and two sons. On Jan. 1, 1951, J.H.N. died, and the question arose whether the gift to the sons created a joint tenancy or a tenancy in common.

HELD: as the effect of the condition attached to the gift was to create a personal obligation on each of the sons, the language of the condition was sufficient to indicate that the interest of the two sons in the property was a tenancy in common, and not a joint tenancy.

Kew v. Rouse (1685) (1 Vern. 353), applied.

AS TO TENANCY IN COMMON, see HALSBURY, Hailsham Edn., Vol. 27, pp. 752-757, paras. 1282-1285, and Vol. 34, pp. 354-356, paras. 398-401; and FOR CASES, see DIGEST, Vol. 44, pp. 977-991, Nos. 8327-8489.

Cases referred to:

- (1) *Robertson v. Fraser*, (1871), 6 Ch. App. 696; 40 L.J.Ch. 776; 44 Digest 977, 8328.
- (2) *Kew v. Rouse*, (1685), 1 Vern. 353; 23 E.R. 517; 44 Digest 977, 8330.

ADJOURNED SUMMONS to determine the nature of the beneficial interests of the testator's two sons in specified property given to them on condition that they agreed to pay in equal shares a certain sum to the testator's widow each week for the remainder of her life.

By his will, made on Mar. 31, 1936, the testator appointed his two sons, William Leonard North and John Henry North, executors thereof, and, subject to the payment of his debts and funeral expenses, he gave the specified property to them on the condition above stated and the residue of his estate to his wife. The testator died on May 21, 1937, leaving his wife and two sons surviving him. John Henry North died on Jan. 1, 1951, and the question arose whether William Leonard North held the legal estate of the property in question on trust as to one moiety for the personal representative of John Henry North.

Bathurst for the plaintiff, William Leonard North.

J. A. Brightman for the defendant, the personal representative of John Henry North.

WYNN-PARRY, J.: The question which I have to decide arises on a home-made will, the relevant part of which is contained in the bequest by the testator to his two sons, William Leonard North and John Henry North, of two properties, which are specified,

" . . . (or if sold during my lifetime such balance of the proceeds of such sale as is in my possession at the date of my death) in each case subject to any mortgage that may be charged on such property at the date of my death . . . "

If the matter stopped there, no doubt, it would be very difficult to come to any other conclusion than that on its true construction that provision in the will

created joint tenancies in favour of the two sons, because up to that point it is difficult to discover any context which could produce the result that, as opposed to joint tenancies, there was a tenancy in common. The will goes on in these words:

" . . . on condition that they agree to pay in equal shares to my wife Mary Emily North for the remainder of her life after my decease the sum of 10s. per week."

The debate has turned on the question whether the language of that condition is sufficient to provide the necessary context to conclude that the interest of the sons is a tenancy in common instead of a joint tenancy. In *Robertson v. Fraser* (1) LORD HATHERLEY, L.C., said (6 Ch. App. 699):

" I cannot doubt, having regard to the authorities respecting the effect of such words as ' amongst ' and ' respectively ', that anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy, and to create a tenancy in common. Perhaps it would have been well if the courts had held that in bequests, as in partnerships, every community of interest was to be considered a tenancy in common."

Having regard to the context in which those words were used in that judgment, in my view, LORD HATHERLEY, L.C., was intending his remarks to be of general application, and they were designed to do no more than to state what he regarded as an existing well-established general rule.

The question then arises: Do these words " on condition that they agree to pay in equal shares to my wife " constitute a sufficient pointer to the conclusion that the gift creates a tenancy in common ? It being conceded that their effect is to create a personal obligation on each of the sons, counsel for the defendant pointed out that, if any other conclusion were arrived at than that the interest of the sons in the property was a tenancy in common, the odd result would arise that on the death of one of them—and it is the death of John Henry North that has raised this question—the interest in the property would be vested solely in the survivor, whereas the estate of the deceased would be or might continue to be liable to make one half of the weekly payment to the widow. That appears to me to be a result which enables me to say that on the true construction of this will the interest of the two sons in the property in question was a tenancy in common and not a joint tenancy.

As counsel for the defendant rightly remarked, it is very seldom that, in a case involving the construction of a will, authorities are of any direct help apart from the expression of some general principle, but it so happens that his researches have led to his citing to me *Kew v. Rouse* (2), decided in 1685, in which the facts are almost on all fours with the facts in this case. The report is as follows (1 Vern. 353):

" The plaintiff's wife, whose administrator he is, and the defendant's wife were the two daughters of Elizabeth Wise, who being possessed of a term for years, in April, 1679, devised that term and all her interest therein unto her two daughters, they paying yearly to her son £25 by quarterly payments, viz., each of them £12 10s. yearly out of the rents of the premises during his life, if the term so long continued. The plaintiff's wife being dead, the defendant claims the whole by survivorship; and whether it was a joint tenancy or a tenancy in common was the question. The Lord Chancellor conceived it clearly to be a tenancy in common; for that £25 per annum was to be paid by the two daughters equally in moieties; and decreed an account of the moiety of the profits to the plaintiff, as administrator to his wife."

The only possible suggested ground of distinction was that in the devise the direction to pay was to pay out of the rents of the premises, but that does not appear to me to form a sufficient ground for any attempted distinction between that case and the case now before me because in both cases the obligation was a personal obligation on each of the devisees. Indeed, from the very short report of the ground on which the Lord Chancellor based his decree it would not appear that he necessarily rested any weight on the circumstance that the £25 was to come out of the yearly rents. The language of the report is "for that £25 per annum was to be paid by the two daughters equally in moieties". If, therefore, any authority were required to support the conclusion to which I arrive as a matter of construction and plain common sense, it is to be provided by that case. Therefore, I propose to answer the question in the sense that on the true construction of the will the interest of the two sons was a tenancy in common, not a joint tenancy.

Order accordingly.

Solicitors: *Payne, Hicks Beach & Co.*, agents for *Day & Son*, St. Ives, Hunts. (for the plaintiff); *Field, Roscoe & Co.*, agents for *Batten & Whitsed*, Peterborough (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

CHORLTON v. CHORLTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), February 20, 1952.]

Justices—Husband and wife—Maintenance—Discharge of order—Adultery—Sexual intercourse by former wife after dissolution of marriage—No evidence that alleged intercourse occurred with married man—Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 7.

On Mar. 28, 1947, the wife was granted by justices a maintenance order against her then husband. On Jan. 9, 1950, the marriage was dissolved, but the maintenance order was allowed to stand. On Dec. 7, 1951, the husband applied to the justices to discharge the order on the ground of his former wife's adultery with a named man, but he adduced no evidence that this man was married at the time of the alleged adultery.

HELD: unless it were proved that the man with whom the former wife was alleged to have committed adultery was married at the material time, any sexual intercourse which might have occurred between them could not constitute an act of adultery, and, therefore, the maintenance order would continue in the former wife's favour.

Abson v. Abson (ante, p. 370), applied.

AS TO DISCHARGE OF MAINTENANCE ORDER, see HALSBURY, Hailsham Edn., Vol. 10, p. 843, para. 1345; and FOR CASES, see DIGEST, Vol. 27, pp. 565, 566, Nos. 6237-6250, and Digest Supps.

Cases referred to:

- (1) *Bragg v. Bragg*, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest 565, 6242.
- (2) *Abson v. Abson*, [1952] 1 All E.R. 370.

APPEAL by the husband against the dismissal on Dec. 7, 1951, by the Stoke-on-Trent justices of his application to discharge an order for maintenance made in favour of his wife on Mar. 28, 1947.

M. E. Holdsworth for the husband.

Fife for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from the dismissal by the justices for Stoke-on-Trent on Dec. 7, 1951, of his application to discharge a maintenance order in favour of the wife made on Mar. 28, 1947, on the ground of his desertion. The marriage between the spouses was dissolved by decree absolute on Jan. 9, 1950, on the ground of the husband's adultery, there being no prayer for the exercise of the discretion on the part of the wife. Notwithstanding the decree absolute, the maintenance order has been allowed to stand by virtue of the decision in *Bragg v. Bragg* (1), which settled that the mere fact that a marriage has been dissolved does not automatically discharge a subsisting order.

The present application was based on an allegation that the wife had committed adultery with a named man. The justices ruled, in effect, that, though there had been opportunity, there was no evidence of guilty affection, and they dismissed the application. It now appears, however, that there was a more fundamental reason for the dismissal of the application, namely, that there was no evidence that at the material time the man in question was married. In other words, the case was put on the ground that because the wife had been a wife, because a wife can commit adultery, and because an order in favour of a former wife can be kept alive under the authority of *Bragg v. Bragg* (1), it follows as a matter of law that a former wife, as if she were a wife, can commit adultery even with a single man. In the recent case of *Abson v. Abson* (2) it was proved that the paramour was a married man and it was sought to argue that because a wife had been divorced she could not commit adultery, even if she was having sexual relations with a married man. We took the view that, whether or not that argument was acceded to, the wife should be left to whatever rights she had in the Divorce Court.

I am not prepared to accede to the view that a husband can establish adultery against his former wife by proof that she has had sexual intercourse with a man without proving that that man was married at the material time. For that reason we have not thought it necessary to consider the weight of the evidence which was adduced to show that sexual intercourse took place between these persons. This appeal, therefore, fails and must be dismissed.

KARMINSKI, J.: I agree.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker*, agents for *G. H. Morgan & Sons*, Shrewsbury (for the husband); *Doyle, Devonshire & Co.*, agents for *Moxons*, Hanley, Stoke-on-Trent (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

TYMANS, LTD. v. CRAVEN.

[[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), February 13, 14, 22, 1952.]

Company—Registration—Restoration to register—Validation of acts done on its behalf before restoration—Application for new tenancy under Leasehold Property (Temporary Provisions) Act, 1951—Companies Act, 1948 (c. 38), s. 353 (6).

On Nov. 10, 1950, a company was struck off the register under the Companies Act, 1948, s. 353 (5). On July 23, 1951, an application was made on behalf of the company under the Leasehold Property (Temporary Provisions) Act, 1951, Part II, for the grant of a new tenancy of a shop. In the circumstances of the case the last day on which such an application on behalf of the company could have been made was July 24, 1951. On Oct. 15, 1951, on the company's application to the Vice-Chancellor of the County Palatine of Lancaster, the company's name was restored to the register under s. 353 (6) of the Act of 1948, the order, following the words of the sub-section, providing that, on an office copy of the order being delivered to the registrar, "the company shall be deemed to have continued in existence as if its name had not been struck off". On Oct. 31, 1951, the company's application under the Act of 1951 was heard, but the county court judge held that the Vice-Chancellor's order did not have a retro-active effect, and that, the time for making such an application having expired, the company could not ratify the application made on its behalf during the period of its dissolution. He, therefore, dismissed the application. On appeal,

HELD (JENKINS, L.J., dissentiente): the effect of the provision in s. 353 (6) that the company should be "deemed to have continued in existence as if its name had not been struck off" was not only that the corporate existence of the company was preserved, but was also retro-active so that at the date of the hearing of the application on Oct. 31, 1951, the company was to be regarded as never having been dissolved and it was not open to the landlord to object that no application had been made on behalf of the company on July 23, 1951, merely by reason of the company's having been struck off the register.

Morris v. Harris ([1927] A.C. 252), distinguished.

Per SIR RAYMOND EVERSLED, M.R.: The final words of s. 353 (6) can properly and usefully be regarded as intended to give the court, where justice requires and the general words [by which the company is deemed to have continued in existence] would or might not themselves suffice, the power to put both the company and third parties in the same position as they would have occupied in such cases if the dissolution of the company had not intervened.

AS TO RESTORATION TO THE REGISTER, see HALSBURY, 1949 Edn., Vol. 5, pp. 886-888, paras. 1475, 1476.

Cases referred to:

- (1) *Morris v. Harris*, [1927] A.C. 252; 96 L.J.Ch. 253; 136 L.T. 587; Digest Supp.
- (2) *Dibbins v. Dibbins*, [1896] 2 Ch. 348; 65 L.J.Ch. 724; 75 L.T. 137; 1 Digest 402, 1026.

APPEAL by the plaintiffs, Tymans, Ltd., from an order of His Honour JUDGE FRASER HARRISON made at St. Helens and Widnes County Court on Oct. 31, 1951, dismissing an application purporting to have been made by the company for the grant to it by the landlord, Walter Craven, of a new tenancy of a lock-up shop under the provisions of the Leasehold Property (Temporary Provisions) Act, 1951, on the ground that he had no jurisdiction to entertain the application.

Caplan for the company, *Tymans, Ltd.*
S. Pascoe Hayward, Q.C., and *Bingham* for the landlord.

Cur. adv. vult.

Feb. 22. The following judgments were read.

SIR RAYMOND EVERSLED, M.R.: This appeal raises a short question of the construction of a few words in the Companies Act, 1948, s. 353 (6):

"... the company shall be deemed to have continued in existence as if its name had not been struck off . . ."

The phrase is of respectable ancestry, being derived from earlier legislation relating to limited liability companies since before the beginning of the present century, but it has never been the subject of judicial interpretation, save, incidentally, in *Morris v. Harris* (1).

The facts are simple and undisputed. On July 23, 1951, an application in proper form was made in the appellant company's name for the grant of a new tenancy of certain premises pursuant to the provisions of the Leasehold Property (Temporary Provisions) Act, 1951. July 23, 1951, was the last day but one on which such an application on the part of the company might in the circumstances be made. The respondent, Craven, is the person entitled to the premises subject to such rights as the company may have under the Act as his previous tenant. At the date of the application the name of the company had, in fact, been struck off the register pursuant to s. 353 (5). The company had, therefore, on that date been dissolved and was non-existent. The hearing of the application in the company's name did not take place till Oct. 31, 1951. In the meantime, on an application duly made to the Vice-Chancellor of the County Palatine of Lancaster pursuant to s. 353 (6), an order had been made (in the absence, in fact, of Mr. Craven, who had had no notice of the application) restoring the company's name to the register. The form of the order followed the language of the sub-section and contained a declaration that on an office copy of the order being delivered to the registrar

"the company shall be deemed to have continued in existence as if its name had not been struck off."

Nothing on the present appeal turns on the condition nor on the form of the order, which contained no special terms affecting the present question. On the application coming before the learned county court judge, Mr. Craven took the point that the order made by the Vice-Chancellor did not have retro-active effect, nor did it enable the company effectively to ratify the application made in its name during the period of its dissolution, since the time for making such an application expired on July 24. This question was tried as a preliminary issue by the judge, who accepted Mr. Craven's contention and dismissed the company's application accordingly.

If the words which I have quoted stood alone, the question, as a matter of plain English, would appear at first sight to be simple. A limited liability company cannot act, save through agents. At the time of the making of the application the company's agents—its directors—had no authority so to act because (but only because) the company had been struck off the register and did not, therefore, exist. But the words I have quoted provide clearly, on the face of them and without qualification, that

"the company shall be deemed to have continued in existence *as if* its name had not been struck off."

On the hypothesis, therefore, which the statute requires, it would appear to follow that on the hearing of the application on Oct. 31, 1951, Mr. Craven's objection could no longer be taken, for the ground of that objection—viz., that on July 23, 1951, the company's name had been struck off the register—had, by the terms of the statute and the order made thereunder, been taken

away. But the sub-section does not end with the quoted phrase. After a semi-colon it continues

“ . . . and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.”

The argument of Mr. Craven is that the addition of this further and (as it is said) expository sentence substantially qualifies the effect of the phrase that precedes it, so that the latter does no more than preserve the continuance of the company's corporate existence without validating *ex post facto* any acts done in the company's name during the period of its temporary dissolution. In accepting this view, the county court judge applied, and relied on, the speech of LORD BLANESBURGH in *Morris v. Harris* (1) already noticed.

The last named case was concerned with the effect, not of s. 353 (or its predecessor), but with the predecessor of s. 352. It will, therefore, be convenient at this stage to set out the relevant parts of both s. 352 and s. 353. Section 352 (1) provides:

“ Where a company has been dissolved, the court may at any time within two years of the date of dissolution, upon an application [as there specified] make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.”

The second sub-section is immaterial for present purposes. Section 353 (1) provides:

“ Where the registrar of companies has reasonable cause to believe that a company is not carrying on business or in operation, he may send to the company by post a letter inquiring whether the company is carrying on business or in operation.”

Sub-section (2) makes provision for the sending by the registrar of a second letter if no answer is received by him to the first; and by sub-s. (3):

“ if the registrar either receives an answer to the effect that the company is not carrying on business or in operation or does not . . . ”

receive an answer to his second letter, he is authorised to take certain further administrative steps. Sub-section (4) makes the section applicable to the case of a company in the course of being wound-up where the registrar has reasonable cause to believe there is no liquidator acting, or where, the company's affairs having been fully wound up, no returns have been made as therein mentioned. By sub-s. (5):

“ At the expiration of the time mentioned in the notice [referred to in sub-s. (3)] the registrar may . . . strike [the company's] name off the register, and shall publish notice thereof in the Gazette and on the publication in the Gazette of this notice the company shall be dissolved.”

Sub-section (6) provides:

“ If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiration of twenty years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court

may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off."

This sub-section first appeared in substantially the same form in the Companies Act, 1880, s. 7, the only material difference being that in the earlier Acts up to and including the Act of 1908 the words "and thereupon" appeared immediately before the general words here in question in lieu of the present phrase

"and upon an office copy of the order being delivered to the registrar for registration."

The difference in the terminology between the latter part of s. 353 (6) and that at the end of s. 352 (1) (which was first introduced into the legislation in 1907) is marked, and has been, naturally, much relied on by counsel for the company who has also sought support for his argument in *Morris v. Harris* (1). The difference in form and language is, indeed, in my judgment, of the highest importance, and it is derived, at least in part, from the fact that the two sub-sections are dealing with different and distinct sets of circumstances. Section 352 (1) is applicable to cases where, under one or other of the earlier provisions of the Act (s. 274, s. 290 and s. 300) the company has been dissolved as a consequence of winding-up, either compulsory or voluntary. *Ex hypothesi*, there can be no question of the company having since dissolution conducted trading or business operations. An obvious purpose of the sub-section is to enable proper provision to be made in regard to some asset or liability newly come to light or for some other reason not taken into account in the winding-up. Section 353 (6) applies, on the other hand, where (subject to one qualification) there has been no winding-up. The qualification arises from sub-s. (4) of the section which makes it applicable to the case of a winding-up where the registrar has cause to believe that there is no liquidator acting, or that the winding-up has not properly proceeded, but those special circumstances have the practical result that the qualification is really not a qualification at all, for, *ex concessis*, the winding-up has not been completed, and the company has not, therefore, been dissolved as a consequence of liquidation. Section 353 (6) is, no doubt, primarily directed to the case where a formal end has been put to a company which has in practice become defunct or lapsed into inanition. But the earlier provisions of the section provide an effective sanction for failure to comply with the statutory obligations on a limited liability company as to making returns, etc. The section is, therefore, specifically directed (and the sub-section in its original form in the Act of 1880 was exclusively applicable) to cases, like the present, where a company which has failed in the performance of its statutory duties had, nevertheless, continued to trade and to transact business and, necessarily as a consequence, entered into numerous engagements with third parties.

Morris v. Harris (1) (on which, as I have already said, the county court judge relied, and to which both parties before us have turned for succour) raised the question whether the words in s. 223 (1) of the Companies (Consolidation) Act, 1908, the statutory predecessor of s. 352 of the Act of 1948 "... declaring the dissolution to have been void" had, as it were, full retro-active effect so as to enable the respondent to claim against the liquidator of a resuscitated company a sum awarded to him during the period of its dissolution. The Court of Appeal (reversing the decision of ROMER, J.) so held; but the House of Lords, by a majority of three to two, came to an opposite conclusion in what must be admitted to have been a point of serious doubt. The basis of the opinion of the majority of the noble Lords was that the final words of the sub-section introduced by the words "and thereupon" were expository of the preceding generalisation, and that these two introductory words "and

thereupon" showed that the consequences flowing from the company's re-animation and specified in the final words of the sub-section only took effect from the date of the order of restoration. Three passages, one from the speech of LORD SUMNER, and two from the speech of LORD BLANESBURGH, being those relied on by the county court judge and by counsel for Mr. Craven in this court, must be cited. LORD SUMNER said ([1927] A.C. 257):

"The next question turns on the language and effect of s. 223 of the Companies (Consolidation) Act, 1908 [the predecessor of s. 352 of the Act of 1948]. It deals with the case of a company which has been dissolved, and that at an ascertained or ascertainable date . . . Nor, again, is the phraseology of s. 242 [the predecessor of the present s. 353] followed, whereby, when the registrar has reasonable cause to believe certain things and has taken certain action, ending in the erasure of the company's name from the register and a publication of the fact in the Gazette, the company thereupon 'shall be dissolved'. Under this section, when the court intervenes by order to modify this result, 'the company shall be deemed to have continued in existence, as if its name had not been struck off', and then the court can give directions to replace the company and all parties affected in an 'as you were' position."

LORD BLANESBURGH said (*ibid.*, 267):

"First of all, a company treated as defunct by the registrar in the circumstance stated in s. 242, may by him be struck off the register under that section, 'and the company will be dissolved.' It must be noted that in this case the dissolution takes place without any previous winding-up, and may be effected without anyone interested in the company in fact being aware of it."

The noble Lord then sets out s. 242 (6), which is in the same terms (so far as material) as the present sub-section, and he put in italics what I have called the general words and the final sentence. He continued (*ibid.*):

"My Lords, this section first appeared in company legislation in s. 26 of the Companies Act, 1900.* It was before the legislature when s. 223 was first enacted in 1907. It will appear in a moment how significant is the fact that the provisions of s. 242 (6), which I have italicised, are not repeated in s. 223."

That section is not concerned with a dissolution of a company following a winding-up by the court, or one following a voluntary winding-up, the second and third of the events which may precede a dissolution. LORD BLANESBURGH then discusses the history of s. 223 of the Act of 1908 and states the inferences which he derives from its terms. He adds finally (*ibid.*, 269):

"And now is made apparent the reason for the difference in phraseology and effect between s. 223 and s. 242 (6). A dissolution under s. 242, as I have said, is preceded by no winding-up, and the section had to envisage a dissolution which might have taken place without the knowledge of anyone concerned in the company. Hence the wide powers given to the court by sub-s. (6). Section 223, on the other hand, is confined to cases where the dissolution succeeds the complete winding-up of the company's affairs and cannot take effect at all except at the instance or with the knowledge of the liquidator, the company's only executive officer. The legislature has not seen fit to make provision for validating any intermediate acts done on behalf of such a company so dissolved."

The argument for Mr. Craven in the present case is that the very different words of s. 353 (6) must be similarly construed, with only this difference, that

* This appears to be incorrect: see s. 7 of the Act of 1880.

the final words of the sub-section here in question, though similarly "expository" of the preceding generality, empower the court making the order of restoration to give, quoad any particular transaction or series of transactions, appropriate directions so as to make the restoration retro-active as regards that transaction or series of transactions. I agree with counsel for Mr. Craven that, if the effect of the sub-section is not retro-active, but only enables the company from the date of the Vice-Chancellor's order to ratify acts done during the period of inanition in its name, the result does not enable the company to succeed, for, as I have already stated, the last date available to the company for making an application under the Leasehold Property (Temporary Provisions) Act, 1951, was July 24, 1951, and on that date (on this view of the matter) the company was non-existent and is not to be deemed to have been otherwise. On the other hand, I cannot accept the argument which counsel for Mr. Craven first put forward, that s. 353 (6) was retro-active to the extent of validating what he called "internal" acts done in the company's name but not "external" acts, that is, acts done, or purporting to be done, in relation to third parties. The line between the two kinds of activity would not, as it seems to me, always be easy to draw, but, beyond (or, perhaps, in part, because of) that difficulty, I have found it impossible to formulate the qualification that would have to be read into the general words of the sub-section, or to find any satisfactory basis for holding that those general words were in this sense retro-active to a limited extent only. In my judgment, if Mr. Craven is entitled to succeed it must be on the ground that the (very different) wording of s. 353 (6) has (in the absence of some special directions given under the power contained in the final sentence) the same effect as the language of s. 352 (1), i.e., that the general words serve only (in the absence of such direction) to preserve the continued corporate existence of the company, without more, so as only thereby to circumvent those calamitous consequences which would otherwise flow from the hiatus in the company's life and which LORD BLANESBURGH regarded with such horror, but did not exactly specify, for example (as I take it) that the company would have to be regarded as being for the second time incorporated.

In my judgment, the wording of s. 353 (6) is not apt to achieve the same result as that which flows from the language of s. 352 (1). The final sentence of the former, following the semi-colon, cannot, as I think, properly be regarded as "expository" of that which precedes, as is the case with the final sentence of s. 352 (1), which, by the introductory "and thereupon", denotes the consequences which, on the making of the order of restoration, flow from that fact, viz., that from the date of the order (but not before)

"such proceedings may be taken as might have been taken if the company had not been dissolved."

Section 353 (6) contains no statement at all of any such consequences; the final sentence confers a special power to add where necessary to the order of restoration special directions designed to achieve something wholly different, viz., a putting back of the clock, an achieving of what LORD SUMNER called an "as you were position" between the company and third parties. Yet the consequences expressed in the last sentence of s. 352 (1) must in any event (I assume) be deemed to flow from an order under s. 353 (6). If the latter sub-section was intended to achieve, in law, the same result as the former (though with the addition implicit in the power to give special directions) it seems to me (to say the least) a strange and misleading piece of draftsmanship that such widely different formulae should have been chosen. And I attach, for myself, considerable significance to the absence of the words "and thereupon" or any similar language. If on the power contained in the final words of the sub-section in question to insert special directions in the order of resuscitation depended the validation of all the multifarious engagements into which the dissolved company might have entered during the period of its statutory

suspense (a period which might have lasted for twenty years), what would be the appropriate procedure? Prima facie, all the third parties concerned would have to be given an opportunity of making representations to the court, a proceeding which I find it well nigh impossible to contemplate. On the other hand, some sensible content must be given to the final words of the sub-section, and this problem at first seemed to me to create a difficulty in the company's way. Without, however, attempting to define the scope of the words exhaustively, counsel for the company was able to give instances in answer to the question put to him. During the period of the company's suspended animation, the company, as well as third parties, might well have abstained from taking those steps—a step in an action, or the exercise of some contractual right—for which the proper time might have in the meantime expired. In my judgment, the final words of the sub-section can properly and usefully be regarded as intended to give to the court, where justice requires and the general words would or might not themselves suffice, the power to put both company and third parties in the same position as they would have occupied in such cases if the dissolution of the company had not intervened. More generally the final words of the sub-section seem to me designed not, by way of exposition, to qualify the generality of that which precedes them, but rather as a complement to the general words so as to enable the court (consistently with justice) to achieve to the fullest extent the “as you were position”, which, according to the ordinary sense of those general words, is prima facie their consequence.

As appears from the passages which I have cited from the speeches in *Morris v. Harris* (1), the majority of their Lordships derived considerable support for their view of the qualified effect of the general words in what is now s. 352 (1) from the contrast between the language of that sub-section and the language now under discussion. I find it difficult to regard such reasoning as consistent with the suggestion that the general words in s. 353 (6) are as qualified as those of s. 352 (1). Their Lordships seized rather on the characteristics of the latter sub-section which were different and distinct from those of the former as deliberately intended, especially since the predecessor of s. 352 first made its appearance considerably later in date than did the predecessor of s. 353, to give to s. 352 (or its forerunner) a more limited effect. It is true that both LORD SUMNER and LORD BLANESBURGH appear to have placed special emphasis on the final sentence of what is now s. 353 (6), though LORD BLANESBURGH'S italics extended not only to that final sentence, but also to the preceding generalisation. But the House was concerned only with the effect of the words now contained in s. 352 (1), and was not called on to examine or precisely to construe the language which is the subject of the present appeal.

It may be said that on any view the sub-section is not very happily drafted. It contemplates, for example, that the application for an order for restoration may be made by the company at a time when the company had been dissolved and is non-existent: see the note in PALMER'S COMPANY PRECEDENTS, 15th ed., vol. 1, at p. 1159. But, as I have already stated, the sub-section is in terms directed to the case (like the present) when during the period, possibly of long duration, of the company's dissolution, many acts will have been done and many engagements entered into by individuals purporting to act as directors or officers of the company and in its name. In this regard the sub-section operates in reference to circumstances wholly different from the circumstances relevant to an order under s. 352, and such as make it at least reasonable and sensible to expect that the re-animation of the company should be retro-active in its effect. Whatever, then, might have been the situation if the present application had come before the county court judge before the order of restoration—and in such event it is possible (though I do not so decide) that the Vice-Chancellor could, had he thought it just after hearing Mr. Craven, have included some special direction to his order under the final words of the sub-section—

it seems to me that on Oct. 31, 1951, it was no longer open to Mr. Craven to allege the non-existence of the company on the preceding July 23, for, by the terms of the sub-section, the company had then to be deemed to have continued in existence as if its name had never in fact been struck off the register.

I have expressed my conclusion, contrary to that entertained by the county court judge, with the greater diffidence having regard to the dissenting judgment of JENKINS, L.J., which I have had the advantage of reading. But I am comforted by the support of HODSON, L.J., and by the intimation of a like opinion expressed by the learned editors of the last two editions of BUCKLEY ON THE COMPANIES ACTS, 12th ed. (1949), p. 705; 11th ed. (1929) p. 596) and, according to his preface to the 11th ed., LORD WRENBURY (who participated, though he formed one of the minority, in the House of Lords case of *Morris v. Harris* (1)) was able to give some assistance in that editing. In my judgment, the appeal should be allowed, and the case remitted accordingly to the county court judge for determination of the company's application on its merits.

JENKINS, L.J.: It is common ground that under the relevant provisions of the Act of 1951 the latest date on which an application by the company for the grant of a new tenancy of the shop in question could be made was July 24, 1951, and that any application made after that date would be irremediably out of time and wholly ineffective for the purpose of founding proceedings under the Act. It is also common ground that in November, 1950, the Registrar of Companies, pursuant to the provisions of the Companies Act, 1948, s. 353, struck the name of the company off the register and published notice thereof in the LONDON GAZETTE, whereupon the company was dissolved as provided by sub-s. (5) of the same section. Nor is it disputed that the company, having been thus dissolved, remained in a state of dissolution down to Oct. 15, 1951, on which date an order was made by the Vice-Chancellor of the Palatine Court of Lancaster restoring the name of the company to the register under the Companies Act, 1948, s. 353 (6). The application which the learned county court judge had before him was an application purporting to have been made by the company on July 23, 1951, and was admittedly a nullity at the time when it was made, inasmuch as the company was then in a state of dissolution or, in other words, non-existent. The statutory period within which an application for the grant of a new tenancy of the shop in question was capable of being made under the Act of 1951 having expired on July 24, 1951, and no valid application (which is as much as to say no application at all) for that purpose having been made within that period, the result, *prima facie*, was that thereafter Mr. Craven became and remained free to deal with his interest in the shop as he chose, discharged once and for all from the possibility of being compelled to grant a new tenancy to the company under the relevant provisions of the Act of 1951. It is, however, contended on the part of the company that this conclusion is displaced by the circumstance that the purported application of July 23, 1951, originally fixed for hearing on Sept. 6, 1951, was adjourned by consent and not in fact heard by the learned county court judge until Oct. 31, 1951, by which time the learned Vice-Chancellor had already made the order of Oct. 15, 1951, restoring the company's name to the register. Admittedly, if the application had been heard by the learned county court judge at any time before Oct. 15, 1951, or (to be strictly accurate) at any time before the delivery to the Registrar of Companies for registration of an office copy of the Vice-Chancellor's order of that date, he would have had no option but to dismiss it. But it is argued by counsel for the company that on the true construction of the Companies Act, 1948, s. 353 (6), the effect of the learned Vice-Chancellor's order when perfected by delivery for registration (as counsel for Mr. Craven concedes it to have been before Oct. 31, 1951) was *ex post facto* to convert the invalid application of July 23, 1951, into a valid application duly made by the company on the same date, and consequently into a valid application duly

made by the company within the time allowed by the relevant provisions of the Act of 1951. It follows (says counsel for the company) that on Oct. 31, 1951, the learned county court judge, by force of the Companies Act, 1948, s. 353 (6), and the order made thereunder had before him a valid application made within due time for the grant of a new tenancy, which he should have heard and determined on its merits instead of dismissing it, as he did, on the ground of a supposed want of jurisdiction. Of course it also follows, if counsel for the company is right, that Mr. Craven, who under the Act of 1951 was at risk of being compelled, in derogation of his common-law rights, to grant a new tenancy if, but not unless, application was duly made on or before July 24, 1951, might in the result be compelled to do so upon an application which, so far from being duly made within the prescribed period, in fact was at the date of its purported making, and thereafter for more than two months beyond the expiration of the prescribed period remained, a mere nullity, and for the first time acquired validity on the making and delivery for registration of the order of Oct. 15, 1951.

As this, to my mind, strange and startling result is said to flow expressly, or by necessary implication, from the language of the Companies Act, 1948, s. 353 (6), that sub-section had better be read in full.

“If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the court on an application made by the company or member or creditor before the expiration of twenty years from the publication in the Gazette of the notice aforesaid may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon an office copy of the order being delivered to the registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.”

It will be seen (i) that the effect of the making and delivery for registration of an order under the sub-section is expressed to be that the company shall be deemed to have continued in existence as if its name had not been struck off; and (ii) that the sub-section goes on to provide that the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off. No such directions or provisions were made by the learned Vice-Chancellor's order in the present case. It will further be observed that an application under the sub-section may be made at any time before the expiration of twenty years from the publication in the Gazette of the striking off of the company's name from the register.

Counsel for the company fastens on the provision that

“the company shall be deemed to have continued in existence as if its name had not been struck off”,

and argues thus: If the company in the present case had continued in existence, and not been struck off, the application purporting to have been made by the company on July 23, 1951, would have been an application in fact made by the company on that date, and thus would have been a valid application duly made by the company within the time prescribed by the Act of 1951. Therefore (he submits), sub-s. (6), if not expressly, at all events by necessary implication, provides not merely that the company is to be deemed to have continued in existence as if its name had not been struck off, but also (as a necessary consequence of, or corollary to, that hypothesis) that the company

is to be deemed further to have made, as a valid act of its own, the purported application of July 23, 1951, on the date of its purported making. I do not think the conclusion is warranted by the premise. The purported application at the time of its making was in fact wholly invalid, because it was not, and could not be, validly made by or on behalf of the company, inasmuch as the company was then in a state of dissolution or, in other words, non-existent. True it is that the company is to be deemed to have continued in existence as if its name had not been struck off. But the hypothesis enjoined in these terms does not alter the vital circumstance that the purported application was not in fact made by or on behalf of the company. Moreover, the company could clearly have continued in existence without making any such application, and the hypothesis of its continued existence, therefore, by no means requires that it should be deemed to have done so.

I have so far stated the argument on the Companies Act, 1948, s. 353 (6), with reference to this particular case. But in general terms the submission of counsel for the company comes to this, that, whenever a company has been dissolved under the provisions of s. 353, an order under sub-s. (6) restoring its name to the register at any distance of time up to twenty years has the automatic, indiscriminate, and retrospective effect of validating all acts and things purporting to have been done by or on behalf of the company during its state of dissolution without any protection for the rights of other persons. Speaking for myself, I decline to attribute any such effect to sub-s. (6) in the absence of clear words requiring me to do so, and for my part I can find no such words in the language of the sub-section. The retrospective import of the provision that the company shall be deemed to have continued in existence as if its name had not been struck off is, to my mind, amply satisfied by the necessity of restoring the company to its original corporate status and preserving its identity as the same company and the same legal person as was previously dissolved. Otherwise obvious difficulties as to incorporation, membership, share capital, and so forth, would arise, and if the resuscitated company was brought into being as a legal entity distinct from the dissolved one, claims by and against the resuscitated company in respect of the pre-dissolution dealings of the dissolved company would not be maintainable. I see no justification for holding that the notional continuation of the company's existence retrospectively brought about by the sub-section does any more than restore and preserve for reasons such as I have mentioned the corporate existence and identity of the company. If that is right, I cannot see that it follows by necessary implication from the language used, or as a legal consequence of the hypothetical state of facts which the sub-section requires to be assumed, that all acts purporting to have been done by or on behalf of the company during the period of its dissolution are to be deemed by force of the section to have been, and to be, valid acts of the company. It would be difficult, indeed, to define with any degree of precision the scope of this suggested validation. While in a state of dissolution the company is non-existent. It can do nothing. It can have no directors, managers, agents or members. When an order is made for restoration of the company's name to the register, whose acts done in the meantime are to qualify for automatic validation as acts of the company? The answer, I suppose, must be the acts of any person or persons who, if the company had not been in a state of dissolution, would have had authority to bind the company in those particular matters. But how are the persons answering this hypothetical description to be identified? Dissolution for a period of, perhaps, as much as twenty years is envisaged. Cases may occur in which a company has been struck off the register, but all the necessary procedure as to the appointment of directors, general meetings, and so forth, is, nevertheless, carried on as if it had not been struck off. In such cases there would be no difficulty in identifying the persons who, if the company had not been struck off, would

have had power to bind it. I conceive, however, that such cases would be rare. There may also be cases in which directors in office at the time of the striking off would, but for that event, have remained in office during the whole of the period of dissolution. Here, again, no difficulty would arise. But there must inevitably be many cases in which, during the whole or some part of the period of dissolution, the business of the defunct company was being carried on de facto by some person or persons without even a hypothetical vestige of authority, it may be to the grave detriment of pre-dissolution creditors. It would seem, therefore, that the suggested automatic validation of acts purporting to have been done by or on behalf of the company while in a state of dissolution must either extend even to acts of such de facto and wholly unauthorised managers as I have mentioned, or else be limited to the acts of persons answering a test of hypothetical authority by no means easy either to formulate or to apply. These considerations reinforce my conclusion that an order under sub-s. (6) does not automatically validate acts purporting to have been done by or on behalf of the company while dissolved.

Some reliance was placed in argument on the inconvenience which might result in the case of a company the business of which has in fact been carried on after its striking off if an order under sub-s. (6) does not have the effect of validating transactions taking place between striking off and restoration to the register. This argument (though, to my mind, balanced by the considerations against automatic validation to which I have already adverted) would have some force were it not for the concluding provision of sub-s. (6). That provision, to my mind, not only refutes the argument based on inconvenience, but also makes it reasonably plain that the provision as to the continued existence of the company does not have the validating effect contended for by counsel. For the company even if that effect might, as a matter of construction, have been attributed to it standing alone and divorced from the context provided by the remainder of the sub-section. It will be remembered that the concluding provision of sub-s. (6) is to the effect that the court may, by the order restoring a company's name to the register, give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off. The argument of counsel for the company, as I understood it, necessarily involves the corollary that, by force of the provision that the company is to be deemed to have continued in existence as if its name had not been struck off, the company and all other persons are automatically placed in the same position as if the name of the company had not been struck off, and that, accordingly, no room is left for any exercise of the discretionary jurisdiction conferred on the court for placing the company and all other persons as nearly as may be in that position. The concluding provision of the sub-section thus becomes to all intents and purposes otiose and inoperative. Counsel for the company showed considerable ingenuity in suggesting circumstances in which a useful purpose might have been served by the concluding provision in conjunction with the provision as to the continued existence of the company when given the construction and effect for which he contends. Nevertheless, he failed to satisfy me that the true construction and effect of the sub-section read as a whole is not simply that an order made under it: (i) operates to restore and preserve the original corporate status and identity of the company as if its name had not been struck off the register; (ii) may at the discretion of the court provide for the validation of acts purporting to have been done by or on behalf of the company while it has been in a state of dissolution so far as the court considers it just so to do, having regard to the rights and interests of all parties concerned; but (iii) does not, in the absence of any such provision as is mentioned in (ii) above, have the effect of validating any such acts. We were told that, as a matter of practice, orders made under sub-s. (6) do not

generally contain any such directions or provisions as are mentioned in the concluding lines of the sub-section. But this cannot affect the question of construction, and (it may fairly be added) it is probably true to say that in a majority of cases under sub-s. (6) the company is defunct de facto as well as de jure and the order for restoration is sought by some aggrieved creditor.

We were referred to only one authority bearing at all closely on the point at issue, viz., the House of Lords case of *Morris v. Harris* (1). In that case a company was dissolved at the conclusion of a voluntary liquidation for the purposes of reconstruction. The dissolution was later declared to have been void by an order made under the Companies (Consolidation) Act, 1908, s. 223, which corresponds to s. 352 of the present Act. The question was whether this order had the effect of making binding on the company an arbitration award pronounced against the company between the date of its dissolution and the date of the order. The House by a majority (VISCOUNT DUNEDIN, LORD SUMNER and LORD BLANESBURGH, LORD SHAW OF DUNFERMLINE and LORD WRENBURY dissenting) held that the order did not have this effect. The case has been relied on by both parties in the present appeal, but, to my mind, it tells strongly in favour of Mr. Craven. It turned, as I have said, on s. 223 of the Act of 1908 corresponding to s. 352 of the present Act. The relevant words of that section are:

"... the court may at any time within two years of the date of the dissolution ... make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

The terms of the provision which the House had to consider were thus materially different from those of s. 353 (6) of the present Act or of the corresponding s. 242 (6) of the Act of 1908. But in the course of the speeches a contrast was drawn between s. 223 (1) and s. 242 (6) of the Act of 1908 which applies equally as between s. 352 (1) and s. 353 (6) of the present Act. Counsel for the company submits that the terms in which this contrast was drawn indicate that their Lordships regarded an order under s. 242 (6) of the Act of 1908 (and hence would have regarded an order under s. 353 (6) of the present Act) as automatically validating acts purporting to have been done by or on behalf of a restored company while it was in a state of dissolution. I do not agree. LORD SUMNER, after referring to s. 223 of the Act of 1908 and discussing its terms, said ([1927] A.C. 257):

"Nor, again, is the phraseology of s. 242 followed, whereby, when the registrar has reasonable cause to believe certain things and has taken certain action, ending in the erasure of the company's name from the register and a publication of the fact in the Gazette, the company thereupon 'shall be dissolved.' Under this section, when the court intervenes by order to modify this result, 'the company shall be deemed to have continued in existence, as if its name had not been struck off', and then the court can give directions to replace the company and all parties affected in an 'as you were' position. The words 'to have been void', in s. 223, appear, it is true, so far as they go, to have some retrospective effect, and tend to some extent to support the respondent's argument. On the other hand, the remaining words, which define the order, point rather to a declaration removing a bar to such action as might otherwise have been taken, than to one validating past proceedings, taken since the dissolution through ignorance or disregard of it and consequently invalid. The remaining words, 'and thereupon such proceedings may be taken, as might have been taken if the company had not been dissolved', seem to me to point conclusively in the same direction. They describe an authority given to the parties concerned to do, 'thereupon' and accordingly thereafter, things

which they might have done but obviously had not done theretofore, and, but for the order, could not have done after the dissolution. I think these words do not affect the validity or the contrary of steps taken during that interval. They must still depend on the facts existing and the rights arising before and independently of the order."

Then LORD BLANESBURGH said (*ibid.*, 267):

"My Lords, the Companies (Consolidation) Act, 1908, makes the dissolution of one of its companies possible in three different events. First of all, a company treated as defunct by the registrar in the circumstance stated in s. 242, may by him be struck off the register under that section, 'and the company will be dissolved.' It must be noted that in this case the dissolution takes place without any previous winding-up and may be effected without any one interested in the company in fact being aware of it. Sub-section (6) of s. 242 accordingly provides . . . [and his Lordship then read the section, italicising its terms from this point,] '*and thereupon the company shall be deemed to have continued in existence as if its name had not been struck off; and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.*' My Lords, this section first appeared in company legislation in s. 26 of the Companies Act, 1900. It was before the legislature when s. 223 was first enacted in 1907. It will appear in a moment how significant is the fact that the provisions of s. 242 (6), which I have italicised, are not repeated in s. 223."

The same learned Lord further said this (*ibid.*, 268):

"In these circumstances, I cannot myself doubt that both the words of s. 223 empowering the court to make an order 'declaring the dissolution to have been void', and the following words expository of the result, 'and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved', were in each case designedly chosen to produce the precise result which my noble and learned friend has attributed to them. It is true that a declaratory order under the section unqualified in terms does, and it was in my judgment essential, if many difficulties which readily occur to the mind were to be avoided, that such an order should have the effect of restoring to the revived company its corporate existence as from the very moment of the dissolution thereby declared 'to have been void'. But the expository words which follow carefully and, as I think, advisedly refrain from adding that such an order is to have the effect of restoring to the company from the same moment, not its corporate existence only, but its corporate activity also. On the contrary, these expository words import, as I think, that it is only after the order has been made—it is 'thereupon' but not before—that any active consequences are to ensue. I think, my Lords, that the terms in which these consequences are described are exhaustive and emphatic. They are intended to show that an order under the section made, it may be, as long as two years after a dissolution which up to that moment was completely effective, is not at once and as of course to ratify acts done during the interval, which, if done at all, must necessarily have been acts of mere usurpation, by a liquidator or other pretended agent with no office knowingly done on behalf of a company which had no existence. On consideration, it appears, I think, clear that automatically to validate such acts as being the acts of a duly constituted officer on behalf of a duly incorporated company might involve consequences too disastrous to be even envisaged. These are avoided by the terms of the section. The company is restored to life as from the moment of dissolution but, continuing a convenient

metaphor, it remains buried, unconscious, asleep and powerless until the order is made which declares the dissolution to have been void. Then, and only then, is the company restored to activity. And now is made apparent the reason for the difference in phraseology and effect between s. 223 and sub-s. (6) of s. 242. A dissolution under s. 242, as I have said, is preceded by no winding-up, and the section had to envisage a dissolution which might have taken place without the knowledge of any one concerned in the company. Hence the wide powers given to the court by sub-s. (6). Section 223, on the other hand, is confined to cases where the dissolution succeeds the complete winding-up of the company's affairs and cannot take effect at all except at the instance or with the knowledge of the liquidator, the company's only executive officer. The legislature has not seen fit to make provision for validating any intermediate acts done on behalf of such a company so dissolved."

It seems to me reasonably plain that in these passages their Lordships were not treating an order under s. 242 (6) of the Act of 1908 as having the effect of automatically validating acts done while the restored company was in a state of dissolution, but were contrasting the presence in s. 242 (6) of a power for the court (as LORD SUMNER put it)

"to replace the company and all parties affected in an 'as you were' position"

with the absence of any such power in s. 223 (1). In view of what LORD BLANESBURGH said (*ibid.*, 269) about the possibly disastrous consequences of automatic ratification, I cannot but think he would have made some comment on the automatic ratification produced by an order under s. 242 (6) if he had thought such an order would produce that result. Further, I think his contrast (*ibid.*, 268) between "corporate existence" and "corporate activity" is no less applicable to s. 242 (6) (now s. 353 (6)). I should add that LORD WREN-BURY in his dissenting judgment (*ibid.*, 263) uses language which by no means indicates that he would not have taken a different view on the entirely different facts of the present case.

Even if, contrary to my view, an order under s. 353 (6) does automatically validate acts purporting to have been done by or on behalf of the company while dissolved, I think it would be wrong in principle to regard such validation as extending to making retrospectively effective an application such as the one here in question, which could not have been effectively made by the company at the date of the order of restoration, because the time allowed for making it had by then already expired. In other words, I think the effect of any statutory ratification brought about by s. 353 (6) must at all events be limited by the principle stated in *Dibbins v. Dibbins* (2), which should be applied with reference to the facts as they stand at the date when the order of restoration is perfected by delivery for registration. For these reasons I would dismiss the appeal.

HODSON, L.J., stated the facts, read s. 353 (6) of the Act of 1948, and continued: It is conceded that the words in s. 353 (6) "the company shall be deemed to have continued in existence as if its name had not been struck off" have some retro-active effect, but the respondent, Mr. Craven, contends that their force is insufficient to bring to life such an application as was made by the applicants to the county court. It is necessary to compare s. 352 (1) with s. 353 (6). The last words of s. 352 (1) are markedly different from the words here to be considered. In particular, the words

"thereupon such proceedings may be taken as might have been taken if the company had not been dissolved"

are to be noticed. The predecessor of s. 352, viz., s. 223 of the Companies Act, 1908, was considered by the House of Lords in *Morris v. Harris* (1). The

House by a majority held that the section did not validate proceedings during the interval between dissolution and avoidance under that section: see LORD SUMNER's speech ([1927] A.C. 257). LORD SUMNER said (*ibid.*):

"The next question turns on the language and effect of s. 223 of the Companies (Consolidation) Act, 1908. It deals with the case of a company which has been dissolved, and that at an ascertained or ascertainable date. It provides for an order, which it empowers a court to make in all such cases, on such terms as the court may think fit (and therefore also without terms, if the court so thinks fit) 'declaring the dissolution to have been void.' Pausing here, I remark that the order is not expressed to be one setting anything aside or declaring that the dissolution is to be deemed not to have taken place and thus reversing the actual language of s. 195, or declaring the dissolution to be void. Nor, again, is the phraseology of s. 242 followed, whereby, when the registrar has reasonable cause to believe certain things and has taken certain action, ending in the erasure of the company's name from the register and a publication of the fact in the Gazette, the company thereupon 'shall be dissolved.' Under this section, when the court intervenes by order to modify this result, 'the company shall be deemed to have continued in existence, as if its name had not been struck off', and then the court can give directions to replace the company and all parties affected in an 'as you were' position. The words 'to have been void', in s. 223, appear, it is true, so far as they go, to have some retrospective effect, and tend to some extent to support the respondent's argument. On the other hand, the remaining words, which define the order, point rather to a declaration removing a bar to such action as might otherwise have been taken, than to one validating past proceedings, taken since the dissolution through ignorance or disregard of it and consequently invalid. The remaining words, 'and thereupon such proceedings may be taken, as might have been taken if the company had not been dissolved', seem to me to point conclusively in the same direction. They describe an authority given to the parties concerned to do, 'thereupon' and accordingly thereafter, things which they might have done but obviously had not done theretofore, and, but for the order, could not have done after the dissolution. I think these words do not affect the validity or the contrary of steps taken during that interval. They must still depend on the facts existing and the rights arising before and independently of the order."

Section 242 of the Act of 1908 is the predecessor of s. 353 of the present Act. The respondent, Mr. Craven, relies on the words of LORD SUMNER

"and the court can give directions to replace the company and all parties in an 'as you were' position"

as tending to support the view that an "as you were" position is not created unless the court gives special directions under powers conferred by the last four lines of sub-s. (6). LORD BLANESBURGH also drew attention to the difference in the language of the two sections, and pointed out that the section which corresponds to s. 352 had to do with companies which had been wound-up either compulsorily or voluntarily. These are dealt with by s. 279, s. 290 and s. 300 of the present Act. The section which corresponds to s. 353, on the other hand, dealt with dissolution when there had been no winding-up, which might have taken place without the knowledge of anyone concerned in the company. LORD BLANESBURGH did not consider the precise effect of an order under the last-mentioned section, but, in my opinion, says nothing inconsistent with the view that an order under what is now s. 353 (6) brings about an "as you were" position as contended by the company. Both of their Lordships were concerned to show that on a comparison of the two sections

of the Act of 1908 the retro-active effect of an order under s. 223 was less than that of an order which might be made under s. 242, but went no further in considering s. 242 than was necessary for the purpose of construing s. 223.

Some difficulty is presented by the last four lines of s. 353 (6) of the Act of 1948, which might seem to be mere surplusage if the preceding words are completely retro-active. Mr. Craven, accordingly, contends that the retro-active effect of the earlier part of the sub-section is confined to internal acts of the company, leaving external matters in the shape of the company's relationship with third parties unaffected in the absence of a special order under the last part of the section. He suggests other lines of demarcation, one between acts done in the ordinary course of business and acts done outside that course, and another between acts which a company can ratify and those which it cannot ratify in accordance with the ordinary laws of agency. These various lines of demarcation cannot be said to be based on any words contained in the sub-section itself, although the distinction between internal and external activity finds some support from the language of LORD BLANESBURGH in *Morris v. Harris* (1) when he drew a distinction between the corporate existence and the corporate activity of the company in considering the effect of an order under what is now s. 352.

For my part, I think the words of s. 353 (6) are clearly designed to produce an "as you were" position, and think that the latter part of the sub-section is complementary and intended to provide for cases where provision is necessary in order to clarify an obscure position or give back to the company an opportunity which it might otherwise have lost. An example of this would be a case where a company had lost an opportunity of obtaining a concession or renewing a lease during the interval between its dissolution and an order under the sub-section. A provision in the order could deal with such a case. That the last four lines of the sub-section do not cut down the retro-active effect of that which precedes them is, to my mind, indicated by the introductory words "and the court may by the order". The directions and provisions to be made by the order would naturally be supposed to make good what had previously been stated, viz., that the company should be deemed to have continued in existence as if the name had not been struck off. Finally, there is in s. 353 (6) no language comparable with the words "thereupon such proceedings may be taken", etc., in s. 352. In my judgment, the appeal should be allowed and the matter referred back to the county court judge to hear the application on its merits.

Appeal allowed.

Solicitors: *Lawrence Barnett & Co.* (for the appellants); *Jaques & Co.*, agents for *T. J. Smith & Son*, Liverpool (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

VAMVAKAS v. CUSTODIAN OF ENEMY PROPERTY AND ANOTHER.

[QUEEN'S BENCH DIVISION (Ormerod, J.), February 11, 12, 13, 14, 27, 1952.]

Enemy—Non-enemy alien resident in enemy territory—Residence not voluntary—Vesting of property by Board of Trade in Custodian of Enemy Property—Right to confer power of sale—Trading with the Enemy Act, 1939 (c. 89), s. 2 (1) (b), s. 7 (1) (b) (c) (d).

A Greek subject resident in Roumania when it was declared enemy territory in February, 1941, according to his evidence, was unable to leave during the 1939-45 war. In May, 1942, the Board of Trade made an order under s. 7 (1) (b) of the Trading with the Enemy Act, 1939, vesting three thousand gold sovereigns, which were held by a bank in England on behalf of the Greek subject, as enemy property in the Custodian of Enemy Property and giving him power to sell them. In June, 1942, the Custodian caused the sovereigns to be sold for £5,887 10s., the price then ruling, and held the proceeds until 1949 when he paid that sum to the Greek subject. In an action by the Greek subject against the Custodian for the return of the sovereigns or for their value, or, alternatively, for damages for conversion,

HELD: (i) "resident" in s. 2 (1) (b) of the Trading with the Enemy Act, 1939, meant, not voluntarily resident, but de facto resident, and, as the Greek subject was in fact resident in enemy territory at the time of the Board of Trade's order, he was an "enemy" and his property was enemy property within the meaning of that enactment whether or not his residence was voluntary.

Re Hatch ([1948] 2 All E.R. 288), applied.

(ii) the Board of Trade had the right where it made such a vesting order, to prescribe a power of sale under s. 7 (1) (d), such a right not being impliedly excluded by s. 7 (1) (c) which was intended to give the right to prescribe a power of sale where it was unnecessary or impracticable to vest the property in the Custodian.

Re Münster ([1920] 1 Ch. 268), explained.

(iii) the vesting order made by the Board of Trade, therefore, was valid.

FOR THE TRADING WITH THE ENEMY ACT, 1939, see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 326.

Cases referred to:

- (1) *Porter v. Freudenberg, Kreglinger v. Samuel (S.) & Rosenfeld, Re Merten's Patents*, [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 2 Digest 140, 155.
- (2) *Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)*, [1943] 1 All E.R. 76; [1943] A.C. 203; 112 L.J.K.B. 32; 168 L.T. 323; 2nd Digest Supp.
- (3) *Re Hatch*, [1948] 2 All E.R. 288; [1948] Ch. 592; [1948] L.J.R. 1393; 2nd Digest Supp.
- (4) *Re Münster*, [1920] 1 Ch. 268; 89 L.J.Ch. 138; Digest Supp.
- (5) *Re Gourju's Will Trusts*, [1942] 2 All E.R. 605; [1943] Ch. 24; 112 L.J.Ch. 75; 168 L.T. 1; 2nd Digest Supp.

ACTION for delivery up of three thousand gold sovereigns deposited on the plaintiff's behalf with the Westminster Bank, London, in 1937, or their value, and alternatively for damages for their conversion.

On May 22, 1942, the Board of Trade made an order under s. 7 (1) (b) of the Trading with the Enemy Act, 1939, vesting the sovereigns in the Custodian of Enemy Property and giving him power to sell them. On June 30, 1942, in pursuance of a direction from the Custodian, the bank sold the gold sovereigns and paid £5,839 5s., the proceeds (less expenses), to the Custodian. On Jan. 11,

1949, the bank, on behalf of the plaintiff, applied to the Board of Trade for release of the plaintiff's assets and in due course it received on his behalf the sum of £5,839 5s., but not his holding of sovereigns. The plaintiff claimed the return of the sovereigns, their value, or damages for their conversion on the ground that: (i) he was not an enemy, and the sovereigns were not enemy property, within the meaning of the Trading with the Enemy Act, 1939, s. 2 (1) (b) and s. 7 (8) (a), his residence in enemy territory at the time not having been voluntary, and (ii) the Board of Trade, in making a vesting order under s. 7 (1) (b) of the Act, had no power to confer a power of selling the property on the Custodian.

Diplock Q.C., and *Dare* for the plaintiff.

J. P. Ashworth and *R. J. Parker* for the first defendant.

J. H. Barrington for the second defendant.

Cur. adv. vult.

Feb. 27. **ORMEROD, J.**, read the following judgment. The plaintiff, a Greek subject living in Athens, claims from the defendants delivery up of three thousand gold sovereigns deposited by him with the Westminster Bank, London, in 1937, or, alternatively, damages for their conversion, and any further requisite relief.

The claim arises in these circumstances. In 1937 the plaintiff lived at Rafina, a suburb of Athens, with his wife and family, and carried on the business there of a general merchant which required him to spend much of his time in other European countries, particularly Roumania, where his brother carried on a similar business in Bucharest. In 1937 he arranged that his brother should transfer to his credit at the Westminster Bank, Foreign Branch Office, London, the three thousand gold sovereigns the subject of this action. In August, 1939, the plaintiff contracted to supply five hundred horses to the Greek army, and, in consequence, went to Bucharest, taking his wife and children with him, and lived there at the brother's house. Until October, 1947, he spent all his time in Roumania, with the exception of short visits to Greece in October, 1939, April, 1940, and September, 1940. The horse contract was completed about Oct. 10, 1940, but the plaintiff then concerned himself with the charter of a ship to take petrol from Roumania to the Greek army. This ship appears to have made three voyages on the plaintiff's behalf, the last being about February, 1941. According to the plaintiff, the horse contract was financed partly by himself and partly by his brother, and the petrol contract was financed by his brother and he did the technical work. Also, during the time he was engaged on the petrol contract he was disposing to Roumanian peasants and others about three hundred surplus horses which the Greek army authorities had not accepted. In October, 1940, Italy declared war on Greece. German troops began to gather on the Roumanian frontier, and Germans in civilian clothes began to infiltrate into Roumania. A revolution took place in Roumania in December, 1940, and January, 1941, which resulted in General Antonescu and the Iron Guard being in control of the country. On Feb. 15, 1941, Roumania was declared to be enemy territory within the meaning of the Trading with the Enemy Act, 1939, s. 2 (1), and shortly after this the Greek consulate in Bucharest was closed. The plaintiff says that, before the consul left, he advised the plaintiff and other Greek subjects in Bucharest to "lie low", to use the plaintiff's words. On Apr. 6, 1941, Germany declared war on Greece, and from that date the plaintiff was unable to leave Bucharest and was not allowed to carry on any business. He lived as best he could with his wife and family in two rooms in Bucharest and was, he says, in constant fear of arrest. He was imprisoned in August, 1941, by the Roumanians for a period of six weeks without any charge being brought against him, and in 1944 he was arrested by the Germans, but escaped after six or eight weeks' imprisonment. His evidence is that when Axis troops were concentrating on the frontier in November and December, 1940, it would have been suicide to try to get through, but that in any event

he was morally obliged to remain in Bucharest as he had assumed the responsibility for the petrol transaction. He agreed in cross-examination that from June 3, 1937, to Sept. 30, 1940, he had only spent a total of five months in Greece. It was his business to go backwards and forwards. He did not spend all his remaining time in Roumania, but that country was his "centre of movement". On Sept. 5, 1941, the Westminster Bank made a return to the Custodian of Enemy Property showing that they held the three thousand gold sovereigns in question on behalf of the plaintiff, whose address was given as Bucharest. On May 22, 1942, the Board of Trade, in pursuance of powers contained in s. 7 (1) (b) of the Trading with the Enemy Act, 1939, made an order vesting the sovereigns in the Custodian of Enemy Property and giving the Custodian power to sell them. On June 19, 1942, the Custodian directed the Westminster Bank to sell the sovereigns to the Bank of England, and an account dated June 30, 1942, shows that this was done for the sum of £5,887 10s., the price then ruling. The proceeds of sale, less expenses, were paid by the Westminster Bank to the Custodian and held by him.

The plaintiff was able to return to Athens from Roumania in October, 1947, and on Jan. 11, 1949, through the Westminster Bank applied to the Controller-General, Administration of Enemy Property Department of the Board of Trade, for the release of his assets. The sum of £5,839 5s., the proceeds of the sale of the gold, and a small balance on his current account, less certain fees and charges, was paid to his credit at the Westminster Bank, but he was unable to obtain the restoration of his holding of gold sovereigns. He now claims from the Custodian and from the Bank of England the return of the sovereigns or their value or damages for their conversion on the following grounds: (i) that he was not an enemy, nor were the sovereigns enemy property, within the meaning of the Trading with the Enemy Act, 1939, s. 2 (1) (b) and s. 7 (8) (a); and (ii) that in any event the Board of Trade, in making a vesting order under s. 7 (1) (b) of the Act, could not confer a power to sell the property.

On the first ground it is contended for the plaintiff that the word "resident" in s. 2 (1) (b) of the Trading with the Enemy Act, 1939, which defines "enemy" as "any individual resident in enemy territory," must mean "voluntarily resident", and, as the plaintiff at the relevant time was unable to leave Roumania, he could not be regarded as resident in enemy territory, and, therefore, as an "enemy" within the meaning of the section. It was argued that the Act of 1939 repealed the existing legislation which was contained in the Trading with the Enemy Act, 1914, the Trading with the Enemy Amendment Act, 1914, and the Trading with the Enemy Amendment Act, 1916, and that the Trading with the Enemy Act, 1914, contained no definition of "enemy", but in the preamble of the amending Act of 1914 "enemies" were defined as

"... persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war . . ."

This, said counsel for the plaintiff, should be construed as meaning nothing more than a statement of the common law definition of the word "enemy". In *Porter v. Freudenberg* (1) LORD READING, C.J., includes in his definition of enemy ([1915] 1 K.B. 869):

"... a British subject . . . who is voluntarily resident . . . in hostile territory . . ."

and this definition has been followed and approved in a number of cases both in the Court of Appeal and in the House of Lords, particularly in the *Sovfracht* case (2). It is argued that, as the words in s. 2 (1) (b) of the Act of 1939 are substantially the same as the words in the preamble to the amending Act of 1914, they should have the same effect and be construed as meaning "voluntarily resident". I cannot accept this contention. There is no doubt on the

authorities that at common law an individual to be an enemy in these circumstances must be voluntarily resident in hostile territory. But the circumstances in which the question of enemy status may arise at common law are substantially different from those arising under the statute. At common law the question most frequently arising is the right or liability of the individual to sue or to be sued, whereas under the statute the principal consideration is the administration of property in this country belonging to individuals resident in hostile territory, lest that property should be used to the advantage of the enemy.

In *Re Hatch* (3) ROXBURGH, J., says ([1948] 2 All E.R. 292):

"As the Trading with the Enemy legislation has to be applied and acted on during war and under warlike conditions it would be surprising if 'residence' meant anything more complicated than *de facto* residence irrespective of circumstances, for it would, in most cases, be impossible to investigate the circumstances during a war."

Counsel for the plaintiff contends that in cases of doubt the Board of Trade may specify the individual concerned as an "enemy" by virtue of s. 2 (2) of the Act of 1939, but, in my opinion, that cannot be the object of the subsection. If it were, it would require to be invoked in a very large number of cases, if not in every case, and would, indeed, render any other definition of "enemy" unnecessary. I have come to the conclusion that I should accept the view of ROXBURGH, J., that "residence" in this context means "*de facto* residence irrespective of circumstances". If this be right, then I am satisfied that the plaintiff must be regarded as coming within the statutory definition of "enemy". His evidence is that he regarded it as his duty to remain in Bucharest at least until February, 1941, when Roumania was declared to be enemy territory, and that afterwards he accepted, no doubt wisely, the advice of the consul to "lie low" and not take the risk of attempting to leave the country and return to Greece. It may well be, as he says, that after the declaration of war by Germany on Greece in April, 1941, it was impossible for him to leave. He was, in my opinion, none the less *de facto* resident in Roumania during the relevant period. It is unnecessary, in view of the conclusion to which I have come, to consider whether the Custodian would in any event be protected by the provisions of s. 7 (3) of the statute.

It is further contended on behalf of the plaintiff that, even though the Board of Trade had the power to make an order vesting the gold in question in the Custodian, there was no power under the statute to include in that order a power of sale. The power to make vesting orders of enemy property is given to the Board of Trade by s. 7 (1) of the Trading with the Enemy Act, 1939, which provides that the Board of Trade may by order

"(b) vest in the prescribed custodian such enemy property as may be prescribed, or provide for, and regulate, the vesting in that custodian of such enemy property as may be prescribed; (c) vest in the prescribed custodian the right to transfer such other enemy property as may be prescribed, being enemy property which has not been, and is not required by the order to be, vested in the custodian."

"Enemy property" is defined by s. 7 (8) (a) to be

"... any property for the time being belonging to or held or managed on behalf of an enemy or an enemy subject."

The plaintiff's contention is that paras. (b) and (c) of s. 7 (1) are mutually exclusive. The Board of Trade may vest the property in the Custodian, but may not at the same time give the Custodian a power of sale, or they may, without vesting the property, vest in the Custodian a right to transfer it. Section 7 (1) (d) provides that the Board of Trade may confer on the Custodian

"... such rights, powers, duties and liabilities as may be prescribed as respects (i) property which has been, or is required to be, vested in a

custodian by or under the order, (ii) property of which the right of transfer has been, or is required to be, so vested . . .”

It is contended by the plaintiff that the powers conferred by para. (d) do not extend the powers conferred by para. (b) or para. (c), but only provide for such ancillary powers as may be necessary to carry out orders made under (b) and (c) respectively.

It is interesting to look at the provisions in the earlier statutes. The Trading with the Enemy Amendment Act, 1914, s. 4 (1), provides:

“The High Court or a judge thereof may . . . by order vest in the Custodian any such real or personal property as aforesaid . . . and may by the order confer on the Custodian such powers of selling, managing and otherwise dealing with the property as to the court or judge may seem proper.”

The Trading with the Enemy Amendment Act, 1916, s. 4 (1), confers this power on the Board of Trade. Why, then, should the statute of 1939 limit the powers of the Board of Trade to prescribe a power of sale only in cases where a vesting order has not been made? Counsel for the plaintiff contends that the reason for this is to be found in the decision of RUSSELL, J., in *Re Münster* (4), which dealt with the right of the Special Commissioners to assess the Custodian to supertax as agent or receiver for Prince Münster, an enemy. In dealing with the objection that the Custodian's contention involved the existence of a period of time during which there was no beneficial owner of the property, RUSSELL, J., said ([1920] 1 Ch. 279):

“That is quite true, but it is the result of a statute which, in my judgment, causes the beneficial ownership to be and remain in statutory suspense or abeyance during the period in question, during which period the Custodian has certain limited powers of dealing with the property.”

This decision was followed in *Re Gourju's Will Trusts* (5), a case dealing with the payment to a widow residing in enemy territory of the income of a trust fund in this country. SIMONDS, J., says ([1942] 2 All E.R. 607):

“He [the Custodian] does not receive such money as agent for the enemy. He has certain limited powers of dealing with it, but apart from that the beneficial ownership is to be regarded as in statutory suspense . . .”

Counsel for the plaintiff contends that the effect of these decisions is that, once a vesting order is made, the beneficial ownership of the property is in suspense and remains in suspense until the signing of a peace treaty or a general release of enemy property. It is to be noted that *Re Münster* (4) deals with the liability of the Custodian to be assessed to supertax on the income of enemy property vested in him, and is in no way concerned with the right of the Custodian to sell such property. The case was decided when the Trading with the Enemy Amendment Act, 1916, was in force, and, if counsel for the plaintiff's contention is correct, would render s. 4 of that Act, so far as it related to powers of sale, of no effect, as the Board of Trade would have the power to order a sale of the legal estate only, while the beneficial ownership would remain in suspense until the happening of the specified future event.

In my opinion, the true effect of *Re Münster* (4) is that, although the beneficial ownership of property vested in the Custodian is in suspense, the power of sale is not thereby altered. On a transfer of the property by the Custodian, the beneficial ownership once again attaches to it, but the purchase price remains in the hands of the Custodian under the same conditions as the property for which it has been transferred, including, of course, the suspension of the beneficial ownership. I do not accept, therefore, the contention that the power of the Board of Trade to prescribe a power of sale has been limited because of *Re Münster* (4), and I do not accept the contention that the Board of Trade may not

prescribe a power of sale under s. 7 (1) (d) in cases where a vesting order has been made. In my view, the object of s. 7 (1) (c) is to give the right to the Board of Trade to prescribe a power of sale in cases where for any reason it is unnecessary or impracticable to vest the property in the Custodian and the paragraph is not intended to exclude the right to prescribe such a power of sale when a vesting order is made.

The plaintiff further contended that, even if the Custodian had power to sell the property in question to the Bank of England, the beneficial ownership was still in suspense, and that on a general release of enemy property it would vest in him. This contention was, of course, based on *Re Münster* (4), and, in view of the opinion I have already expressed, it is unnecessary for me to deal with the question further. It follows, therefore, that there must be judgment for the defendants. *Judgment for the defendants.*

Solicitors: *Lucien Fior* (for the plaintiff); *Solicitor, Board of Trade* (for the first defendant); *Freshfields* (for the second defendants).

[Reported by F. A. AMES, ESQ., Barrister-at-Law.]

RODGERS v. MINISTRY OF TRANSPORT AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), February 20, 1952.]

Highway—Trunk road—Improvement—Widening and levelling—Construction of “lay-by”—Powers of Ministry of Transport—Right of driver to park vehicle on grass verge of highway—Highway Act, 1864 (c. 101), s. 48.

Lorry drivers stopping at a café for refreshment made a practice of driving off a trunk road and on the verge, churning it up and obliterating a footpath. The Ministry of Transport, in whom the powers and duties of a highway authority in respect of the road were vested by the Trunk Roads Act, 1936, as extended by the Trunk Roads Act, 1946, sched. I, acting through the county council, constructed something like a “lay-by”, levelling and making good the grass verge and the area where the footpath had been and curving the footpath so that it no longer ran across the space made good. In proceedings by an owner of adjoining property to restrain the Ministry and the council from providing a parking place,

HELD: (i) the verge was part of the highway and lorry drivers were entitled to drive and to leave their vehicles on it during a temporary stop for a legitimate purpose, e.g., for refreshment, and, therefore, if in consequence of the works they were to drive over the verge, they would not be doing anything illegal.

(ii) the Ministry had not exceeded their statutory powers by constructing a car park, but had “levelled” or “widened” the road in accordance with the powers contained in the Highway Act, 1864, s. 48, and, therefore, there was no ground for restraining the construction of the “lay-by.”

FOR THE HIGHWAY ACT, 1864, s. 48, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 156.

ACTION for an injunction and a declaration.

The plaintiff was the owner and occupier of a house and land, Marling Manor, near Cobham, Kent, abutting on the northern boundary of the London to Canterbury and Dover main road (Watling Street), a metalled road forty feet wide with grass verges and footpath, and near to its junction with White Hill Lane which branched off to the north. At the junction was Marling Cross Café which was constantly used by lorry drivers wishing to obtain refreshment. Drivers stopping at the café made a practice of driving their lorries off the road and on the grass verge at the side, churning it up and obliterating the footpath. By virtue of the Local Government Act, 1888, s. 11 (1), the Local Government Act, 1929, s. 29 (1) (2), the Road Traffic Act, 1930, s. 53, and the Trunk Roads Act, 1936, as extended by the Trunk Roads Act, 1946, sched. I,

all the powers and duties of a highway authority in respect of the London to Canterbury road were vested in the first defendants, the Ministry of Transport. Being unsuccessful in their efforts to prevent the damage to the grass verge and footpath or to induce the proprietor of the café to provide a parking ground for customers, the Ministry, through the second defendants, the Kent County Council, curved the footpath so that it avoided running across the piece of land which had become ploughed up, and made it into a hard path with a kerb to prevent vehicles driving on it. They also levelled and made good the grass verge and the area where the footpath had been, and made something like a "lay-by", which vehicles could enter at one end and leave at the other.

The plaintiff sought an injunction restraining the defendant county council by their servants and agents (i) from providing or constructing a parking place for vehicles on the grass verge opposite the frontage of the plaintiff's land, (ii) from utilising or authorising the use of any part of the verge as a parking place for vehicles, and (iii) from doing any work in respect thereof, and ordering them to reinstate the verge to the state and condition in which it was before July 16, 1951. She also asked for a declaration that the defendant Ministry were not, and never had been, entitled to provide or construct a parking place for vehicles on the grass verge or to use, or authorise the use of, any part of the verge as a parking place for vehicles.

Case referred to:

(1) *Harrison v. Rutland (Duke)*, [1893] 1 Q.B. 142; 62 L.J.Q.B. 117; 68 L.T. 35; 26 Digest 317, 491.

Elwes, Q.C., and *J. G. S. Hobson* for the plaintiff.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), *J. P. Ashworth* and *R. J. Parker* for the defendants.

LORD GODDARD, C.J.: The first point is whether a lorry driver is doing anything illegal or wrong in driving a vehicle on the grass verge of a highway. He might be doing something which would be punishable under the Highway Acts if he drove on the footpath, but, in my opinion, he is not doing anything wrong if he drives his lorry on the grass verge at the side of the road so as to be out of the way of traffic using the highway. Indeed, that is a proper thing to do because other vehicles will not then have an obstructed road. The right of the public to use the highway is a right to pass and re-pass along it, and they have no right to use it for any other purpose. In *Harrison v. Duke of Rutland* (1) Harrison did not like grouse shooting and he walked up and down the Duke's moors in Derbyshire and kept opening and closing his umbrella to frighten off the grouse. He was held to be using the highway for scaring the birds and not for passing and re-passing. There is no suggestion that the lorry drivers in the present case used the road for any purpose other than for passing and re-passing, though they do stop—and why should they not?—at the café.

The question is whether the Ministry did something illegal in creating this "lay-by". It is said that the Ministry thereby have created a car park, having no power so to do, but "car park" is not a term of art in the law. No doubt, a place has been created where cars will stop, but they have a right to stop. So far as I know, provided he does not drive on the footpath, no one suggests that a driver cannot drive a lorry on the verge of the road which is part of the highway. I cannot assent to the proposition that the Ministry have done anything illegal because they have put the footpath and kerb in such a place that the footpath is now clear of the part of the verge on which the lorries drive. Possibly some of the lorries may get on the verge lower down and in front of the plaintiff's house, but even then they will not be trespassing. They will be on a part of the highway which is the verge.

The relevant enactments seem to me to be perfectly clear. By s. 47 of the Highway Act, 1864:

“A highway board may make such improvements as are hereinafter mentioned in the highways within their jurisdiction, and may . . .”,

then follow certain other powers. By s. 48:

“The following works shall be deemed to be improvements of highways:
(1) The conversion of any road that has not been stoned into a stoned road:
(2) The widening of any road, the cutting off the corners in any road where land is required to be purchased for that purpose, the levelling roads, the making any new road, and the building or enlarging bridges.”

Whether it is looked on as levelling or as widening the road—undoubtedly it is widened—I am certain that what was done here was within the Minister's statutory powers. It is said that the work done invites people to use the space as a parking ground. What can be said is that the county council, acting for the Ministry, have carried out works which will protect the footpath so that it will remain unaffected by the passage of lorries over it, and have strengthened and levelled a place where lorries can stand so as not unduly to obstruct the road during the short time drivers require for refreshment. I cannot find that in so doing the Ministry have done anything they had no power to do. I certainly cannot find that the fact that the lorries call at the café for refreshment causes an obstruction of the highway. They do not obstruct the highway merely by temporary call for a legitimate and proper purpose such as getting a meal while on the road, provided they do not stop in a place where the mere presence of a stationary vehicle would create an obstruction. The Ministry have done their best to abate the trouble of which the plaintiff complains, and if, as she fears, the lorry drivers are not content with pulling up at the place made but drive down the verge in front of her house they will not, in my view, be doing anything illegal, since I cannot subscribe to the idea that a lorry driver may not drive on the verge of the road, which is part of the highway, if he so pleases. The action is misconceived and I give judgment for the defendants with costs.

Judgment for the defendants.

Solicitors: *Waterhouse & Co.*, agents for *W. A. Wyatt*, Gravesend (for the plaintiff); *Treasury Solicitor* (for the defendant).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

**BAGLEY v. WINSOME (NATIONAL PROVINCIAL
BANK, LTD., *Garnishee*).**

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.),
February 19, 1952.]

*Execution—Garnishee order—Debt “owing or accruing”—Deposit account—
Money repayable only on production of deposit book—R.S.C., Ord. 45, r. 1—
County Court Rules, Ord. 27, r. 1.*

A judgment debtor had a sum of money in a deposit account with a bank, the contract between the bank and the debtor being subject to the conditions (a) that fourteen days' notice should be given of a withdrawal, and (b) that money could be withdrawn only on a personal application by the debtor at the bank and on production of the deposit book. On Jan. 11, 1952, a notice of withdrawal given by the debtor expired, and, on the same day, the judgment creditor issued a garnishee summons against the bank. The debtor did not apply, personally or at all, for repayment of the money and it was still with the bank.

HELD: as the judgment debtor had failed to comply with all the terms of the contract of deposit, he could not obtain payment from the bank of the money in his deposit account, and the judgment creditor could not be in a better position than the debtor; therefore, the sum standing to the credit of the debtor's deposit account was not a debt “owing or accruing” to him from the bank, within the meaning of R.S.C., Ord. 45, r. 1, and the County Court Rules, Ord. 27, r. 1, and it was not a proper subject of garnishee proceedings.

AS TO DEBTS OWING OR ACCRUING, see HALSBURY, Hailsham Edn., Vol. 14, pp. 107-111, paras. 171-176; and FOR CASES, see DIGEST, Vol. 21, pp. 624-626, Nos. 2105-2120.

Cases referred to:

- (1) *Webb v. Stenton*, (1883), 11 Q.B.D. 518; 52 L.J.Q.B. 584; *sub nom. Re Hatton, Webb v. Stenton*, 49 L.T. 432; 21 Digest 625, 2107.
- (2) *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 21 Digest 639, 2188.
- (3) *Rekstin v. Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Kom-severputj & Bank for Russian Trade*, [1933] 1 K.B. 47; 102 L.J.K.B. 16; 147 L.T. 231; Digest Supp.
- (4) *Atkinson v. Bradford Third Equitable Benefit Building Society*, (1890), 25 Q.B.D. 377; 59 L.J.Q.B. 360; 62 L.T. 857; 7 Digest 487, 202.
- (5) *O'Driscoll v. Manchester Insurance Committee*, [1915] 3 K.B. 499; 85 L.J.K.B. 83; 113 L.T. 683; 79 J.P. 553; 21 Digest 634, 2156.

APPEAL by the judgment creditor from an order of His Honour JUDGE THOMAS, at the Mayor's and City of London Court, dated Jan. 29, 1952. A garnishee summons having been issued by the judgment creditor against the National Provincial Bank, Ltd., in respect of the judgment debtor's deposit account with the bank, the bank disputed its liability. The learned judge held that the deposit account was not a proper subject-matter of garnishee proceedings.

C. H. Duveen for the judgment creditor.

H. J. Phillimore and *H. T. Walker* for the garnishee, the bank.

The judgment debtor did not appear.

SIR RAYMOND EVERSLED, M.R.: This appeal has raised a question of some difficulty and interest in regard to what are commonly known as garnishee proceedings. The proceedings in this case have taken place in the county court according to the appropriate terms of the County Court Rules, Ord. 27, but it is convenient to state that, as learned counsel have both agreed, the matter does not fall to be in any way differently decided on that account from the way

in which it would be decided in a case where the proceedings occur under R.S.C., Ord. 45.

The point may be formulated in very brief terms. Under the rules, whether of the Supreme Court or of the county court, the creditor who has obtained judgment has available to him, as one form of executing his judgment, what is called attachment of debts by means of garnishee procedure, the subject-matter of which is described in both R.S.C., Ord. 45, r. 1, and the County Court Rules, Ord. 27, r. 1, as, debts "owing or accruing" from a third party to the judgment debtor. The question in this case is whether a sum deposited with National Provincial Bank, Ltd., on deposit account by the judgment debtor, in respect of which at the material date (i.e., the date of service of the garnishee summons) a notice of withdrawal had been given by the judgment debtor and had expired, is, within the formula, a debt "owing or accruing" from National Provincial Bank, Ltd., to the judgment debtor. The judgment creditor obtained a judgment for a sum which, with costs, amounted to £50 odd. The summons which has given rise to this problem was issued on Jan. 11, 1952, that being the date on which the notice of withdrawal given by the judgment debtor expired. It is well known (and references to this effect may be found in the text-books) that contracts relative to what are now called deposit accounts may vary between one banking house and another. The contract which was in operation between the National Provincial Bank, Ltd., and the judgment debtor provided, so far as material, as follows:

"Sums of £1 and upwards paid into this account will bear interest at the current rate. The interest will be credited yearly on Dec. 31 and it is requested that this book be either brought or sent to the bank in January in order that the interest may be recorded therein."

The reference to "this book" is a reference to the fact that these terms are written in the book in which the sums deposited, the interest, and other particulars, are recorded. To continue with the terms of the contract:

"Personal application must be made and this book produced at the bank when any money is withdrawn. All withdrawals are subject to fourteen days' notice."

It, therefore, follows, that the bargain between the bank and the customer in this case was that the bank would credit the customer with interest on the sums deposited, as stated in the terms which I have read, and would only be liable to pay the whole or any part of the sums deposited on two conditions being satisfied—(i) that fourteen days' notice should be given of any withdrawal, i.e., of any claim to repayment, and (ii) that when the time came for repayment the depositor should attend personally and produce the deposit book. The notice of withdrawal in the present case had been given and had expired at the relevant date, so that, beyond doubt, the first condition was satisfied. But it appears that, notwithstanding, the judgment debtor has not presented himself, armed with his deposit account book, at the relevant branch of the National Provincial Bank, Ltd., and, therefore, the sum deposited still remains with the bank. In those circumstances, is the sum standing to the credit of the judgment debtor with the bank a debt "owing or accruing" from the bank to him? Unless it is, plainly it is not a proper subject of this form of execution.

We have been referred to a number of cases which throw some light, on some occasions a little indirectly and on other occasions of a rather tantalising character, on the problem, but it is certain that, in any previous case, so far as the researches of counsel have been able to discover, this particular matter has never been decided. It is convenient to start with a reference to the decision of this court in *Webb v. Stenton* (1). In that case an explanation, which I am prepared to adopt and apply, was given of the meaning of the phrase, "debts owing or accruing". The creditor there claimed by this

procedure of execution to get possession of the income of a trust fund, held by trustees, in which the judgment debtor had a limited interest. The facts do not matter, but the members of this court made it plain that by the formula, "debts owing or accruing," was meant debts which were then owing, debts due in praesenti, whether or not they were immediately payable. Thus, a debt which had accrued due, but was not payable for, say, a month or until some future date, was within the phrase, "debts owing or accruing." Such a construction of the phrase enables a judgment creditor in garnishee proceedings to garnishee a debt which is payable over a number of instalments.

I turn to a consideration of the present case. It has for a long time been well established that this form of execution is available in the case of a current account with a banker. Until 1921 it was not apprehended that there was any problem involved, having regard to the contract between banker and customer, in such circumstances, but in that year there came to be decided, again in this court, *Joachimson v. Swiss Bank Corpn.* (2). The problem of the true nature of garnishee proceedings in relation to current accounts was indirectly raised, for the question was whether the plaintiffs, Joachimson (a firm), could say that a cause of action had accrued against the defendant bank in regard to the repayment of an account in the absence of a demand made by the customer, and the Court of Appeal held that in the case of a current account a cause of action did not arise until the demand had been made. In the course of the argument the attention of the court was drawn to the question how, if that were so, were the well established garnishee proceedings in relation to current accounts to be justified, since, at any rate, in nine cases out of ten, no demand for payment would have been made at the time when the garnishee proceedings occurred. It was, I think, a serious problem, but the three members of the court (BANKES, WARRINGTON and ATKIN, L.JJ.), were undaunted by that consideration in the conclusion at which they arrived in the particular case, and said in effect: "The service of the garnishee summons should be taken as operating as a demand, and that will avoid the difficulty." Although it was not strictly necessary for them to decide the point, I think they clearly indicated that the answer to the point was as I have stated it, and, as counsel for the judgment creditor in his reply indicated, I think that the later decision of this court in *Rekstin v. Severo Sibirsko &c., Co. Bank for Russian Trade* (3) shows that such a view must now be taken as accepted: see, e.g., the judgment of SLESSER, L.J., in *Rekstin's* case (3).

Counsel for the judgment creditor in the present case contends that, if the service of a garnishee summons can operate as a demand by the judgment debtor, there is no logical reason why it should not be taken as operating as satisfaction of any other conditions such as those which apply in the case of a deposit account. I cannot accept that argument. It seems to me that the two conditions with which we are concerned in this contract—the notice, on the one hand, and the personal application with the production of the deposit book, on the other hand—are of a somewhat different character. The deposit book is the document of title to the deposit account. As other cases have illustrated, delivery of it to a third person may operate as an effective *donatio mortis causa*. At the same time I think it is an unnatural and wrong use of language to suggest that where, as here, a notice of withdrawal has been given, there remains only a contingent debt. If the service of the notice of withdrawal can be regarded as a demand for payment, still the bank is entitled to rely and insist on the contract which only obliges it to pay on satisfaction of the other condition. That condition may or may not be satisfied at some indefinite future time, and in the meantime the judgment creditor cannot, as it seems to me, be in a better position than the party to the contract with the bank, namely, the judgment debtor. I am not, therefore, satisfied that in such a case as the present, on the facts that I have stated, the deposit account

can and should be treated, in consequence of the decision in *Joachimson v. Swiss Bank Corpn.* (2), as a debt "owing or accruing" within the meaning of the relevant rules.

There have been other cases in which some oblique references have been made to the case of a deposit account. I cannot refrain from a brief reference to one of the earliest, *Atkinson v. Bradford Third Equitable Benefit Building Society* (4), for it was in that case that LORD ESHER, M.R., pointed out (25 Q.B.D. 380) that the case of money paid into a deposit account would be very different from the case he was there considering, that of money lent to a building society, and he went on to whet the appetite, without satisfying it, by saying (*ibid.*):

"... we shall know how to deal with it [i.e., the case of a deposit account] when it comes before us."

It did not come before the court in LORD ESHER's day, but it has come before the court now. *Atkinson's* case (4) was one on which it is worth pausing for a moment more. The terms of the contract with the building society to which money had been lent required that notice of a certain length of time should be given before the lender could withdraw his money, and that, when applying for the money, the lender should attend personally, or send written authority, and produce his investor's book. Notice of withdrawal was given by the lender, but he died on Jan. 14, 1879, the day on which the money became payable. On May 3, 1889, the plaintiff obtained letters of administration to the lender's estate, and on May 18, 1889, commenced an action against the society to recover the money. The building society pleaded that the claim was then barred by the Limitation Act, 1623, s. 3. The answer of the court was (inter alia) that the condition as to the production of the book by the lender or by some person with his written authority was a condition precedent to the right to receive back the money, and, as this condition had not been complied with, the statute had not begun to run at the time when the society said that it had. That case is, therefore, not entirely dissimilar from the case of a deposit account, for it showed that the special terms of the contract govern the obligation of the banker or borrower of the money to repay. It is possible to imagine other cases of a similar character. A man may lend to a company money on, say, an unsecured debenture, under which the company would only be liable to pay on the satisfaction of certain contractual terms or conditions. Until those terms or conditions have been satisfied, it would, I think, be very difficult to say that such a debt has arisen as is contemplated by R.S.C., Ord. 45, r. 1, and the County Court Rules, Ord. 27, r. 1.

O'Driscoll v. Manchester Insurance Committee (5) illustrates the opposite conclusion, for it was a case where a doctor, under certain contractual arrangements which need not be elaborated, became entitled to a certain share of an insurance pool under the National Insurance Act, 1911, the share being calculated and made payable at certain specified intervals. At the relevant date the doctor was entitled to a certain share, though its precise amount had not fallen to be computed, and it was, therefore, a case of a debt debitum in praesenti but solvendum in futuro, and, therefore, a debt within the formula that we find in the rules. The matter was stated shortly in this language by SWINFEN EADY, L.J. ([1915] 3 K.B. 512):

"It was not presently payable, the amount not being ascertained, but it was a debt to which the doctors were absolutely and not contingently entitled. The only question was as to the amount of the debt, the debt not being payable until the amount had been ascertained."

Counsel for the judgment creditor contended that, as a matter of principle, the case which is now before us should be treated as in pari materia with such a case as *O'Driscoll v. Manchester Insurance Committee* (5). The production of

the book (he said) is a matter of mere formality. The judgment debtor has given notice to withdraw. The debt is now, in ordinary parlance, payable subject only to compliance on the part of the judgment debtor with conditions which the bank is entitled to enforce, but which amount to no more than a mere formality, for, if the judgment debtor had lost his deposit book, no doubt in the circumstances he would be able to recover payment in a court, notwithstanding. I concede that the distinctions between one class of case and another are apt to be somewhat narrow, but, still, reverting to *O'Driscoll's* case (5), it cannot be said in the case now before us that the only question remaining is that of amount. What is here outstanding is that the contract relating to the deposit requires certain things to be done before the bank is under an obligation to pay. I should assume from the negative results with which counsel's researches have met, as well as from reference to the text-books, that this form of execution has never been treated, during the long period when it has been available, as applicable to deposit accounts. I am much fortified in that view by the reference which counsel for the bank made to PAGET'S LAW OF BANKING. In the fifth edition, which was published in 1947, after the death of SIR JOHN PAGET [which occurred in 1938], it is stated quite clearly (ch. 6, p. 90 et seq.) that the case of a deposit account differs in this respect from the case of a current account, and that garnishee proceedings will not be available as a means of execution against a deposit account. At p. 92 it is stated:

"Apart from any question of the deposit being repayable on demand, at notice, or at a fixed period, it would seem clear that if the return of the receipt is by agreement of the parties, express or implied, made a condition precedent to withdrawal or repayment, garnishee proceedings will not lie against the deposit account."

In the corresponding passage from the first edition (1904) (ch. III, pp. 18, 19), the matter is a little more fully stated, but clearly to the same effect. That reference, I think, strongly reinforces the view that, over what is now a very long period, deposit accounts have not been regarded as liable to this type of execution.

I think that counsel for the judgment creditor is entitled to say that, before the *Joachimson* case (2), the distinction for this purpose between the deposit account and the current account may not, to say the least, have been clearly apprehended, but I am still of opinion, for the reasons which I have given, that it would not be right to say that the reconciliation of the decision in the *Joachimson* case (2) with the continuing practice of garnishee proceedings against current accounts involves today, for the first time, making that form of procedure available also against a deposit account. The judgment creditor is not, after all, left without remedy. There are other forms of execution, e.g., equitable execution by way of appointment of a receiver. I think that, on the whole and for the reasons which I have given, it would not now be right for this court to reverse a practice of such long standing. Moreover, I am not clear how far such a reversal would go and what other types of contract might then be held to be liable to a similar form of attachment and to what extent, as a consequence, third parties might be at serious risk. I, therefore, conclude that the decision of the learned judge was correct, and I think that this appeal should be dismissed.

JENKINS, L.J.: I agree. Prima facie, it would be wrong in principle for garnishee proceedings to have the effect of putting the judgment creditor in a better position as against the garnishee than the judgment debtor himself would have been. That, so far as I can see, is exactly what we are being asked to do in the present case. The judgment debtor could not obtain payment from the bank of the money in his deposit account without making a personal application and producing his deposit book. It is now claimed that the bank, at the

instance of the judgment creditor, should be compelled to make payment without compliance with those stipulations. That seems to me to be wrong in principle, and there is nothing in the authorities saying that we ought to hold otherwise. As to *Joachimson v. Swiss Bank Corpn.* (2), approved in *Rekstin's* case (3), it is, to my mind, one thing to hold that a garnishee order nisi should be treated as equivalent to a simple demand by the judgment debtor in a case in which a simple demand is all that is necessary in order to make the garnishee immediately liable, and quite another thing to say that such an order is to be taken in substitution for, and as the equivalent of, such a condition or stipulation as the production of a deposit book. I agree that the appeal fails.

HODSON, L.J.: One of the terms of the contract between the debtor and the bank was that personal application must be made, and the deposit book produced, at the bank when money was withdrawn. That condition of the contract was not complied with. Counsel for the judgment creditor, in seeking to avail himself of garnishee proceedings in the county court, relied strongly on *Joachimson v. Swiss Bank Corpn.* (2). That case dealt with the relationship between banker and customer, and decided that, where money was standing to the credit of a customer on current account with a banker, in the absence of a special agreement a demand by the customer is a necessary ingredient in the cause of action against a banker for money lent. A distinction was drawn between the position of a bank and its customers, on the one hand, and the position of other debtors and creditors, on the other, the banker not being in the position of a debtor who was bound to find out the creditor and pay him the debt when due. The decision in that case in itself was, therefore, against the contention of counsel for the judgment creditor. However, counsel arguing the *Joachimson* case (2) pointed out that the decision at which the court arrived would, apparently, throw doubt on the validity of garnishee orders, and two members of the court (BANKES and WARRINGTON, L.JJ.) in clear terms ([1921] 3 K.B. 121 and 126), and the third member (ATKIN, L.J.) in less definite terms (*ibid.*, 131), expressed the view that garnishee orders would nevertheless be good, because the service of the order nisi would operate as a demand and take the place of the demand of the customer. It could not be said that those observations were mere obiter dicta, because they were affirmed by a further decision of the Court of Appeal in *Rekstin's* case (3), where the point was directly raised. Therefore, it is argued that, since garnishee proceedings are not made inapplicable where certain terms of the contract have not been complied with between the customer and the bank, there is no reason why one particular term should be preferred to another. Counsel for the judgment creditor says: "As the garnishee order nisi takes the place of the demand, why should it not also take the place of the production of the deposit book?" I agree with SIR RAYMOND EVERSHED, M.R., and JENKINS, L.J., that it is not right to take that further step. The authorities stop short of supporting the view that the contract between the customer and the bank should be treated as performed by the issue of the garnishee order where the step required by the contract, viz., the production of the book, has not been taken. The consequences of taking the further step contended for by the judgment creditor in this case would, I think, lead to great difficulties. I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Cooper, Bake, Fettes, Roche & Wade* (for the judgment creditor); *Wilde, Sapte & Co.* (for the bank).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

KEINER v. KEINER.

[QUEEN'S BENCH DIVISION (Donovan, J.), February 27, 1952.]

Conflict of Laws—Contract—Law applicable—Deed executed by husband in United States—Husband resident in England—No assets in United States—Payments under deed in dollars—American law applied by deed to investment of funds—Rights of inspection exercisable in America.

By a deed executed in the State of New Jersey in the United States of America, a husband undertook to make certain payments to his wife from whom he was divorced. At that time both husband and wife were in New Jersey, but the husband was ordinarily resident in the United Kingdom and the wife in the United States. After the execution of the deed, and in consequence of it, the husband had no assets in the United States, the great bulk of his assets being in the United Kingdom. The deed provided that the payments should be made in dollars and incorporated the law of the State of New York or of New Jersey for the purpose of determining in what securities certain funds should be invested. It also created certain rights of inspection which in the normal course would be exercised in America. The husband fell into arrear with his payments and was sued by his wife in the High Court in England. In his defence he asserted that the law of the State of New Jersey was the proper law for determining the validity of the agreement. An order was made by consent for payment of £6,000 in respect of the arrears. The husband paid £2,000 in full, but when tendering the balance sought to deduct £2,754 for income tax on the whole £6,000, claiming to be entitled to do so under r. 19 and r. 21 of the All Schedules Rules of the Income Tax Act, 1918.

HELD: having regard to the provisions of the deed (payment in dollars, incorporation of New Jersey law, and the right of inspection), and the assertion as to the law applicable by the husband in his pleading, the presumption that the deed was governed by the *lex loci contractus* was not displaced by the fact that the husband was at the time ordinarily resident in the United Kingdom and was left with no assets in the United States (the institution by the wife of proceedings in the English courts being immaterial), and the deed was governed by the law of New Jersey, and, therefore, the husband could not deduct income tax under English law by which they had not agreed to abide.

Indian & General Investment Trust, Ltd. v. Borax Consolidated, Ltd.
([1920] 1 K.B. 539), applied.

AS TO LAW GOVERNING CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 6, pp. 263-269, paras. 321-323; and FOR CASES, see DIGEST, Vol. 11, pp. 394-399, Nos. 673-707.

Case referred to:

- (1) *Indian & General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*,
[1920] 1 K.B. 539; 89 L.J.K.B. 252; 122 L.T. 547; 11 Digest 387, 640.

ACTION for a declaration and an injunction.

The plaintiff husband had fallen into arrears with payments which, by a deed made in New Jersey in the United States of America, he had undertaken to make to his wife, the defendant, and in proceedings brought by her in the High Court in England had consented to an order for payment of £6,000 in respect of the arrears. He paid £2,000 of that amount in full, but deducted income tax on the whole £6,000, when tendering the balance. Being threatened by the wife with execution for the sum deducted he brought an action for a declaration that the judgment obtained against him by the wife had been satisfied by the tender of the sum of £1,246 together with certificates of deduction of tax, and, alternatively, that he was entitled to satisfy the judgment by the

payment of that sum. He claimed also an injunction to restrain the wife from proceeding to any execution on the judgment or otherwise to enforce it. He contended that the deed was governed by English law and that the deduction was properly made under r. 19 and r. 21 of the All Schedules Rules of the Income Tax Act, 1918. The wife denied the right to make the deduction on the ground that the deed was governed by the law of the State of New Jersey.

Mustoe for the husband.

Borneman for the wife.

DONOVAN, J.: Mr. Keiner, the plaintiff, was originally married to Mrs. Keiner, the defendant. The parties were divorced in or shortly before 1939. Under a deed which was executed on Jan. 7, 1939, the husband undertook to make certain payments to his wife. Those payments fell into arrear and in 1951 the wife sued her husband for the arrears in the High Court before McNAIR, J. In that action an order was made, by consent, for payment of £6,000 in respect of the said arrears. This sum was paid as to £2,000 in full shortly after the order was drawn up, but when he came to tender the balance of £4,000 the husband sought to deduct the sum of £2,754 for income tax on the whole £6,000, relying, as his authority for doing so, on r. 19 and r. 21 of the All Schedules Rules of the Income Tax Act, 1918. The wife, however, denying any such right on the part of the husband to deduct tax, threatened to levy execution for the sum of £2,754, whereupon the husband commenced this action, claiming, among other things, a declaration that he had satisfied the judgment. In her defence to the claim the wife pleaded that the proper law of this deed of Jan. 7, 1939, under which the payments become due to her, was the law of the State of New Jersey, so that the husband was not entitled to invoke All Schedules Rules 19 and 21 and deduct tax against her. A reply was delivered by the husband in which he claimed that the proper law of the contract was English.

It seemed to me, for reasons which will appear, that it was fundamental to the husband's case to show that the proper law of the contract was English law, and by agreement this issue has been dealt with first. Certain evidence was called about the husband's residence and resources which I accept and which is reflected in my findings of fact, which I can summarise in this way:—(i) at the time that the deed of Jan. 7, 1939, was executed both parties were in the State of New Jersey; (ii) the deed itself was executed and delivered in that State; (iii) at the time of such execution the husband was ordinarily resident in the United Kingdom and the wife was ordinarily resident in the United States of America; (iv) after the execution of the deed and in consequence of it, the husband had no assets in the United States of America, the great bulk of his assets being in the United Kingdom; (v) when the husband fell into arrears with his payments the wife sued him in the High Court here.

When a contract is made abroad *prima facie* the parties are taken to have intended the *lex loci contractus* to govern their rights under it, but this presumption can be rebutted by evidence of some contrary intention on their part. Counsel for the husband submits that such evidence can be found in the facts which I have numbered (iii), (iv) and (v) in the catalogue I have just read out, and he says these facts show that the parties intended English law to apply to the deed of Jan. 7. I cannot share that view. The payments under the deed were to be made in dollars; by cl. 2 the law, either of the State of New York or of the State of New Jersey, is specifically incorporated in the deed for the purpose of determining in what securities certain funds shall be invested; certain rights of inspection are created by cl. 4 which in the normal course would be exercised in America; and in the proceedings before McNAIR, J., the husband himself specifically asserted that the deed was governed by the law of New Jersey. The relevant words appear in para. 1 of his defence and they are these:

“By the law of the State of New Jersey, being the proper law for determining the validity of the purported agreement . . .”

In these circumstances I cannot accept the argument that the presumption that American law is the proper law of the contract—which presumption arises from the fact that it was executed in America—is rebutted by the circumstances to which counsel for the husband referred. In particular, the fact that the wife resorted to the English courts to enforce her rights is immaterial. She presumably had to do so because the husband was living here. I find that the law of the State of New Jersey governs this contract, and, once that conclusion is reached, I think the husband's claim must fail. For he seeks to say to the wife: “I can satisfy my obligation to pay you £6,000 by paying you £3,246 and deducting the balance as income tax.” She naturally asks: “Why is that?” and he replies: “Because English law, as represented by r. 19 and r. 21, or both, gives me that right”. Her answer to him is: “But your obligation towards me arises under the contract of Jan. 7, 1939, and both your obligations and mine, and your rights and mine, under that contract are interpreted and governed by American law, by which law we both agreed to abide. You cannot, therefore, diminish my right to get £6,000 by relying on some provision of English law by which we have not agreed to abide”. That assertion, to my mind, is unanswerable. It is erroneous to argue, as counsel for the husband does, that, being resident in the United Kingdom and paying the money from English sources, the husband is amenable to English law, and, therefore, is entitled to deduct the tax. The question at issue in this case is not what are the husband's rights and obligations vis-à-vis the Inland Revenue here. The question is: What are the rights and obligations of the parties inter se? These are to be ascertained by referring to the contract between them, in other words, to the rules by which they have both agreed to abide, and those rules are to be found in the contract itself as governed by the law of New Jersey. It may well be that if r. 21 applies to this payment—as to which I say nothing—the husband may find himself bound, vis-à-vis the Revenue here, to deduct and pay over tax on the payment, and yet have to pay the wife in full. That is not her fault. It arises, if at all, because the husband has chosen to come and live here. I think this case is the converse of the decision in *Indian & General Investment Trust, Ltd. v. Borax Consolidated, Ltd.* (1). Taking the view I do as to the proper law of the contract and the effect as between the parties of finding that the proper law of the contract is the law of the State of New Jersey, it is not necessary to canvass the interesting questions which would have arisen in this case otherwise, and which are indicated in the pleadings. In my judgment, this action must be dismissed.

Judgment for the wife.

Solicitors: *Wood & Sons* (for the husband); *J. M. Isaacs & Co.* (for the wife).
[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

UNION CORPORATION, LTD. v. INLAND REVENUE
COMMISSIONERS.

JOHANNESBURG CONSOLIDATED INVESTMENT CO., LTD. v.
INLAND REVENUE COMMISSIONERS.

TRINIDAD LEASEHOLDS, LTD. v. INLAND REVENUE
COMMISSIONERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.),
January 23, 24, 25, 28, 29, 30, February 22, 1952.]

*Profits Tax—Relief—Non-distribution relief—Companies ordinarily resident both
within and outside the United Kingdom—Finance Act, 1947 (c. 35), s. 39 (1).*

*Income Tax—Residence—Dual residence—Company—Residence in countries where
sufficient part of “superior and directing authority” is found.*

The three taxpayer companies were ordinarily resident both in the United Kingdom and outside it. On the question whether profits tax was to be ascertained as if no net relevant distributions to proprietors had been made (i.e., whether non-distribution relief was to be given in respect of the whole of the profits and no distribution charges were to be made),

HELD: section 39 (1) of the Finance Act, 1947, which provides that persons “ordinarily resident outside the United Kingdom” shall be entitled to the relief stated must be construed as referring only to persons who were not also ordinarily resident in the United Kingdom, and, therefore, the companies’ claims to have profits tax ascertained as if no net relevant distributions to proprietors had been made failed.

Per curiam: A finding that a company is a resident of more than one country ought not to be made unless the control of the general affairs of the company is not centred in one country, but is divided or distributed among two or more countries. The matter must always be one of degree, and residence may be constituted by a combination of various factors, but one factor to be looked for is the existence in the place claimed as a place of residence of some part of the superior and directing authority by means of which the affairs of the company are controlled: observation of SIR OWEN DIXON, J., in *Koitaki Para Rubber Estates, Ltd. v. Federal Commissioner of Taxation* (1940) (64 Commonwealth L.R. 19), approved and adopted. The question in any particular case whether or no the test is satisfied, whether such part of the “superior and directing authority” of a limited liability company is found in any country as will justify the conclusion that the company is really doing business there, and is, accordingly, there resident, is one of degree, and, therefore, one of fact, on which, if there be evidence to support it, the conclusion of the Special Commissioners will be final. Central management and control may be divided, and such division, being a matter of fact and degree in each case, is not denied by the circumstance that the supreme command, the power of final arbitrament, may be found to be, or to be predominantly, in one place.

Test laid down by LORD LOREBURN, L.C., in *De Beers Consolidated Mines, Ltd. v. Howe* ([1906] A.C. 458), applied.

Swedish Central Ry. Co., Ltd. v. Thompson ([1925] A.C. 495), examined and explained.

FOR THE FINANCE ACT, 1947, s. 39 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 12, p. 784.

Cases referred to:

- (1) *Clifford v. Inland Revenue Comrs.*, [1896] 2 Q.B. 187; 65 L.J.Q.B. 582; 74 L.T. 699; 39 Digest 252, 372.
- (2) *Congreve v. Inland Revenue Comrs.*, [1948] 1 All E.R. 948; [1948] L.J.R. 1229; 30 Tax Cas. 163; 2nd Digest Supp.

- (3) *Swedish Central Ry. Co., Ltd. v. Thompson*, [1924] 2 K.B. 255; *affd.* H.L., [1925] A.C. 495; 94 L.J.K.B. 527; 133 L.T. 97; 9 Tax Cas. 342; 28 Digest 28, 144.
- (4) *Egyptian Delta Land & Investment Co., Ltd. v. Todd*, [1929] A.C. 1; 98 L.J.K.B. 1; 140 L.T. 50; *sub nom. Todd v. Egyptian Delta Land & Investment Co., Ltd.*, 14 Tax Cas. 119; Digest Supp.
- (5) *Inland Revenue Comrs. v. Lysaght*, [1928] A.C. 234; 97 L.J.K.B. 385; 139 L.T. 6; *sub nom. Lysaght v. Inland Revenue Comrs.*, 13 Tax Cas. 511; Digest Supp.
- (6) *De Beers Consolidated Mines, Ltd. v. Howe*, [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T. 221; 5 Tax Cas. 198; *affg.* [1905] 2 K.B. 612; 74 L.J.K.B. 934; 93 L.T. 63; 28 Digest 30, 155.
- (7) *A.-G. v. Alexander*, (1874), L.R. 10 Exch. 20; 44 L.J.Ex. 3; 31 L.T. 694; 28 Digest 30, 159.
- (8) *American Thread Co. v. Joyce*, (1913), 108 L.T. 353; 6 Tax Cas. 163; 28 Digest 30, 157.
- (9) *New Zealand Shipping Co., Ltd. v. Thew*, (1922), 8 Tax Cas. 208; 28 Digest 31, 164.
- (10) *Bradbury v. English Sewing Cotton Co.*, [1923] A.C. 744; 92 L.J.K.B. 736; 129 L.T. 546; 8 Tax Cas. 481; 28 Digest 81, 445.
- (11) *Cesena Sulphur Co. v. Nicholson. Calcutta Jute Mills Co. v. Nicholson*, (1876), 1 Ex.D. 428; 45 L.J.Q.B. 821; 35 L.T. 275; 1 Tax Cas. 83, 88; 28 Digest 25, 136.
- (12) *Goerz & Co. v. Bell*, [1904] 2 K.B. 136; 73 L.J.K.B. 448; 90 L.T. 675; 28 Digest 31, 160.
- (13) *Koitaki Para Rubber Estates, Ltd. v. Federal Commissioner of Taxation*, (1940), 64 Commonwealth L.R. 15, 241.
- (14) *Cooper v. Cadwalader*, (1904), 5 Tax Cas. 101.

APPEAL by the taxpayers, three companies, from an order of HARMAN, J., dated July 20, 1951, upholding the decision of the Special Commissioners of Income Tax that the companies were not entitled to have profits tax ascertained, by virtue of s. 39 (1) of the Finance Act, 1947, as if no net relevant distributions to proprietors had been made.

The companies contended that, although they were admittedly ordinarily resident in the United Kingdom, they were also ordinarily resident outside the United Kingdom, and that by reason thereof they fell within s. 39 (1). The Special Commissioners found that the expression in the sub-section "ordinarily resident outside the United Kingdom" was not equivalent in its context to the expression "not ordinarily resident in the United Kingdom", but they found against the companies on the question of fact of residence, holding that they were ordinarily resident only in the United Kingdom. HARMAN, J., dismissed the companies' appeals, holding, on the question of construction of s. 39 (1), that the words in the sub-section "ordinarily resident outside the United Kingdom" were synonymous with the words "not ordinarily resident in the United Kingdom" appearing in sub-s. (2). It was, therefore, unnecessary for him to decide the question of residence, but he expressed the view that the first two companies had an ordinary residence outside the United Kingdom, and that there was insufficient evidence to show whether that was so in the case of the third company. The companies appealed on the question of construction of s. 39 (1) of the Finance Act, 1947, and the third company also on the question of residence.

Millard Tucker, Q.C., and *Mustoe* for the first and second companies.
Grant, Q.C., and *F. N. Bucher* for the third company.
Heyworth Talbot, Q.C., and *Sir Reginald Hills* for the Crown.

Feb. 22. **SIR RAYMOND EVERSLED, M.R.**, read the following judgment of the court. These are three appeals brought respectively by Union Corporation, Ltd., Johannesburg Consolidated Investment Co., Ltd., and Trinidad Leaseholds, Ltd., from three orders made by **HARMAN, J.**, on July 20, 1951, dismissing their respective appeals from decisions of the Special Commissioners concerning the computation of their liabilities to profits tax. Each of the three taxpayer companies admittedly is, and has at all material times been, resident in the United Kingdom, but each of them also claims that it is, and has at all material times been, concurrently resident in a place outside the United Kingdom, namely, in South Africa as regards Union Corporation, Ltd. and Johannesburg Consolidated Investment Co., Ltd., and in Trinidad as regards Trinidad Leaseholds, Ltd.

Each of the three appeals raises the same two questions: (i) whether, on the assumption that a company is shown to have been ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period, it is, on the true construction of s. 39 (1) of the Finance Act, 1947, entitled to the benefit of that provision in the computation of its liability to profits tax, as having been "ordinarily resident outside the United Kingdom" throughout the relevant chargeable accounting period within the meaning of s. 39 (1), notwithstanding that it was admittedly also ordinarily resident in the United Kingdom throughout the same period, and (ii) if the answer to the first question is in the affirmative, whether, having regard to the circumstances in which, according to the authorities, dual residence can as a matter of law properly be inferred, the company is on the facts of the case shown to have been throughout the relevant period ordinarily resident in the place outside the United Kingdom claimed as its second or concurrent place of residence.

The effect of the Special Commissioners' decision in each of the three cases was: (i) as regards the first question, that residence in a place outside the United Kingdom throughout a given chargeable accounting period would, if established, entitle the company to the benefit of s. 39 (1), notwithstanding the admitted fact of concurrent residence in the United Kingdom throughout the same period, but (ii) as regards the second question, that the test of dual residence in their view deducible from the authorities precluded them as a matter of law from holding that the company was on the facts of the case shown to have been ordinarily resident outside the United Kingdom as claimed, concurrently with its admitted residence in the United Kingdom. The claims of the three companies to the benefit of s. 39 (1) of the Finance Act, 1947, accordingly failed before the Special Commissioners.

The learned judge (who took the convenient course, also adopted in this court, of hearing the three cases together and combining them in a single judgment) differed from the Special Commissioners on both questions, but nevertheless arrived at the same result, for he held (in effect): (i) as regards the first question, that on its true construction s. 39 (1) did not apply to a company ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period if it was also ordinarily resident in the United Kingdom during the same period, or, in other words, that the condition of residence outside the United Kingdom required by s. 39 (1) postulated absence of residence in the United Kingdom, and, accordingly, was not satisfied in a case of dual residence by proof of residence in a place outside the United Kingdom concurrently with residence in the United Kingdom, and (ii) as regards the second question (on which he thought it right to express his view, although his decision on the first question concluded the appeals against all three companies, and made it strictly unnecessary for him to do so) that the Special Commissioners had misapprehended the effect of the authorities as regards the circumstances in which dual residence can as a matter of law properly be inferred, and that, judged by the true test deducible from the authorities when properly under-

stood, the facts as found by the Special Commissioners in the cases of Union Corporation, Ltd., and Johannesburg Consolidated Investment Co., Ltd. sufficed to establish the dual residence in South Africa as well as in the United Kingdom claimed by them respectively, but that as regards Trinidad Leaseholds, Ltd. the facts so far found were not sufficient to warrant the same course, and he would, had he reached a different conclusion on the first question, have thought it necessary to remit the case to the Special Commissioners for further consideration.

We are now invited to reverse the learned judge's decision on the first question, and to adopt his views on the second. On the part of Trinidad Leaseholds, Ltd. we are asked to go further and to hold its claim to dual residence established on the facts as already found, dispensing with the remission to the Special Commissioners which the learned judge would have thought it necessary to direct. It is unnecessary for the purposes of the present appeals to discuss in any detail the intricacies of the profits tax legislation. The tax was first imposed by the Finance Act, 1937, under the name of national defence contribution as a tax at a uniform rate on profits, whether distributed or not, sub-s. (1) and sub-s. (2) of the charging section (s. 19 of the Act of 1937), as amended by the Finance Act, 1942, s. 36 (1), and sched. IX, being in these terms:

"(1) There shall be charged, on the profits arising in each chargeable accounting period falling within the years of charge to the national defence contribution from any trade or business to which this section applies, a tax (to be called the 'national defence contribution') . . . (2) Subject as hereafter provided, the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on, whether personally or through an agent, by persons ordinarily resident in the United Kingdom."

The tax, originally introduced for a period of five years, was continued indefinitely by s. 36 (1) of the Finance Act, 1942. Its name was changed to profits tax by s. 44 of the Finance Act, 1946.

A radical alteration in the character of the tax was made by the Finance Act, 1947, which introduced an entirely new feature in the shape of discrimination between distributed and undistributed profits. By s. 30 (1) of the Finance Act, 1947, as amended by s. 7 (1) of the Finance (No. 2) Act, 1947, the rate of profits tax was increased to twenty-five per cent. By s. 30 (2) of the Finance Act, 1947, as amended by s. 7 (2) of the Finance (No. 2) Act, 1947, relief was granted at the rate of fifteen per cent. on the amount of any excess of profits chargeable to tax for any chargeable accounting period over the amount of profits distributed for that period. Conversely, by s. 30 (3) of the Finance Act, 1947, as amended by s. 7 (2) of the Finance (No. 2) Act, 1947, an additional charge at the rate of fifteen per cent. was made on the amount of any excess of profits distributed for any chargeable accounting period over the profits chargeable to tax for that period.

The broad effect of the provisions thus briefly summarised was, therefore, to charge profits tax at the rate of twenty-five per cent. on distributed, and ten per cent. on undistributed, profits; and these were the rates in force during the periods relevant to the present appeals. By s. 31 of the Finance Act, 1947, trades or businesses carried on by individuals, partnerships of individuals, and persons acting as personal representatives, were exempted from the tax, and its scope (save in certain special cases probably rare in practice) was thus in effect limited to trades or businesses carried on by corporate bodies. The Act also contains elaborate provisions, which need not for the present purpose be considered in detail, but to which some further reference is made hereafter, for exempting from further liability to tax profits received by way of distribution by one profits-tax paying concern from another (termed in the Act "franked investment

income"), and for excluding the appropriate proportion of any franked investment income in computing the amount of any taxable distribution made out of profits which include franked investment income.

Reference should now be made to s. 39 of the Finance Act, 1947, and as the first question in these appeals turns on the true construction of sub-s. (1) of this section, while its remaining provisions have been relied on in argument as aiding one way or the other in the solution of that problem, it had better be read in full.

"(1) Where the person carrying on a trade or business is ordinarily resident outside the United Kingdom throughout a chargeable accounting period, the profits tax payable by that person shall be ascertained as if no net relevant distributions to proprietors had been made in the case of that person for that period. (2) Where a trade or business is carried on by a body corporate and, throughout a chargeable accounting period, both the following conditions are fulfilled, that is to say—(a) that that body corporate is ordinarily resident in the United Kingdom; and (b) that another body corporate which is not ordinarily resident in the United Kingdom controls, directly or indirectly, not less than one half of the voting power in the first-mentioned body corporate, distributions to that other body corporate shall be left out of account in determining, in relation to the first-mentioned body corporate, the net relevant distributions to proprietors for that period. (3) Where the franked investment income of a person includes income received from a body corporate ordinarily resident outside the United Kingdom to which sub-s. (1) or sub-s. (2) of this section applies, the preceding provisions of this Part of this Act relating to the determination of the net relevant distributions for any period by reference to the gross relevant distributions therefor shall have effect subject to the following modification, that is to say, that any reference therein to the profits for the period (not being a reference to profits computed without abatement and including franked investment income) shall be construed as a reference to the first-mentioned profits increased by the said income received from the said body corporate."

The first question to be determined depends on the construction of the word "outside" in s. 39 (1). The companies contend that the word has a wide meaning which does not exclude other residence inside the United Kingdom, whereas the Crown contends for a narrower construction, making residence outside the United Kingdom exclusive of residence inside the United Kingdom. It was conceded that for present purposes the word "ordinarily" adds nothing to the word "resident". Having regard to the language chosen by Parliament in s. 39 the question is not an easy one, but, apart from a special context, we think that the word "outside" has naturally an exclusive meaning, and in its ordinary application has a negative import as opposed to the positive import which the word "inside" possesses. When, however, it is attached to such a word as "residence", and when it is remembered that a person may be resident in two places at the same time, the purely negative import of the word "outside" is not so obvious. Nevertheless, we agree with HARMAN, J., in thinking that the exclusive is still the *prima facie* meaning of the word. To speak of residence inside the United Kingdom is to make a positive assertion of fact. To speak of residence outside the United Kingdom is merely to contradict the fact of residence inside the United Kingdom, without any positive assertion of any other particular residence. The research of counsel was directed to finding examples of the use of similar words in a taxing statute when it could be said with certainty that the word "outside" had been used in the exclusive or purely negative sense. No satisfactory illustration was given, except one taken from r. 12 (1) of the Rules Applicable to Cases I and II of sched. D. Here it is conceded that the phrase "persons resident outside the United Kingdom" must necessarily connote

the exclusion of persons residing inside the United Kingdom. When we come to the particular context here involved the question of construction is rendered difficult by the change of language in s. 39 (2) (b) where the words used are not "ordinarily resident outside the United Kingdom" but "not ordinarily resident in the United Kingdom".

The companies contend, first, that the change of language must be regarded as deliberate, and shows that, whereas the words used in sub-s. (2) (b) are plainly exclusive, the words used in sub-s. (1) are not exclusive of residence inside the United Kingdom. In the alternative they argue that the problem goes beyond the sphere of difficult construction and becomes one of ambiguity. They rely on the judgment of POLLOCK, B., in *Clifford v. Inland Revenue Comrs.* (1) approving a passage in MAXWELL ON STATUTES, 1st ed., which read as follows ([1896] 2 Q.B. 193):

"Statutes which impose pecuniary burdens are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language by which the tax is imposed is perfectly clear and free from doubt."

The companies, then, contend that the ambiguity must be resolved in favour of the taxpayer. As to this we have, after the exhaustive argument addressed to the court on behalf of all parties concerned, arrived at the conclusion that there is no ambiguity in the sense contended for and that the difficulty is one of construction which can and should be overcome. And in any case, the section is primarily a relieving section and not a taxing section.

We return to the first point. Change of language in itself is not a necessary support for an argument that meaning is changed: see *Congreve v. Inland Revenue Comrs.* (2). LORD SIMONDS, in discussing in that case ([1948] 1 All E.R. 952) the use of the words "by means of" and "by virtue or in consequence of" in s. 18 of the Finance Act, 1936, both phrases being in close proximity to one another, refused to draw a fine distinction, and concluded that the difference of language was there sufficiently explained by the wish of the draftsman not to use the same expression twice. We admit that, if the Crown is right, the change in terminology is open to criticism as a matter of drafting, but we think it is easy to see (on the Crown's view) how it may have come about. The Act reads in s. 39 (2) (a) "that that body corporate is ordinarily resident in the United Kingdom", and then continues in s. 39 (2) (b) "that another body corporate which is not ordinarily resident in the United Kingdom", etc. In drafting (a) and (b) together it seems natural enough to add the word "not" before the words "ordinarily resident" rather than to look back to see what form of words was used in s. 39 (1) to describe the same thing. We are not, then, persuaded that the change of language in s. 39 (2) displaces what we regard as the prima facie meaning of the words "resident outside the United Kingdom" in s. 39 (1). On the other hand, we think that assistance can be gained from a consideration of the language of s. 39 (3).

The first two companies contended that the words in s. 39 (3)

"... a body corporate ordinarily resident outside the United Kingdom to which ... sub-s. (2) of this section applies ..."

refers to the body corporate in sub-s. (2) (b). That contention is accepted by the Crown, and prima facie it supports their submission that the words "ordinarily resident outside" in sub-s. (3) are synonymous with the words "not ordinarily resident in" in sub-s. (2) (b). The Crown thus endeavour in part to meet the contention based on change of language. Counsel on behalf of the first two companies retorts that this reference carries the matter no further, since reference to sub-s. (2) (b) in sub-s. (3) may be to a limited class of corporations already

included in the wider language of the latter sub-section. Sub-section (3) is concerned with what is called "franked investment income". This phrase is defined in sub-para. (1) (A) of para. 7 of sched. IV to the Finance Act, 1937, as amended by s. 32 (1) of the Finance Act, 1947. Without attempting a complete or precise exposition, the purpose and effect of these provisions are to avoid double payment of the tax (at the full rate) when and to the extent that the profits of one body corporate (liable to the tax) consist of "investment income" directly or indirectly received from another body corporate which has, in respect of that income, already become liable to tax at the full rate. Both sub-s. (1) and sub-s. (2) of s. 39 of the Act of 1947 make provision for reducing the rate of tax in certain cases—sub-s. (1) in the case of all the taxable profits of a body corporate "ordinarily resident outside the United Kingdom", and sub-s. (2) in the case of a body corporate "ordinarily resident inside the United Kingdom" which is controlled as to not less than half its voting power by a body corporate not ordinarily resident inside the United Kingdom, to the extent of the profits distributed to the latter body. It is reasonably clear, then, in our view, that what sub-s. (3) is designed to do is to provide that where income or profits, in respect of which the rate of tax has been reduced by virtue of sub-s. (1) or sub-s. (2), would in the hands of another body corporate be entitled to be treated as "franked investment income" under the earlier provisions of the Act, then that other body corporate is, quoad such income or profits, disentitled to the relief it would otherwise obtain. As regards the reference in sub-s. (3) to sub-s. (1) no difficulty seems to arise. The phrase "to which sub-s. (1) . . . applies" is in all respects appropriate. As regards sub-s. (2), however, the language used in sub-s. (3) is much less clear and on any view the drafting must be regarded as somewhat inelegant. For sub-s. (2) is dealing with the case of a body corporate ordinarily resident inside the United Kingdom—albeit having the characteristic that not less than fifty per cent. of its voting power is controlled by a body corporate not ordinarily so resident. The taxpayer companies are then confronted with a dilemma. If the word "applies" in sub-s. (3) has, quoad sub-s. (2), its ordinary significance, then the only body corporate to which sub-s. (2) "applies" is one ordinarily resident, not outside, but inside, the United Kingdom. To avoid this difficulty the word "applies" must be read as "refers". This is the horn of the dilemma preferred by counsel for the first two taxpayer companies, and although, as we have already said, it is no doubt possible as a matter of language to regard sub-s. (3) as intending, by its reference to sub-s. (2), to identify a sub-class (as it were) of bodies corporate ordinarily resident outside the United Kingdom, namely, those that are not also ordinarily resident inside the United Kingdom, it is a singularly oblique method of achieving that end, to say the least; and if the word "applies" must for this purpose be read as equivalent to "refers", then the far more natural sense of the language, in our judgment, is that "ordinarily resident outside the United Kingdom" and "not ordinarily resident inside the United Kingdom" are treated as synonymous.

Counsel for the third company so far recoiled from this result that he grasped the first horn of the dilemma. He insisted that the word "applies" must, quoad sub-s. (2), be correctly used and read. But this conclusion is, we think, even less happy for him than was the alternative preference of counsel for the first two companies, for, as we have already observed, sub-s. (2) applies not to a body corporate ordinarily resident outside the United Kingdom but to a body corporate ordinarily resident inside the United Kingdom. To make sense, therefore, of the provision at all, sub-s. (3), on the argument of counsel for the third company, must be treated quoad sub-s. (2) as intended, by an even greater obliquity than demanded by the alternative construction, to be referring to a body corporate ordinarily resident inside the United Kingdom which is also ordinarily resident outside it, and (by what must be admitted to be a queer caprice) to be taking away the benefit introduced by s. 32 of the Act of 1947 from a person who has

received as "franked investment income" income received from *that* body corporate and not income received from the body corporate referred to in sub-s. (2) (b). Notwithstanding that, relief in regard to the rate of tax has been given by sub-s. (2) to distributions to the latter body corporate and not to the former.

In our judgment, the complexities and anomalies which either of the arguments of counsel for the companies require are such as to make it impossible to attach significance to the change in expression from "ordinarily resident outside", on the one hand, to "not ordinarily resident inside", on the other. In other words, the inelegance of language and the mental contortions which are otherwise forced on the reader point strongly, in our judgment, to the solution that the two expressions are and were intended to be synonymous. We think, therefore, on the whole that the argument of the Crown has persuasive force and that the natural reference to sub-s. (2) in sub-s. (3) is to the body corporate not ordinarily resident in the United Kingdom mentioned in sub-s. (2) (b), so that "ordinarily resident outside" in sub-s. (3) is synonymous with "not ordinarily resident in" in sub-s. (2) (b).

We think, however, that support for the Crown's contention (apart from the *prima facie* meaning of the word "outside") is also to be found in the structure of the legislation by which the profits tax is imposed. The normal dichotomy in the taxing acts is between persons residing in, and persons residing out of, the United Kingdom. We use the word "normal" to show that we have not overlooked the fact (pointed out by counsel for the third taxpayer company) that the Act of 1947 introduced a new conception, namely, differential rates of profits tax according to whether profits were distributed or not, and that the distinction is not one wholly between resident and non-resident, since under s. 39 (2) relief is given to a person who is resident in this country. The distinction does, however, appear in s. 19 of the Finance Act, 1937, which first imposed the national defence contribution. The taxpayer companies were made subject to the tax by the Act of 1937, and if it had been intended by s. 39 (1) of the Act of 1947 to give persons resident not only inside but also at the same time outside the United Kingdom relief already given by the same section to persons residing exclusively outside the United Kingdom the legislature would, in our opinion, have said so in terms. In our judgment, the words of s. 39 (1), construed in their natural meaning, in their context, and against the background of the taxing acts generally, can only properly be construed in the sense contended for by the Crown, so that the companies, being resident inside, cannot claim the benefit conferred by the section on persons resident outside, the United Kingdom.

Before leaving this part of the case it is desirable that we should refer to one sentence used by HARMAN, J., which has been the subject of criticism in this court. He said:

"It is, however, to be observed that 'not resident in' in sub-s. (2) (b) is used as the opposite to 'resident in' in sub-s. (2) (a) and that the latter must mean 'resident in and nowhere else'."

We are unable to assent to this statement, since, once it is conceded that a company may be resident in two places, the positive finding that a company is resident in the United Kingdom does not, according to the natural sense of the words, exclude a finding that the same company is also resident outside the United Kingdom. In so far, therefore, as the learned judge found support for the construction he placed upon the language of s. 39 (1) in the language of sub-s. (2) (a) and sub-s. (2) (b), we should not follow him.

Having regard to the conclusion at which we have arrived on the first question, it becomes, in strictness, unnecessary for us to express our view on the second. But it has been most fully and elaborately argued before us, and we have been informed by learned counsel that those who are engaged in the practice and administration of income tax law have now for more than twenty years been

vexed by the problem, and have awaited an opportunity for its determination by the court. Both the Special Commissioners and HARMAN, J., have given their opinions on it, and the present case may well be considered by the House of Lords. In the circumstances we have thought it right to state our own conclusions. The short question at issue may conveniently be posed, at this stage, in reference to one of the three companies—say, Union Corporation, Ltd., and so posed it may, indeed, seem at first sight simple enough. This large corporation, incorporated according to the laws of the Union of South Africa, having its registered office in Johannesburg in that country, has an issued share capital of more than £1,000,000, and controls the activities of sixteen subsidiary companies, thirteen of them incorporated in South Africa and managed by the company from Johannesburg, two of them incorporated in England, and the last in Mexico which, like the English companies, is managed from London. In addition the company acts in secretarial and technical capacities for a number of other companies, most of them incorporated in South Africa, in which country the company's services are performed. More than two-thirds of the company's staff is in South Africa. A minority of the board of directors resides in South Africa. Meetings of the board, or of committees of the board, take place in South Africa, but on matters of policy or otherwise generally affecting the company's affairs the supremacy rests with the board in London. It follows that the real and ultimate control over the company's activities is to be found in London, where the majority of the directors reside and act, and of the large revenue which the company enjoys more than one half (as appears from the Case Stated) may fairly be taken to be earned in England or outside the Union.

We have given but a brief summary of the functions and activities of Union Corporation, Ltd. They are fully analysed in the Case Stated, but the summary is sufficient for our present purpose. Where, on these facts, is Union Corporation, Ltd. "ordinarily resident"? Or, since it is conceded on both sides that in the present case the adverb is without significance, where is it "resident"? We have put the question deliberately in that form since it is also conceded, and must in any event since *Swedish Central Ry. Co., Ltd. v. Thompson* (3) be taken as established, that an incorporated company may for income tax purposes have more than one residence. But though we think the question is properly put as we have posed it, the circumstances have presented it to us in slightly different form. The company being admittedly resident in England, is it resident also in South Africa? For residence in England has throughout been conceded on the company's behalf, and having regard to the existence and exercise of final and effective control by the directors in London, to the presence or "abiding" in London (to anticipate the formula recurring time and again in the many cases cited) of "central control and management"—we deliberately omit the definite article as tending to beg the question—the company's advisers could do no other.

The words "residing" and "residence", whether applicable to a natural or an artificial person, are nowhere defined in any of the relevant Income Tax or Finance Acts. There is no indication in such legislation that the significance of the words is to be determined by reference to any particular facts or circumstances. So far as the words apply to a natural person, it is established that they are to be construed according to their natural and ordinary import: see per VISCOUNT SUMNER in the *Egyptian Delta Land & Investment Co., Ltd. v. Todd* (4) ([1929] A.C. 27) citing *Inland Revenue Comrs. v. Lysaght* (5) ([1928] A.C. 249). On the other hand, it is obvious that a body corporate, a persona ficta, cannot appropriately be said to "reside" at all in the same and ordinary sense as an individual. Physical presence and its normal manifestations, e.g., of eating and sleeping, are absent in the former case. The relevant legislation has, however, over a long period applied the test of "residence" indifferently to natural and artificial persons. The sense of the words must, therefore, as respects a

body corporate, be derived, as LORD LOREBURN, L.C., observed in his much quoted opinion in *De Beers Consolidated Mines, Ltd. v. Howe* (6) ([1906] A.C. 458), from analogy. But the analogy involves no mere technicality, no great mystery or mental strain; it leaves, we should have thought, room for common sense. Still the words remain, "residing" and "resident". There is, as we have said, no substitution in the statutes in the case of a body corporate of a new and elaborate formula, the precise terminology of which requires to be construed by the court.

If, then, this were the whole matter, we should for our part have been much inclined to say, on the facts as we have summarised them and regarding the first company's activities and functions as best we could by sensible analogy to those of an individual trader, that, if Union Corporation, Ltd. resided in the United Kingdom, it resided also in the Union of South Africa, since there are ample manifestations of its presence in both places and it truly does business in both countries, or at least we should have been inclined to hold that the question was one of fact to be conclusively determined in a broad man-of-the-world sense by the Special Commissioners. Unfortunately, so simple an approach and so easy a solution are not possible. And the Special Commissioners attempted no such matter of fact determination, but concluded, after a most careful summary of the numerous authorities, that in the circumstances of the present case the (admittedly correct) concession of a London residence negated as a matter of law the existence of a residence elsewhere.

During the thirty years between 1875 and 1905, the span covered at its extremes by the decision of the Exchequer Chamber in the *Ottoman Bank* case (*A.-G. v. Alexander* (7)) and the decision of the House of Lords in the *De Beers* case (6), the courts undoubtedly worked out and enunciated a rule or principle for determining where, for purposes arising under sched. D of the Income Tax Acts, a limited company resided. The rule found classical expression in LORD LOREBURN'S words ([1906] A.C. 458) in the *De Beers* case (6)—"where the central management and control actually abides". Thereafter, and before the *Swedish Central Ry. Co.* case (3), this enunciation was thrice affirmed in the House of Lords in *American Thread Co. v. Joyce* (8), in *New Zealand Shipping Co., Ltd. v. Thew* (9), and in *Bradbury v. English Sewing Cotton Co.* (10). And it must now be taken also, since the case of *Egyptian Delta Land & Investment Co., Ltd. v. Todd* (4), as clear that the rule or principle was and is equally applicable to companies incorporated in the United Kingdom and to companies incorporated outside the United Kingdom (see [1929] A.C. 25 of the report of that case). But nowhere in any of the authorities from the *Ottoman Bank* case (7) until the *Swedish Central Ry. Co.* case (3) was it decided—nor was it material to decide—whether the test, if satisfied as regards one country, was exclusive of residence in another. There are many judicial dicta favouring the possibility of dual residence—for example, KELLY, C.B., in *Cesena Sulphur Co. v. Nicholson* (11) (1 Ex.D. 445); CHANNELL, J., in *Goertz & Co. v. Bell* (12) ([1904] 2 K.B. 146); PHILLIMORE, J., in the *De Beers* case (6) ([1905] 2 K.B. 632); BUCKLEY, L.J., in *American Thread Co. v. Joyce* (8) (106 L.T. 175), and elsewhere.

But the truth was that at the time of the *De Beers* case (6), as VISCOUNT SUMNER said in the *Egyptian Delta* case (4) ([1929] A.C. 23):

" . . . and for twenty years afterwards it was assumed, that a limited liability company could not have two residences for income tax purposes; either it resided abroad or it did not."

We are, therefore, disposed for ourselves to think (with all respect to certain language of VISCOUNT CAVE, L.C., in the *Swedish Central Ry. Co.* case (3)) that if LORD LOREBURN and the other noble lords who participated in the *De Beers* decision (6) had been asked if the test there formulated was exclusive in its effect, they would have answered affirmatively, because the possibility of dual residence by a limited liability company for tax purposes was not then in

contemplation. But whether our surmise be right or wrong, it is beyond doubt that none of the cases referred to ever so decided.

So the question arose for the first time in the *Swedish Central Ry. Co.* case (3), and in that case—equally beyond doubt—the House of Lords answered the question affirmatively, and decided that a limited company which was admitted to reside in Sweden (where its board of directors, in fact, met to conduct the company's business) could still have, and did have, at the same time an English residence also for income tax purposes. But it is, we think, impossible to avoid the conclusion that the opinions in that case, on the face of them, went further than merely to assert the validity of the proposition that a limited liability company might contemporaneously reside in more than one country, and that there was evidence sufficient to justify the finding by the Special Commissioners that the Swedish Central Railway Company resided in the United Kingdom as well as in Sweden. The opinions lend strong support to the view that, even where the "central control and management" were concentrated exclusively in one country, still concurrent residence in another country might exist, based on not much more than the facts of incorporation and registration in that other country, together with such further activities as were necessary to maintain the registration in accordance with the local law. It will be necessary for us hereafter to state more fully the facts in the *Swedish Central Ry. Co.* case (3), and to refer to certain language used by LORD CAVE on which the companies in the present cases have particularly relied. But it is pertinent at this place to state first that both ATKIN, L.J., and LORD ATKINSON dissented from the conclusion of the majority in the Court of Appeal and the House of Lords respectively, and maintained that the rule enunciated in the *De Beers* case (6) was exclusive in its effect; and, secondly, that LORD SUMNER, though expressing no reasons of his own, assented to the conclusion proposed by LORD CAVE. If, therefore, on the facts of the present case having been presented to us for our opinion before the *Swedish Central Ry. Co.* case (3), we should have felt bound by the authority of the *De Beers* case (6)—contrary to our own inclination as above intimated—to answer the question posed adversely to the companies' arguments, after the decision of the *Swedish Central Ry. Co.* case (3) we should have felt no less bound to express the opposite conclusion.

Four years later, the *Egyptian Delta* case (4) came before the House of Lords. In that case, as in the *Swedish Central Ry. Co.* case (3), residence in a country outside the United Kingdom was admitted, but it was contended that, although beyond a peradventure the central control and management abided wholly in Egypt, the mere fact of incorporation and registration in the United Kingdom, together with the performance there of such other formal or administrative functions as were essential by the law of England to maintain such registration, sufficed to give to the company English residence also. HARMAN, J., was of opinion that in the *Egyptian Delta* case (4) the House of Lords did not reside in any respect from the opinions it had expressed in the *Swedish Central Ry. Co.* case (3), and, so far as concerns the matters strictly decided in the latter case, no doubt the House did not do so and could not have done so. But we have found it impossible to avoid the conclusion that LORD SUMNER, in the course of his long analysis of the previous decisions, and particularly of the decision in the *Swedish Central Ry. Co.* case (3) itself, did at least substantially qualify, and intend to qualify, some of the dicta in the last mentioned case and the inferences to which, unqualified, they must inevitably have led. In support of this view we refer particularly to the attention directed by LORD SUMNER to the dissenting judgments of LORD ATKINSON and ATKIN, L.J., in the *Swedish Central Ry. Co.* case (3), and to the emphasis placed by LORD SUMNER, LORD BUCKMASTER and LORD WARRINGTON OF CLYFFE on the language of r. 7 of All Schedules Rules to the Income Tax Act, 1918, which had not been previously noticed.

The question presented to the House of Lords for decision in the *Egyptian Delta* case (4) was of a limited character—whether the company, being admittedly resident in Egypt, could in the circumstances already mentioned properly be held also to have an English residence. But as it had been with VISCOUNT CAVE in the *Swedish Central Ry. Co.* case (3), so the speech of VISCOUNT SUMNER was not confined to giving a negative answer to the question posed. He “trod again the weary road of the tax cases” and elaborately analysed previous decisions, and particularly the *Swedish Central Ry. Co.* case (3). As a consequence, on certain passages of his speech, the Crown have relied with no less zeal than have the companies on their chosen sections of the speech in the *Swedish Central Ry. Co.* case (3). The result has been that the language of both these speeches and of LORD LOREBURN’s speech in the *De Beers* case (6) has at times been subjected to a closeness of scrutiny more appropriate to the examination of the words of a statute in course of interpretation by the court. This process has, we think, run the risk of doing less than justice to the speeches in question which were intended only to express the speakers’ reasons for the conclusions at which they arrived in the particular circumstances before them.

What, however, is the result? The view of the Special Commissioners was that in the case of a limited company engaged in active business operations (like each of the taxpayer companies but unlike the *Swedish Central Railway Company*) residence in more than one country could only be found if the supreme command, as it were, over the company’s affairs, “the central control and management”, was in truth divided so as to be equally, or substantially equally, present in both countries: as if, in *Union Corporation Limited’s* case, the board of directors in England and South Africa were equally, or substantially equally, balanced, and board meetings in each country possessed and exercised a like authority, or, as if a company’s single board of directors divided its presence, energies and functions correspondingly between two countries. We agree with HARMAN, J., in rejecting this view. It is clear that mere registration and mere performance of those acts which the English law relating to limited companies (and corresponding laws in other countries) require to be done to maintain registration do not constitute such activities as are by analogy equivalent to the activities which, in the case of a natural person, establish residence. It is, we think, no less clear that the mere presence in a country of physical assets belonging to a company and the conduct of substantial productive or other business operations on the company’s behalf by its managing or other servants will not suffice, if the control of all those operations and of the general affairs of the company is elsewhere, for otherwise it would follow (and the argument of counsel for the third company seemed, indeed, at times to go so far) that a company would reside in every country where substantial business activities were being in fact conducted on its behalf. The company may be properly found to reside in a country where it “really does business”, that is to say, where the controlling power and authority which, according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and authority, is to some substantial degree to be found. In our judgment, the formula “where the central power and authority abides” does not demand that the court should look and look only to the place where is found the final and supreme authority.

We have on this difficult question derived great assistance from the judgment of SIR OWEN DIXON, J., in the Australian case of *Koitaki Para Rubber Estates, Ltd. v. Federal Commissioner of Taxation* (13), where the same problem was fully considered by that learned judge and by the full High Court of Australia. We cite one paragraph from DIXON, J.’s, judgment (64 C.L.R. 19):

“The better opinion, however, appears to be that a finding that a company is a resident of more than one country ought not to be made unless the control of the general affairs of the company is not centred in one country

but is divided or distributed among two or more countries. The matter must always be one of degree and residence may be constituted by a combination of various factors, but one factor to be looked for is the existence in the place claimed as a residence of some part of the superior or directing authority by means of which the affairs of the company are controlled."

We accept and respectfully adopt that passage as accurately stating the solution of the problem. The question in any particular case, whether or no the test is satisfied, whether such part of the "superior and directing authority" of a limited liability company is found in any country as will justify the conclusion that the company is really doing business there, and is, accordingly, there resident, is one of degree, and, therefore, one of fact, on which, if there be evidence to support it, the conclusion of the Special Commissioners will be final.

Of the cases decided before the *Swedish Central Ry. Co.* case (3) we do not find it necessary to refer to any but the *De Beers* case (6), to which we have already many times referred. The De Beers Company, like Union Corporation, Ltd., had been incorporated in South Africa where a substantial mining business was conducted in its name. But, as in the case of Union Corporation, Ltd., the majority of its directors resided in England, where the superior and directing authority over the company's affairs was undoubtedly exercised. The question—and the only question—involved in the case was whether in the circumstances the company resided in England for income tax purposes. The relevant part of LORD LOREBURN'S judgment must be quoted in full ([1906] A.C. 458):

"In applying the conception of residence to a company, we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business . . . The decision of KELLY, C.B., and HUDDLESTON, B., in the *Calcutta Jute Mills Co. v. Nicholson* (11) and the *Cesena Sulphur Co. v. Nicholson* (11), now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control actually abides. It remains to be considered whether the present case falls within that rule. This is a pure question of fact to be determined, not according to the construction of this or that regulation or bye-law but upon a scrutiny of the course of business and trading."

In that passage LORD LOREBURN was, in our judgment, answering two distinct questions—first, what were the activities or functions of a body corporate, an artificial person, which by analogy corresponded to those human functions or activities which in the case of a natural person might constitute "residence"? , and, second, what (for the purpose of providing the answer to the question raised in the case before him) extent or degree of those activities or functions on the part of an artificial person would suffice to establish "residence"? To the first question LORD LOREBURN'S answer was—"keeping house and doing business", not, be it observed, doing business alone, for otherwise, as we have already stated, a limited company might be said to reside in every country where any substantial business was being done in its name though it remained, in DIXON, J.'s phrase in *Koitaki Para Rubber Estates, Ltd. v. Federal Commissioner of Taxation* (13), a mere "absentee owner". To the second question LORD LOREBURN'S answer was—where those activities are "really" performed, where the company "really keeps house and does business". And the significance of the essential adverb is supplied by the later paraphrase "the real business is carried on where the central management and control actually abides". The form of the language was determined by reference to the particular question which the House was called upon to determine and by the circumstance that the possibility of dual residence was then neither contemplated nor relevant.

in such a context the test formulated amounts, in our judgment, to no more and no less than the test stated by DIXON, J., in the Australian case.

In the *Swedish Central Ry. Co.* case (3) the facts were that the railway undertaking owned by the company had at the material date been leased to another company in Sweden, so that its business activities were for practical purposes limited to the receipt of the contractual rentals. All meetings of directors as well as of shareholders were held in Sweden, but there was a secretary in London and a banking account in London and the company's seal was kept in London, where all transfers of shares were made or registered. It was conceded that the company was resident in Sweden, but the question was whether (as the Crown alleged) the company was also resident for the purposes of schedule D in the United Kingdom. According to the judgment in the *Egyptian Delta* case (4) of LORD SUMNER, who was, as we have noted, a member of the House which heard the appeal in the *Swedish Central Ry. Co.* case (3), the character of the activities performed in Sweden and England respectively were never discussed at the Bar ([1929 A.C. 16]):

" . . . in the static condition of the company's affairs [the business done in England] was not much less important than the Swedish part . . . as things were, little had to be done anywhere except 'administration', as is often the case with companies, and that was fairly divided between the two countries."

Nevertheless, VISCOUNT CAVE, L.C., and the majority of the House proceeded to determine the case on the basis that the central control and management of the company's affairs was to be found, and found (as we think) exclusively, in Sweden. That fact did not, however (they held), negative concurrent residence in England, nor did it invalidate the finding of the Special Commissioners that the company also resided in England. LORD CAVE said ([1925] A.C. 501):

"The effect of this decision is that, when the central management and control of a company abides in a particular place, the company is held for purposes of income tax to have a residence in that place; but it does not follow that it cannot have a residence elsewhere. An individual may clearly have more than one residence: see *Cooper v. Cadwalader* (14); and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and, if so, it may have more than one residence."

The passage on which the companies here most strenuously relied is that which occurs later (*ibid.*, 505):

"In the present case it was found by the commissioners that, while the business of the company was controlled and managed from the head office at Stockholm, so that the company would in the contemplation of English law have a residence in Sweden, the company was resident in the United Kingdom for the purposes of the Income Tax Acts; and it was hardly disputed that, assuming that a company can have two residences, there was sufficient material upon which that finding could be based. I am not at present prepared to say that registration in the United Kingdom would itself be sufficient proof of residence here; that point does not arise in this case, and I express no opinion upon it. But, however that may be, I am satisfied that the fact of registration, together with the other circumstances which were found by the commissioners to exist, were sufficient to enable them to arrive at their finding."

In the *Egyptian Delta* case (4) the facts were similar to those in the preceding case save that (i) the business of the company was not "static" but consisted of active trading operations in Egypt, and (ii) the residual activities of the company in England were confined to such purely "administrative" functions only as

were necessary to comply with the requirements, in order to sustain the company's continued registration in England, of the Companies (Consolidation) Act, 1908. The Crown contended—relying particularly on the *Swedish Central Ry. Co.* decision (3)—that the company was, as a matter of law, resident in England as well as in Egypt for income tax purposes and so the revenue judge and the Court of Appeal had both determined. VISCOUNT SUMNER and the other noble lords who were then associated with him (LORD ATKINSON, LORD BUCKMASTER and LORD WARRINGTON OF CLYFFE) decisively rejected that proposition. We have already cited certain comments by LORD SUMNER on the *Swedish Central Ry. Co.* case (3), but the whole of the following passage should be quoted ([1929] A.C. 16):

“ All that was decided in the *Swedish Central Ry. Co.* case (3) was that the company could have two residences, one in England as well as one in Sweden. Your Lordships were not asked to decide more. It is true that by admission the controlling power over the business was in Sweden, but other business was done in London the character and importance of which, though set out in the case, was not discussed at the Bar. It was a matter of degree on the facts and your Lordships cannot be deemed to have come to some unexpressed conclusion on that ground merely because you did not for yourselves declare either that there was no evidence of business carried on in England or that there was no need to discuss the carrying on of business because the effect of registration was conclusive. Nor is it decisive of the point to say now that the business done in England was only administrative. It was in fact, a good deal more, and in the static condition of the company's affairs, it was not much less important than the Swedish part. If new questions arose the Swedish directors could settle them, but as things were, little had to be done anywhere except ‘administration’, as is often the case with companies, and that was fairly divided between the two countries. I would particularly draw attention to the powerful judgments of my noble and learned friend LORD ATKINSON and of ATKIN, L.J., as showing how strong are the grounds for saying that since the *De Beers* case (6) the test of taxable residence for any company has been settled to be the carrying on of business here and not the bare operation of the Companies (Consolidation) Act.”

Having so restricted the effect and significance of the *Swedish Central Ry. Co.* decision (3), the noble lord then proceeded to his review of the authorities up to and beyond the *De Beers* decision (6). To do justice to its sense and its reasoning, the whole speech must be read. In our judgment, it involved, essentially, an unhesitating affirmation of the validity and authority of the test expounded by LORD LOREBURN in the *De Beers* case (6) (*ibid.*, 20):

“ Then in 1906 the *De Beers* case (6) . . . was decided in terms which in my opinion render it conclusive of the present issue.”

Again (*ibid.*, 25): “ I submit that, even technically, the *De Beers* case (6) is a binding authority today.”

In our judgment, therefore, LORD LOREBURN's test emerges supreme and authoritative, subject only to the rider or corollary that since a limited liability company can contemporaneously have more than one residence (a thing not contemplated by LORD LOREBURN) his analogy to a natural person demands that central management and control may be divided, and that such division, being a matter of fact and degree in each case, is not denied by the circumstance that the supreme command, the power of final arbitrament, may be found to be, or to be predominantly, in one place. The *Swedish Central Ry. Co.* case (3) emerges as a decision justified by its peculiar facts and an authority consequently limited, but at least it renders it no longer possible to satisfy the test of residence by reference only to the country where final control abides or to assert that

when for that reason residence in one country is conceded residence elsewhere cannot co-exist.

There remains the Australian case to which we have already alluded—*Koitaki Para Rubber Estates, Ltd. v. Federal Commissioner of Taxation* (13). In that case, Australian residence being admitted, it was claimed that the company resided also in Papua. But in that country, though substantial productive business was conducted by the company—i.e., by the company's servants in the company's name—there existed no part of the company's "superior or directing authority". DIXON, J., said (64 Commonwealth L.R. 18):

"From the point of view of that territory [i.e., Papua] [the company] is simply an absentee owner of a rubber estate managed by an attorney under power in its name . . . It may be conceded . . . that in respect of the conduct of the plantations a full measure of responsibility is placed in the attorney or manager. But his responsibility, however full, is confined to what may broadly be described as the production and shipment of rubber and does not extend to the control of the general or corporate affairs of the company, to matters of policy or of finance. All control seems to me to be centred in Sydney."

It was held, accordingly, that the company had failed to establish residence in Papua, and we respectfully agree with that decision. We have already expressed our concurrence with the conclusion of DIXON, J., and with his formulation of the proper test, and we are content to adopt the whole of his judgment and reasoning with one slight exception. Where the learned judge has discussed the *Swedish Central Ry. Co.* case (3) and refers to the conclusion that the Swedish Central Railway Company was resident in Sweden and in England, he is reported as saying (*ibid.*, 21):

"But VISCOUNT CAVE, L.C., clearly stated that the reason was that there was a division between the two countries of the 'central management and control'."

With all respect, we have difficulty in accepting this view. Although we think that the explanation of the case by LORD SUMNER in the *Egyptian Delta* case (4) produces, in effect, that result, nevertheless, the passage which we have cited above from LORD CAVE's speech seems to us to show that, in his opinion, residence in England could be supported, though the "central control and management" was concentrated in Sweden. That view was not, however, essential to the decision, as LORD SUMNER interpreted it. This small matter cannot be said to affect DIXON, J.'s, decision or the reasoning on which it was based, and that decision was affirmed by the full High Court. SIR GEORGE RICH (Acting C.J.), in his short judgment, was content to accept the judgment of DIXON, J. He said (64 C.L.R. 244):

"In Papua the company's operations fall into an auxiliary or subordinate position of a purely local as opposed to a central nature."

The judgment of WILLIAMS, J., as we read it, might be said to revert to a more strict interpretation of the original formulation of principle in the *De Beers* case (6). But any divergence between him and DIXON, J., in this respect was immaterial for the purpose of answering the particular question there before the court. WILLIAMS, J., observed (*ibid.*, 250):

"In order that a company may acquire a residence in two countries for the purposes of income tax . . . the central management and control must be divided between such countries so as to 'abide' in them both. The company through the central control is then metaphorically speaking bodily present and residing by analogy in both countries."

We do not, in the circumstances, read that passage as meaning that such dual residence can only be established where the final or supreme authority is found to be divided.

We have, therefore, reached upon this matter the same view as that entertained by HARMAN, J. In such a matter as this the precise formulation of the test must be a difficult matter. According to him, it is

“essential that both features of the phrase ‘keeps house and does business’ must be present. ‘Keeping house’ will thus refer to administrative management and ‘doing business’ to trading activities. Where both are found the conditions are satisfied.”

For our part we feel some doubt whether it is right to treat the phrase “keeping house” as referring only to administrative management, but we think that the sense of the learned judge’s test is the same as that which we have attempted to formulate and the same as that stated by DIXON, J.—in other words, that there must, in order to constitute residence, be not only some substantial business operations in any given country, but also present some part of the superior and directing authority. We prefer, accordingly, to state the matter as we have done, but we agree with HARMAN, J., that the question of the extent of the superior or directing authority required (as well as of the business operations being performed) is one of fact to be determined by the Special Commissioners.

It only remains, accordingly, to apply the test, as we have stated it, to the three companies. As we earlier observed, the Special Commissioners treated themselves as bound in law to reject the companies’ claim for dual residence, and, therefore, expressed no conclusion of fact on the matter of degree. They did, however, in the Stated Cases, fully record their findings in regard to the relevant circumstances affecting each of the three companies. It seems, therefore, proper that the court should now express its own view of the result. As regards Union Corporation, Ltd. the facts which we have earlier summarised seem to us clearly to justify the conclusion, if our test is correctly formulated, that the company has a residence in South Africa as well as in England. It was conceded before us that the position of Johannesburg Consolidated Investment Co., Ltd. is in all material respects the same as that of Union Corporation, Ltd., and a similar result follows accordingly. We agree, therefore, with HARMAN, J., as regards both these companies.

The case of Trinidad Leaseholds, Ltd. presents greater difficulty, and HARMAN, J., was of opinion that this case should be referred back to the Special Commissioners for their opinion. On the whole, however, it seems in the circumstances right for this court to express its conclusion. The findings of the Special Commissioners cover in great detail the nature of the various operations and activities performed by or on behalf of this company in England and elsewhere, and it does not seem to us that any further investigation could usefully be undertaken. The company was incorporated in England and all its eight directors now reside in England, where all formal board meetings take place as well as the general meetings of the company, and where the secretary resides. The main business of the company is that of winning, refining and dealing in petroleum and other mineral oils in Trinidad, and there is no doubt that in that island it possesses property of great extent and value. The issued capital, very largely represented by these assets in Trinidad, is no less than £1,639,432. Its very considerable operations in Trinidad are in charge of a manager who, under a power of attorney from the board of directors, has the widest powers and responsibility. Still, if the matter rested there, the case would seem to us in principle to be the same as the Australian case. The company would be an “absentee owner” and there could not be found in Trinidad any part of the superior and directing authority. But, although the supreme control is undoubtedly exercised at the meetings of the company’s directors in England, it is clear that in practice the chairman, managing director, and other directors pay frequent visits to Trinidad for the purpose of exercising their supervision and a large measure of control over the policy and general affairs of the company. In the words of the Stated Case:

"Frequent visits are made by the chairman and other executive directors and officials of the company to Trinidad, and important decisions are taken by members of the board when there."

Reference is also made to the evidence of the secretary of the company, which the Special Commissioners accepted and which was to a like effect. Thus:

"Important decisions were taken in the course of these visits (to Trinidad), minutes being taken of the various meetings and conferences before the director or directors concerned left Trinidad and being sent to London. In many aspects of the company's business it was important to go into matters with the technical side of the management in Trinidad, particularly as regards drilling and oil production."

On these facts it seems to us that there is sufficient to justify the conclusion that Trinidad Leaseholds, Ltd., is resident in Trinidad as well as in London. On this part of the case, therefore, we are of opinion that each of the three taxpayer companies is able to make good its claim to residence outside the United Kingdom as well as within the United Kingdom. But their success in this matter avails them nothing, having regard to our view on the first question raised in the appeals, which must be dismissed accordingly.

Appeals dismissed.

Solicitors: *Herbert Smith & Co.* (for the first company); *Holmes, Son & Pott* (for the second and third companies); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

HAYWARD v. MARSHALL. WINCHESTER v. SHARPE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), February 27, 1952.]

Rent Restriction—"Separate dwelling"—Sole use of unfurnished rooms—Sharing of other living rooms—Right to draw water and boil clothes in kitchen—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2).

Unfurnished rooms were let with the right to use the kitchen and scullery for the purpose of drawing water and to use the gas stove for boiling the washing once a week.

HELD: in deciding whether the rights over the kitchen amounted to the sharing of the kitchen within the principle of *Neale v. Del Soto* ([1945] 1 All E.R. 191) the court must consider not merely the character of the room over which the rights were exercised, but also the character of the rights exercised; the use of a room for purposes other than "living purposes" did not amount to a sharing of a living room; drawing water and boiling washing were not "living purposes"; and, therefore, the tenants were entitled to the protection of the Rent Restrictions Acts.

AS TO "SEPARATE DWELLINGS", see HALSBURY, Hailsham Edn., Vol. 20, pp. 312-315, paras. 369, 370; and FOR CASES, see DIGEST, Replacement, Vol. 31, pp. 640, 641, Nos. 7475-7483, and Digest Supps.

Cases referred to:

- (1) *Neale v. Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 2nd Digest Supp.
- (2) *Cole v. Harris*, [1945] 2 All E.R. 146; [1945] K.B. 474; 114 L.J.K.B. 481; 173 L.T. 50; 2nd Digest Supp.
- (3) *Kenyon v. Walker. Stevenson v. Kenyon*, [1946] 2 All E.R. 595; 2nd Digest Supp.
- (4) *Winters v. Dance*, [1949] L.J.R. 165; 2nd Digest Supp.

(5) *Baker v. Turner*, [1950] 1 All E.R. 834; [1950] A.C. 401.

(6) *Rogers v. Hyde*, [1951] 2 All E.R. 79; [1951] 2 K.B. 923.

APPEALS by tenants from two orders of His Honour JUDGE LEON, made at Windsor County Court, dated Dec. 5, 1951. The landlords claimed possession of premises consisting of two and three unfurnished rooms respectively with the right to draw water from the kitchen at all reasonable times, and in one case the right to use the gas stove for boiling the washing once a week. The judge held that there was a sharing of the kitchen within the principle of *Neale v. Del Soto* (1) and made orders for possession. The tenants appealed.

C. H. Duveen for the tenants.

Gordon Hardy for the landlords.

SIR RAYMOND EVERSLED, M.R.: I will ask HODSON, L.J., to deliver the first judgment.

HODSON, L.J.: These are two appeals from His Honour JUDGE LEON sitting at Windsor County Court on Dec. 5, 1951, in possession cases in which he gave judgment in favour of landlords against tenants who claimed that they were protected by the terms of the Rent Restrictions Acts, 1920 to 1939. The question to be determined on the appeals was correctly stated by the county court judge in his judgment when he said that the whole crux of the matter was whether what was let to the tenant in each case was let as a separate dwelling, having in mind s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which says:

“ This Act shall apply to a house or a part of a house let as a separate dwelling . . . ”

In the first case, *HAYWARD v. MARSHALL* the material facts found are these. In July, 1939, the tenant was let three unfurnished rooms and had no right to use the kitchen in the house which she had previously had, except for the following two specified purposes, namely, for the drawing of water at all reasonable times for all purposes and once a week to use the gas stove for the purpose of boiling her washing. In the second case, *WINCHESTER v. SHARPE*, the facts were not essentially different. The number of rooms was two instead of three, and the right to use the kitchen and scullery was only for the purpose of drawing water and not, as in the other case, for the purpose of using the gas stove for boiling washing. The learned judge said that, if the matter had been free from authority, he would have found that each of these tenants had separate dwellings which were protected, but he said there were decisions which compelled him to decide these cases against the tenants.

The question which has to be considered in the appeals first came before the Court of Appeal in *Neale v. Del Soto* (1), in which the only judgment, with which the other learned lords justices agreed, was delivered by MORTON, L.J. In that case under an oral agreement the tenant was let two unfurnished rooms in a seven-roomed house, together with the use jointly with the landlord of the garage, kitchen, bathroom, lavatory, coalhouse, and conservatory, and it was held that there was really a sharing of the house, each party having the exclusive use of some rooms and the two parties together having the use in common of other rooms, and there was, therefore, not a letting of the two rooms as a separate dwelling within the meaning of the sub-section of the Act to which I referred. The first point to be noticed is that MORTON, L.J., was dealing with the matter as a question of fact, the county court judge having found the facts in this way ([1945] 1 All E.R. 192):

“ I find as a fact from the evidence, as also appeared in the rent book before it was altered, that what was let was two unfurnished rooms for the sole use and occupation by the applicants and the garage, kitchen, bathroom, lavatory, coalhouse and conservatory for use and occupation by them

jointly with the respondent . . . when, as in this case, a person has got in a lease at a rent two rooms and the use in common with the owner of other rooms such as the kitchen, that is a sole tenancy of two rooms and a joint tenancy, as it were, of the other rooms, since he has a right to use them in every way, not merely as an accessory to something else'."

At the end of his judgment, MORTON, L.J., used this language (*ibid.*, 193):

" . . . I am satisfied on the facts of this case that the county court judge's decision was right . . . and this appeal ought to be dismissed."

In the course of his judgment, he had answered the question: Were the two rooms in question in the present case "a part of a house let as a separate dwelling?" in this way: He said (*ibid.*):

"In my view, they were not. What was let was the two rooms together with the use in common with the owner of the house of the garage, kitchen, bathroom, lavatory, coalhouse and conservatory . . . it would be a misuse of language, to my mind, to say that the two rooms and nothing more were let as a separate dwelling. The real substance of the matter is that there was a sharing of this house; each party had the exclusive use of some rooms and the two parties together had the use in common of certain other rooms."

That decision gave rise to a consideration of the problem when rooms which were part of a house were not living-rooms, and the matter was again considered by MORTON, L.J., in *Cole v. Harris* (2). In that case the landlord let to the tenant three rooms, consisting of a bedroom, living-room and kitchen, on the first floor of a dwelling-house, together with the joint use, with the landlord and the tenant of the second floor, of a bathroom and water closet. It was held by MORTON and MACKINNON, L.JJ., that there was a demise of the three rooms as a separate dwelling and not a mere sharing of the whole house. It was difficult to define, as a matter of legal principle, the dividing line between the two classes of case, but the most satisfactory formula seemed to be to say that, if there was a sharing of essential living-rooms (which would include the kitchen), there would not be a demise of the premises as a separate dwelling-house. MORTON, L.J., examined the matter very closely and used this language ([1945] 2 All E.R. 152):

"I think that the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows: there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as 'living rooms' or 'dwelling rooms'. To my mind a kitchen is fairly described as a 'living room', and thus nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling."

Then he drew a distinction in considering the bathroom and the water closet as being rooms which were visited only on occasions and could not fairly be classed as living-rooms.

Cases have come before the county courts from time to time in which the question has arisen as to what is a sharing within the meaning of the decision in *Neale v. Del Soto* (1). We have not actually been referred to the decisions, but we were told that in cases rather like this case county court judges have taken the view that sharing does not extend to a bare right of passage through a room, nor to a right to use a kitchen only for scullery purposes or for bathing in the bath it contains. For my part, I see nothing in the decisions of *Cole v. Harris* (2) and *Neale v. Del Soto* (1) to lead one to the conclusion that the mere use of a room for purposes other than what might be described as living purposes amounts, in the ordinary use of language, to sharing the room. The mere fact that a person who lives in the house is allowed to go into the kitchen, whether

to draw water, or, indeed, to have a bath there, would not be properly an illustration of a sharing of the room. The kitchen is a room which is normally used for cooking and for living in. The mere right of access to the room does not seem to me to be properly described as a sharing of the room.

I should, perhaps, refer to one or two other cases which seem to me to support this view, as indicating that, at any rate, MORTON, L.J., who again had to consider the problem, or an analogous problem, in *Kenyon v. Walker. Stevenson v. Kenyon* (3) took this view. In considering the use of a kitchen which was used for cooking purposes only he said ([1946] 2 All E.R. 598):

"After all, the primary purpose of a kitchen is for cooking, and in this case there is no doubt that the use of the kitchen, at any rate for that primary purpose, was shared by the parties. It seems to me that the present case comes both within the wording of the test as I expressed it and as it was expressed by MACKINNON, L.J. [In *Cole v. Harris* (2)] I said: 'nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling'."

We were referred to *Winters v. Dance* (4), in which a judgment was delivered by TUCKER, L.J. The question there was whether a kitchenette, which was so small as to be unsuitable for any purpose except that of cooking itself, could come within what might be described as the *Neale v. Del Soto* (1) principle. TUCKER, L.J., said that the authorities indicated ([1949] L.J.R. 169):

"... that in ascertaining whether or not there has been a letting of part of a dwelling-house as a separate dwelling, or whether there has been a sharing of the house, one of the tests is: does the tenant share one of the essential living-rooms? It is to be observed that nowhere in the cases referred to have judges used the word 'sitting-room'; the word is 'living-room'. I think that the basis of the decisions is that a room which is used for the primary purpose of cooking is a living-room . . ."

There is nothing in those cases which, in my view, supports the conclusion at which the county court judge arrived. Counsel for the landlords, in endeavouring to support the judgment, has relied on two more recent cases, which are not directly in point, but which, he says, tend to support the view, first of all, as is no doubt right, that there is no distinction between a licence to use the kitchen and a sharing of the kitchen—in other words, that the relationship between the landlord and the tenant cannot be altered by calling the right to share the kitchen a mere licence to use the kitchen. He says that it follows from what was said by LORD REID in *Baker v. Turner* (5), that once you have established any right in a tenant to use the living-room for any purpose apart from a purpose which might be described as *de minimis*, then that tenant is in a position of sharing the room so as to lose the protection of the Rent Restrictions Acts. In particular, he relies on a passage where LORD REID said ([1950] 1 All E.R. 854):

"It is, perhaps, easier to say what is not a separate dwelling than to say what is one. In *Neale v. Del Soto* (1), the owner of a house, in addition to letting two rooms to a tenant, gave him the right to share the use of other rooms including the kitchen."

Then he refers to another case, and he says he has no doubt the decision in *Neale v. Del Soto* (1) is correct. He goes on (*ibid.*):

"If a tenant has to share with another person a living room which is not let to him, it is, in my view, impossible to find anything which is let to him as a separate dwelling. It cannot be the let rooms plus the right to use the other room, because that other room is not let to him at all—he is only a licensee there. And it cannot be the let rooms alone, because his having to share another room shows that the let rooms are only a part of his dwelling place."

Counsel for the landlord referred, in addition, to a judgment of LORD ASQUITH OF BISHOPSTONE in *Rogers v. Hyde* (6), where counsel for the landlord had put forward the argument that there was really for this purpose no distinction between a sharing and a licence, and that was accepted by LORD ASQUITH in these words ([1951] 2 All E.R. 83):

“ . . . I accept the argument of counsel for the landlord in its essentials so far as they are applicable in this case. The grantee of a licence to use a kitchen seems to me to differ in name only from the grantee of a right to ‘share’ or use it in common with the landlord . . . If we decided otherwise, the effect of *Neale v. Del Soto* (1), which has been accepted by the House of Lords, could be circumvented in every case by simply substituting the word ‘licence’ for ‘share’ or for ‘right to use in common’.”

In my judgment, what is said by LORD ASQUITH OF BISHOPSTONE and by LORD REID does not touch the question in this case, which is whether there is, according to the ordinary use of language, a sharing of the kitchen. The county court judge having indicated that, if he had felt unfettered by authority he would have found there was no sharing, in my opinion, it is the duty of this court to reverse his finding on the ground that there is nothing in the authorities to which we have been referred and to which he referred in his judgment which forces him to find the facts in an opposite way. These appeals should be allowed.

JENKINS, L.J.: I agree. The judge, in his judgment in *HAYWARD v. MARSHALL*, in which he gave his reasons for deciding both cases as he did, thus stated his view of the law deducible from the authorities:

“ If you let to a tenant two rooms and (save for the one qualification which I will mention) the use for any purpose of another room, it does not seem to me that the premises let to the defendant can be said to be let as a separate dwelling, as long as the principle laid down in *Neale v. Del Soto* (1) is accepted. I said there was a qualification. There are in fact two qualifications. In the first place, it has been held by the Court of Appeal that if the room of which use is given is a bathroom or lavatory or a box room or something of that sort, that does not prevent the letting as a whole from being a letting of a separate dwelling. That is the decision in more than one case in the Court of Appeal, and naturally I shall follow it, although I am bound to say I do not fully understand the principle of those cases once the principle in *Neale v. Del Soto* (1) is accepted as being correct.”

With respect to the judge, I cannot regard that passage as correctly stating the law. The effect of the line of authorities in this court, beginning with *Neale v. Del Soto* (1), is simply that it cannot be said that a part of a house is let to a tenant as a separate dwelling if his contract of tenancy includes a right of sharing, as distinct from the exclusive possession of, some essential part of the living accommodation provided under the contract of tenancy. The judge's way of stating the law produces a very different result, for his view is that, if a tenancy of some of the rooms in a house includes the right to use for any purpose another room not itself included in the tenancy, then (apart from cases of “de minimis”) the application of the Rent Restrictions Acts is excluded, whatsoever the nature of the right may be, if the room over which it is exercisable can be described as forming part of the essential living accommodation comprised in the house as a whole. In my view, there is no warrant for that at all. In such a case the first question to ask is: “Is there under this contract a sharing of some room not actually included in the tenancy?” If that question is answered: “No”, then no further question arises. If that question is answered: “Yes”, there arises the further question: “Is that room part of the essential living accommodation?” In my view, both those questions must be capable of an affirmative answer to bring the principle of *Neale v. Del Soto* (1) into play at all.

In the two present cases, the rights held by the county court judge as sufficient

to oust the protection of the Rent Restrictions Acts consisted, in the one case, of the right of drawing water in the kitchen, with an additional right of using the gas stove in the kitchen weekly for the purpose of boiling the wash, and, in the other case, simply of the right of drawing water in the kitchen. I cannot regard the rights over the kitchen in either case as rights amounting to a sharing of the kitchen. They do not extend, as I understand them, to using the kitchen as such, to using the kitchen as part of the living accommodation provided under the contract of tenancy. They are simply rights in the nature of easements, in no way distinguished by reference to the character of the room over which they are exercised. The right of drawing water is no different in kind because the tap happens to be in the kitchen than it would be if the tap was in some out-house not itself included in the tenancy. Similarly, the right of boiling clothes in the kitchen seems to me not essentially different from a similar right given with respect to a copper in an out-house not itself included in the tenancy. These rights, in my view, clearly do not amount to rights to the use of the kitchen as part of the tenants' living accommodation.

It must never be forgotten in these cases that this is the decisive test, as was clearly shown by MORTON, L.J., in *Cole v. Harris* (2), where, after quoting from his judgment in *Neale v. Del Soto* (1), he said this ([1945] 2 All E.R. 151):

"It cannot be that any sharing of any room, however unimportant, takes the property outside the operation of the Act. The words may be susceptible of that construction, but so to construe them would be to defeat, to a large extent, the purpose of the Act. For instance, take a case in which an entire floor of a house is let to a tenant, and there is no sharing of any room, except that the tenant is allowed, in common with the landlord, to store his boxes in an attic. It seems to me quite contrary to the intention of the Act to exclude from its operation a letting of this nature, where the tenant is, I think, 'dwelling' in a 'separate' part of the house."

So, here it seems to me that the tenant cannot rightly be held not to be dwelling in a separate part of the house merely because the tenancy carries with it the right to fetch water from the kitchen or to carry out a weekly boiling of wash on the gas stove in the kitchen.

As has been pointed out by HODSON, L.J., I think it is reasonably plain that in *Kenyon v. Walker* (3) MORTON, L.J., recognised that not merely the character of the room over which rights are exercised but also the character of the rights exercised over it were material in considering whether there was a sharing. I need not read at length the passage to which HODSON, L.J., has already referred. It is the passage where MORTON, L.J., dealing with the tenant's argument based on the fact that in that case the kitchen could only be used for the purpose of cooking, said this ([1946] 2 All E.R. 598):

"To my mind, ingenious though the argument is, we should be introducing an unwarrantable extra refinement into the test which has been already laid down by this court if we accepted that argument. After all, the primary purpose of a kitchen is for cooking, and in this case there is no doubt that the use of the kitchen, at any rate for that primary purpose, was shared by the parties."

If the law had been that any right over a kitchen not capable of being discounted by reference to the maxim "de minimis" amounted to a sharing of the kitchen, it seems to me that this passage in the judgment of MORTON, L.J., would hardly have been appropriate, and that, if he had wished to lay down any such principle, he would simply have said: "It matters not that the right over the kitchen here was limited; any right given to a tenant over a kitchen not itself included in the tenancy amounts to a sharing of the kitchen". As the passage actually stands, he clearly implied that the character of the right over the kitchen was a material factor. In my view, it clearly is, and must be, a material factor.

I have only to add that I have listened with attention to the interesting argument for the landlords and, notwithstanding his submission to the contrary, can find nothing in the speeches of the House of Lords in *Baker v. Turner* (5), in any way inconsistent with my conclusion that the county court judge in these two cases misconceived the effect of the authorities and misdirected himself in law, the true questions to be asked and answered being, not merely whether there was some right given over the kitchen in either case, but whether the right given did amount to a sharing of the kitchen. As appears clearly from his judgment, if he had considered the matter untrammelled by the view he had formed of the law, he would have answered the second of those questions in the negative. Accordingly, in my view, these appeals should be allowed.

SIR RAYMOND EVERSLED, M.R.: I am of the same opinion. I agree with counsel for the landlords that the question to be determined in all cases of this character is whether the person against whom possession is claimed, whom I will call the defendant, is shown to be a tenant of premises let to him or her as a separate dwelling. In arriving at the answer to that essential question, the courts have laid it down (and I do not refer again to the cases to which already my brethren have made reference) that where, as regards some part of his or her living accommodation, the defendant is shown to have no more than a right or licence to share that part in common with the landlord, a negative answer to the question is given, because, in consequence of that finding, the living accommodation of which the defendant is the tenant is incomplete. The result, I think, depends on the proposition that a sharing which disentitles the defendant to the protection of the Act is a sharing of living accommodation as such. Hence is found the distinction between the cases of sharing a kitchen, on the one hand, and those of sharing a bathroom or lavatory on the other. It does not, I think, help to solve the problem merely to give to a kitchen the label of "living-room". The distinction rests rather on the view that the ordinary uses and purposes of a kitchen are essential manifestations of living or residence, so that if a tenant of rooms has to rely on some licence for the exercise of those essential manifestations, he is not, as I have said, the tenant of a separate dwelling. In my judgment, it does not follow, nor do I think have any of the cases so decided, that any common user (other than such as can be disregarded on the principle of *de minimis*) is equivalent to a sharing. The question, then, is: Is there in any particular case, in truth, a sharing, that is, a right in common with other persons to use a living-room as such? That seems to me, *prima facie*, to be a question of fact and of degree. In this case, as my brethren have pointed out, the judge did find as a fact that there was no such sharing. The result, in my judgment, is that both appeals should be allowed.

Appeals allowed.

Solicitors: *Bower, Cotton & Bower*, agents for *T. W. Stuchbery & Son*, Windsor (for the tenants); *Wilkinson, Howlett & Moorhouse* and *Gamlen, Bowerman & Forward*, agents for *Lovegrove & Durant*, Windsor (for the landlords).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

PARVIN v. MORTON MACHINE CO., LTD.

[HOUSE OF LORDS (Lord Normand, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen), January 15, 16, March 6, 1952.]

Factory—Dangerous machinery—Duty to fence machinery—Machinery manufactured in factory—Factories Act, 1937 (c. 67), s. 14 (1), s. 16, s. 20.

The respondents were the owners of a factory engaged in the manufacture of machinery. The appellant, who was under eighteen years of age, was employed by the respondents in the factory as an apprentice fitter. While cleaning a dangerous, but unfenced, part of a machine which had been manufactured in the factory, he was injured. He claimed damages for the breach by the respondents of their statutory duty under s. 14 (1), s. 16, and s. 20 of the Factories Act, 1937.

HELD: on the true construction of s. 14 (1), read in conjunction with s. 12 and s. 13 of that Act, the words "any machinery" did not apply to machines within the factory which were products of the manufacturing processes carried on in the factory, and, therefore, the duty securely to fence dangerous machinery laid on occupiers of factories by s. 14 (1) and s. 16 and the prohibition against young persons cleaning dangerous machinery provided by s. 20 did not apply, and the respondents were not liable to the appellant under those sections.

FOR THE FACTORIES ACT, 1937, s. 14 (1), s. 16 and s. 20, see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 1009, 1011 and 1013.

APPEAL by a workman from an order of the Second Division of the Court of Session (LORD THOMSON (Lord Justice-Clerk), LORD JAMIESON and LORD PATRICK), dated June 23, 1950, affirming an order of the Lord Ordinary (LORD STRACHAN), dated Jan. 5, 1950, whereby he held that the respondents were not liable to the workman (their employee) for breach of s. 14 (1), s. 16, and s. 20 of the Factories Act, 1937, when the appellant was injured while cleaning a machine which had been produced in the factory for sale. The respondents' contentions that the sections were intended to apply only to machinery in use in the factory, and not to manufactured products of the factory, were upheld by both courts.

Beney, Q.C., and *J. G. Wilson* (of the Scottish Bar) for the appellant.

Calver, Q.C., and *Sloan* (both of the Scottish Bar) for the respondents.

The House took time for consideration.

Mar. 6. The following opinions were delivered.

LORD NORMAND: My Lords, the appeal submits for decision a novel question on the construction of the Factories Act, 1937. It is whether the provisions of s. 14 (1), s. 16 and s. 20 of the Act apply to machines or machinery manufactured in the factory or only to machines or machinery for use in the factory in the processes of manufacture or as ancillaries to these processes. There is no reported case in which this question has been decided. The same question might have arisen under the Factory and Workshop Act, 1901, and, though it is not necessary to decide the point, I see no reason to differ from the opinion of LORD PATRICK that there is no difference material to this question between the language of the Act of 1901 and the language of the Act of 1937.

The facts as averred are simple. The appellant, a minor employed by the respondents as an apprentice fitter, was instructed by one of the journeymen fitters to clean a dough-brake which had been manufactured and assembled in the respondents' factory. The dough-brake consists of a flat table six feet long and twenty-two inches wide divided into two equal parts by a pair of rollers each of them twenty-two inches wide. One roller is placed with its upper surface flush with the table surface, and the other is mounted directly above it at a height which can be adjusted according to the required thickness

of the dough which is passed between the rollers while they are revolving. The rollers are driven at a speed of forty revolutions a minute by an electric motor built in under the table. A guard is provided which is so designed that it can come down on the side of the rollers where the nip-in may happen to be according to the direction of the rotation of the rollers. Before the appellant began to clean the dough-brake the fitter had removed the guard in order to adjust it and had set the brake in motion. While the appellant was working, a rag held by him was drawn between the rollers and after it his hand and forearm. He sues both on negligence at common law and on breach of the duties imposed by s. 14 (1), s. 16 and s. 20 of the Act. His averments of negligence were held to be relevant by the Lord Ordinary and issues have been approved. The respondents did not reclaim against that part of the Lord Ordinary's interlocutor. On the other hand, the Lord Ordinary held the averments of breach of statutory duty irrelevant, and he, therefore, repelled the appellant's plea-in-law directed to them and sustained quoad them the respondents' plea to relevance. The appellant reclaimed against this part of the interlocutor and the Second Division of the Court of Session unanimously refused the reclaiming motion and adhered.

My Lords, I agree with the learned judges in the courts below that s. 14 (1), s. 16 and s. 20 of the Factories Act, 1937, do not apply to machines within the factory which are the products of the manufacturing processes carried on in the factory. Section 14 (1) provides:

"Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

If the sub-section applies to the dough-brake, it must follow that s. 16, which deals with the construction and maintenance of the guard required by s. 14 (1), will apply. So, also, will s. 20, which provides:

"A woman or young person shall not clean any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion, and shall not clean any part of any machine if the cleaning thereof would expose the woman or young person to risk of injury from any moving part either of that machine or of any adjacent machinery."

For the purposes of this case the parties were agreed that "machine" and "machinery" could be regarded as interchangeable terms. For the appellant it is contended not only that "any machinery" in s. 14 (1) and likewise "any machine" in s. 20 are words capable of applying to the dough-brake, but that in their ordinary literal meaning they do so apply. It would be difficult to dispute this contention in the abstract. But the context must be looked at and I find in the context supplied by s. 12 and s. 13 compelling reasons for construing the word "machinery" in s. 14 (1) as denoting only machinery used for production. It is necessary to notice the inter-relation of the three sections. Section 12 deals with prime movers, s. 13 with transmission machinery, and s. 14 (1) with "any machinery, other than prime movers and transmission machinery". If it can be shown that the prime movers and the transmission machinery are prime movers and transmission machinery used as part of the factory equipment for its manufacturing processes, it is a logical inference that "any machinery other than prime movers and transmission

machinery" means any other machinery used in the factory for or ancillary to its manufacturing processes. Now s. 12 (1) deals with flywheels directly connected with prime movers and with every part of any prime mover not excepted by sub-s. (3) "whether the flywheel or prime mover is situated in an engine-house or not". It is apparent from these words that the sub-section applies to a flywheel or prime mover which may be in the factory engine-house and, therefore, part of the factory equipment. Sub-section (2) deals with the head and tail race of every water-wheel and of every water-turbine, and these must necessarily be part of the factory plant. Sub-section (3) excepts from the operation of sub-s. (1) electric generators, motors and rotary converters if they are in such a position or of such a construction as to be as safe to every person employed or working on the premises as they would be if securely fenced. The implication of sub-s. (3) is that the machinery excepted may have a permanent position in the factory which in itself secures safety. This sub-section also appears to be concerned only with machinery which is part of the factory equipment. Section 13 is throughout dealing with "the transmission machinery". The use of the definite article is unintelligible unless the transmission machinery is the transmission machinery used in the factory for its processes of manufacture. LORD PATRICK's judgment puts the argument in a clear light when he says that s. 12 and s. 13 obviously are concerned with plant used in manufacture and that s. 14 then naturally follows, to include the rest of the machinery used in the process of production.

These considerations conclude the case against the appellant. For s. 16 can apply only if s. 14 (1) applies, and in s. 20 the division—prime movers, transmission machinery and any machine—corresponds to and repeats the division of machinery in ss. 12 to 14. It appears to me that there is no ambiguity or difficulty in construing the sections founded on by the appellant and that it is quite unnecessary to have recourse to presumptions or maxims which may be an aid to construction when there is ambiguity or doubt. I, therefore, propose to say nothing about the judicial observations cited to us on the proper approach to the construction of ambiguous phraseology in remedial statutes or in penal statutes. Nor do I find it necessary to rely on certain other sections in the Act which are referred to in the judgments of the courts below or which were referred to in the argument. It is true that other sections in the Act are by their terms restricted to premises, plant or equipment of the factory, yet, it might be said, if that were all, there would be no necessary inconsistency in giving to the words "any machinery" in s. 14 (1) their literal and natural meaning and applying them to machinery within the factory which was the product of the factory. But I cannot find that any of the provisions of Part II of the Act apply to any machinery except machinery which is part of the factory and used in the manufacturing processes, and I think that none of them applies to machines made in the factory. I would dismiss the appeal with costs.

LORD REID: My Lords, in this case your Lordships are only concerned with the alleged breach of statutory duty by the respondents. The case for the appellant can be thus stated shortly:—Section 14 (1) of the Factories Act, 1937, requires that every dangerous part of "any machinery, other than prime movers and transmission machinery", shall be securely fenced except in circumstances which did not exist in this case. The appellant, while in the respondents' employment and doing work in the respondents' factory which he had been instructed to do, was injured by a dangerous, but unfenced, part of a machine which was in the factory, and that dangerous part was neither a prime mover nor transmission machinery. The respondents' answer can be stated equally shortly. They manufacture machinery in their factory and this machine had been manufactured by them for sale and was not part of the equipment

of their factory. They contend that s. 14 (1) only applies to machinery which is part of the equipment of a factory.

A number of arguments on both sides were based on inferences to be drawn from other parts of the Act and on general canons of construction. I do not think that these considerations afford much assistance in this case. The scope of s. 14 (1) must be determined by examining its terms and particularly the first part of it

“Every dangerous part of any machinery, other than prime movers and transmission machinery . . .”

The reason why prime movers and transmission machinery are excepted is plainly because these kinds of machinery are dealt with by s. 12 and s. 13 respectively. If one looks at the terms of s. 13 one can hardly doubt that the scope of that section is limited to transmission machinery which is part of the equipment of the factory and the terms of s. 12 strongly suggest a similar limitation of its scope. If the appellant is right, Parliament has not provided any statutory protection where a prime mover or transmission machinery is present in a factory but is not part of its equipment, but it has provided statutory protection when other machinery is so present in a factory. In other words, the word “machinery” where it first occurs in s. 14 (1) has a different scope from that which it has where it next occurs—in the first case “any machinery” includes machinery which is not part of the factory equipment; in the second case “machinery” in the phrase “transmission machinery” does not. I can find nothing in the context to justify this difference. Section 12, s. 13 and s. 14 must be read together, and I think that, in the absence of any indication of a contrary intention, their scope must be held to be similarly limited.

I have had an opportunity of reading the speech which my noble and learned friend, LORD NORMAND, has just delivered and I agree with it. In my opinion, this appeal should be dismissed.

LORD TUCKER: My Lords, I agree.

LORD ASQUITH OF BISHOPSTONE: My Lords, I agree with the opinions expressed by my noble and learned friends. The case turns substantially on the construction of the words “any machinery” in the first line of s. 14 (1) of the Act of 1937. Construed quite literally, these words would, no doubt, include almost anything, for instance, a bicycle or motor car casually left on any premises. But the Act applies only to factories (s. 149). A “factory” connotes a place in which things are made, and by the definition in s. 151 of the present Act it includes a place where they are “repaired”, “adapted for sale”, and the like. When in such a statute “machinery” of, or in, such a factory is spoken of, *prima facie* the expression surely relates to the machinery by which the things in question are made, repaired, or adapted for sale, and not to the things themselves, even if those things themselves consist also of machinery. The assumption that such a limitation is intended is, in my view, strongly reinforced by the collocation—the architecture, if that expression may be allowed—of s. 12, s. 13 and s. 14. Section 14 (1) makes provision for the precautions to be taken in relation to “any machinery” other than “prime movers and transmission machinery”. Going back, we find that s. 13 has already made provision for the precautions to be taken in relation to “the transmission machinery”. Not “transmission machinery” but “the transmission machinery”. The definite article clearly limits this expression to transmission machinery used as factory plant, and prevents it from extending to transmission machinery (if any) produced by the factory plant. In my view, a similar limitation, though not express, must be read into s. 12, which deals with precautions in relation to “prime movers”. It would be a very capricious statute which, in the case of a factory which both used and produced prime movers and both used and produced transmission

machinery, provided by one of its sections—s. 12—that certain protection should be afforded to the worker both in regard to the used and produced prime movers, whereas by another—s. 13—it provided that he should enjoy corresponding protection only in regard to the used, and not in regard to the produced, transmission gear. If this is so, when s. 14 (1) makes provision in regard to “any machinery, other than prime movers and transmission machinery”, the exception carved out of “any machinery” consists entirely of plant, and it seems right to read the whole from which the exception is carved out as also limited to machinery used as plant. The structure of s. 12, s. 13 and s. 14, to my mind, implies that their operation is wholly within the framework or ambit of machinery used as a productive agent, and does not extend to machinery emerging as a product. For these short reasons I respectfully concur with the conclusion at which my Lords have arrived and, like them, would dismiss the appeal.

LORD COHEN: My Lords, I agree.

Appeal dismissed.

Solicitors: *W. H. Thompson*, agent for *Digby Brown & Co.*, Glasgow, and *D. G. M'Gregor*, Edinburgh (for the appellant); *Martin & Co.*, agents for *Biggart, Lumsden & Co.*, Glasgow, and *Morton, Smart, Macdonald & Prosser*, Edinburgh (for the respondents).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

Re STEVENS (deceased). PATEMAN v. JAMES AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), February 28, 1952.]

Will—Incomplete will—No appointment of executor—No reference to property or extent of interest—“I give devise and bequeath unto” three named persons.

A testatrix made a will on a printed form as follows: “This is the last will and testament of me, Mrs. Ellen Stevens, of 43 Caversham Rd. in the county of St. Pancras—made this—day of Mar. 4 in the year of our Lord 1934. I hereby revoke all wills heretofore made by me. I appoint — of — in the county of — and — of — in the county of — to be executors of this my will. I give devise and bequeath unto my brother Mr. Harry Pateman of Collingdale, Larkstone Terrace, Ilfracombe, Devon, (Also sister) Mrs. Jane Slade of 1, Elm Rd. Kentish Town, N.W. (Also sister) Mrs. Ethel James of 67, Dagenham Avenue, Dagenham.” The will was properly executed.

HELD: notwithstanding that no appointment of an executor was made by the testatrix, it sufficiently appeared from the form of the will, not merely that the testatrix did not intend to die intestate, but that she intended to deal with the whole of her property by leaving it to the brother and two sisters, and, one of the sisters having predeceased the testatrix, the will was effective to pass the whole estate to the brother and surviving sister as joint tenants.

Dictum of LORD ESHER, M.R., in *Re Harrison* (1885) (30 Ch.D. 393), applied.

Re Bassett's Estate (1872) (L.R. 14 Eq. 54), *Re Messenger's Estate* ([1937] 1 All E.R. 355), and *Re Turner* ([1949] 2 All E.R. 935), considered.

AS TO ABSENCE OF STATEMENT OF SUBJECT-MATTER OF BEQUEST, see HALSBURY, Hailsham Edn., Vol. 34, pp. 219-222, paras. 274-277; and FOR CASES, see DIGEST, Vol. 44, pp. 610, 611, Nos. 4376-4385.

Cases referred to:

- (1) *Re Harrison*, (1885), 30 Ch.D. 390; 55 L.J.Ch. 799; 53 L.T. 799; 44 Digest 550, 3684.

(2) *Re Bassett's Estate*, (1872), L.R. 14 Eq. 54; 41 L.J.Ch. 681; 44 Digest 837, 6912.

(3) *Re Messenger's Estate*, [1937] 1 All E.R. 355; Digest Supp.

(4) *Re Turner*, [1949] 2 All E.R. 935; 2nd Digest Supp.

ADJOURNED SUMMONS for the determination of the questions whether, on the true construction of the will of Ellen Stevens, deceased, (a) the whole of the net estate of the testatrix belonged to the plaintiff (brother of testatrix and the administrator of her estate) and Ethel James (a sister of the testatrix) as joint tenants, or (b) the said testatrix died wholly intestate as to her said estate, or (c) the said estate or some and what part thereof ought to be held on some and what other trusts.

J. L. Arnold for the plaintiff, the administrator of the estate.

Semken for the first defendant, a sister of the testatrix.

A. A. B. Fuller for the second defendant, interested under an intestacy.

WYNN-PARRY, J.: This case raises a short point of construction on the will of the testatrix, Ellen Stevens. The will was made on a printed form, and reads as follows:

"This is the last will and testament of me, Mrs. Ellen Stevens, of 43 Caversham Rd. in the county of St. Pancras — made this — day of Mar. 4 in the year of our Lord 1934."

Down to there, even after the filling in of the blanks, there are considerable spaces to be found.

"I hereby revoke all wills heretofore made by me. I appoint — of — in the county of — and — of — in the county of — to be executors of this my will. I give devise and bequeath unto my brother Mr. Harry Pateman of Collingdale, Larkstone Terrace, Ilfracombe, Devon, Also sister) Mrs. Jane Slade of 1, Elm Rd. Kentish Town, N.W. Also sister) Mrs. Ethel James of 67, Dagenham Avenue, Dagenham."

Then there is a blank followed by the signature of the testatrix and an attestation in proper form.

The question arises on the will as admitted to probate in that form whether it operates to pass any, and, if so, what, part of the property of the testatrix to the brother and the sister who survived her, or is it completely ineffective to pass any of her property? I have been referred to certain authorities. In the first place, there is the dictum frequently quoted from the judgment of LORD ESHER, M.R., in *Re Harrison* (1), where he said (30 Ch.D. 393):

"There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule."

To my mind, that language makes it clear that LORD ESHER, M.R., was intending to enunciate a rule of general application. The facts of the case which he had to consider were materially different from the facts of the case which I have to consider in that the gap there consisted, not in the omission of any mention of the property proposed to be dealt with, but in the omission of the name or names of the person or persons proposed to be benefited by the disposition of the property.

There are three cases somewhat similar to the present case. The first is *Re Bassett's Estate* (2). In that case a testatrix made a will, which she declared

to be her "last will and testament", and thereby appointed an executor, and, after giving legacies, proceeded as follows:

"After these legacies and my doctor's bills and funeral expenses are paid, I leave (*sic*) to my sister, M.P., without any power or control whatsoever of her husband, J.P., in case of her death to be equally divided amongst her children or grandchildren",

and then followed a blank. It was held by BACON, V.-C., that there was a good gift of the residue to the sister. BACON, V.-C., in the course of his judgment, said (L.R. 14 Eq. 57):

"I read the will as containing a disposition of the whole of the testatrix's estate and effects. That must have been her intention, as is generally the case, when she set about making her 'last will and testament'. That would vest the whole of her estate in the executor."

Pausing there, it will be seen from the statement of facts in *Re Bassett's Estate* (2) that the testatrix appointed an executor, and, as might be expected BACON, V.-C., adverted to that circumstance as one which aided him in coming to the conclusion at which he arrived. But it is necessary not to lose sight of the context in which he refers to the vesting of the estate in the executor. He assumes from the form of the will, which, in being entirely in blank as to the property intended to be dealt with, is similar to the will with which I have to deal, that the presumption should be that the will intended to deal with the whole of the testatrix' estate and effects. In the upshot, BACON, V.-C., held that the will operated to pass the whole of the testatrix' property.

In *Re Messenger's Estate* (3) CLAUSON, J., had to consider the will of a testator which was on a printed form by which he appointed a named person to be his executrix. After providing for the payment of the testator's debts, and funeral and testamentary expenses, the will provided: "I give and bequeath (blank) to", and then followed the name of the executrix. His Lordship held "upon a consideration of the testator's intention expressed in the will" that the person named as executrix "was beneficially entitled to the whole of the testator's estate". In the course of his judgment CLAUSON, J., having referred in detail to the form of the will, said ([1937] 1 All E.R. 356):

"In my view it is quite plain from this document that the testator desired to make an effective will, and in that connection I need only refer to the observations of LORD ESHER, M.R., in the case of *Re Harrison, Turner v. Hellard* (1) . . ."

and then he quoted the "golden rule" which I have already read. He continued (*ibid.*):

"It is quite plain in this case that the testator intended to dispose of his property, otherwise what he was doing was a solemn farce. Another thing which is perfectly plain is this, that he intended in some way or other to benefit Mrs. E. A. Chaplin [who was named as executrix]."

I read those two sentences as indicating that CLAUSON, J., was dealing with two different subject-matters. In the first sentence he was dealing with what, in his view, was the intention of the testator as regards the disposition of his property, and he held that the testator intended to dispose of the whole of his property for the reason which he gives and which is based on the golden rule, viz., otherwise what he was doing was a solemn farce. Having come to that conclusion, he intended to pass on and deal with the question, who was intended to be benefited by this intention? He says (*ibid.*):

"In my view, it appears with reasonable clearness on the face of this will that the extent to which he desired to benefit her was to the extent of the whole of his property, which he was vesting in his executrix, who happens to be named as beneficiary, by means of appointing her executrix."

So one has three elements. First, a conclusion that the testator intended to dispose of the whole of his property; secondly, that he intended in some way to benefit the person named as executrix; and, thirdly, that he intended to benefit her to the extent of his whole estate. I do not find in that reasoning anything which would lead me to the conclusion that the only reason why CLAUSON, J., was able to hold that the testator had effectively disposed of the whole of his estate to the named person was because she was named as executrix.

The last case to which I need refer is *Re Turner* (4). That was a decision of DANCKWERTS, J., on a will made on a printed form by which a testator appointed two named persons to be his "executor" in the singular and directed the payment of his debts and funeral expenses "as soon as conveniently might be after his decease". The will proceeded: "I give and bequeath unto", and under those words were written the names of eleven persons, one name on each line, including the first person appointed executor. Immediately under the last of the names were written the words "my gold wrist watch to go" to the last-named person. DANCKWERTS, J., held that

"the gift of the gold watch . . . was an afterthought, and, as the testator must be taken not to have intended to die intestate, it was reasonably clear that he intended to give all his property to the eleven persons named, who were, therefore, jointly entitled to the whole of the residuary estate apart from the gold watch."

It is true that, as in the two earlier cases to which I have referred, the will in question appointed an executor or executrix, but the problem which DANCKWERTS, J., had to consider was really whether or not the case before him could be distinguished from *Re Messenger* (3) by reason of the fact that a specific gift followed the alleged gift of residue. He came to the conclusion that the specific gift in the will which he had to consider appeared as an afterthought, and, therefore, the case was not distinguishable from *Re Messenger* (3).

On the consideration of those three authorities, I come to the conclusion that the omission of any appointment of an executor is insufficient to enable me to distinguish this case from the earlier cases, and that it sufficiently appears from the form of the will in which it was admitted to probate that the testatrix not merely did not intend to die intestate to any extent, but intended to deal with the whole of her property by leaving it to the brother and the two sisters, and that, as the elder of the two sisters predeceased her, the result is that the will is effective in passing the whole of the testatrix' estate to the brother and second sister who will be entitled to the property as joint tenants.

Order accordingly.

Solicitors: *Walter Jennings & Son* (for the plaintiff and the first defendant);
W. A. L. Osborn (for the second defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

NOTE.**Re AN APPLICATION BY THE NATIONAL COAL BOARD.**

[CHANCERY DIVISION (Danckwerts, J.), January 22, 23, 24, 25, 28, 29, 30, 31, February 1, 20, 1952.]

Mine—Coal mine—Working of mine—Application to let down surface—“Hampering” of working—Evidence—Mines (Working Facilities and Support) Act, 1923 (c. 20), s. 3 (1)—Costs—General rule.

ADJOURNED SUMMONS under R.S.C., Ord. 54o, by which the National Coal Board applied under the Mines (Working Facilities and Support) Act, 1923, for the right to let down the surface of certain land in the city of Stoke-on-Trent and the borough of Newcastle-under-Lyme, North Staffordshire, by the working of seams of coal thereunder. Prior to nationalisation of the coal mining industry, the mines under the relevant land were worked by a private company which, under an order of the Railway and Canal Commission dated Dec. 17, 1943, was granted the right, subsequently vested in the National Coal Board, to let down the surface of the said land by working a seam called the Great Row Seam (not the subject of the present application). That right was granted until Mar. 25, 2000.

Sir Andrew Clark, Q.C., Diplock, Q.C., and J. C. B. W. Leonard for the applicants, the National Coal Board.

S. Pascoe Hayward, Q.C., and Wilfrid Hunt, M. Browne, W. F. Waite, R. M. A. C. Talbot, H. E. Francis, Marnham and R. D. Stewart-Brown for various objectors.

Cur. adv. vult.

Feb. 20. **DANCKWERTS, J.**, in a written judgment, said that jurisdiction was conferred on the court by the Mines (Working Facilities and Support) Act, 1923, s. 3, s. 4 and s. 6, and the Railway and Canal Commission (Abolition) Act, 1949, s. 1 (1) (a), by virtue of which Act the functions of the commission were transferred to the High Court.

It was contended on behalf of the objectors that the jurisdiction conferred by s. 3 of the Act of 1923 was not available unless it could be shown that the applicants were presently hampered by the absence of the facility or right for which they asked—i.e., unless they could show that their effective working of the coal had already been hampered—and that it was not sufficient for them to show that coal was present in the area which they wished to work and that their working of that coal would be hampered in the future. A fortiori, it was said, it was not sufficient to show that coal might or might not be present in commercially workable quantities in the area in question. This construction of the Act put a very strict and limited interpretation on the words “is hampered” in s. 3 of the Act, and it seemed to him that to restrict the meaning so severely would destroy to a large extent the usefulness of the powers conferred on the court and was contrary to the plain intention of the statute. It would hardly be practicable for a mining concern to operate if it were necessary to prove a breakdown of the existing method of working as a condition of making an application under the Act. Continuous output obviously could not be maintained under such conditions, and planning, at the least, would be hampered unduly. The reference in the section to the person who is working or desirous of working the minerals evidently referred to the future as well as the present. Accordingly he (His LORDSHIP) rejected the contention of the objectors on the construction of the Act. He came to the conclusions (i) that the applicants should receive the right to work and, so far as necessary, let down the surface, for a period of fifty years in respect of the whole area under consideration; (ii) that, given proper safeguards, the risk of increased and unduly serious subsidence would not

be caused if the applicants were allowed to work any one or more of the seams, and the applicants should be given liberty to work any of them; (iii) the applicants should have liberty to work super-imposed seams within three years after working a seam during the first ten years from the making of the order.

On the question of costs it was suggested by counsel on behalf of the applicant that the practice of the Railway and Canal Commission in not granting costs (as a general rule) be followed, although he (HIS LORDSHIP) had full discretion in the matter. Certain objectors submitted that they ought to be granted costs. The jurisdiction which he had seemed to him to be *sui generis* and was not to be compared with any of the other jurisdictions of the Chancery Division. The rule normally would be that costs should not be awarded, and he proposed to abide by that rule in the present case.

Solicitors: *R. S. S. Allen*, legal adviser, National Coal Board, agent for *J. Griffith*, legal adviser, National Coal Board, West Midlands Division, Dudley (for the applicants); *Sharpe, Pritchard & Co.*, agents for *C. J. Morton*, town clerk, Newcastle-under-Lyme, *T. H. Evans*, clerk to the Staffordshire County Council, and *The Solicitor*, Birmingham Regional Hospital Board; *Sharpe, Pritchard & Co.*; *Gibson & Weldon*, agents for *Harry Taylor*, town clerk, Stoke-on-Trent; *Wedlake, Letts & Birds*, agents for *Kent & Jones*, Longton; *Cunliffe & Airy*, agents for *Knight & Sons*, Newcastle-under-Lyme; *R. A. Finn*, solicitor, British Electricity Authority; *Lewin, Gregory, Torr, Durnford & Co.*, agents for *E. B. Sharpley*, solicitor, Staffordshire Potteries Water Board; *Sherwood & Co.*, agents for *A. C. Croasdel*, Edgbaston (all for various objectors).

R.D.H.O.

STREET AND ANOTHER *v.* BRITISH ELECTRICITY AUTHORITY AND OTHERS.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.JJ.), February 26, 27, 28, 1952.]

Factory—Place “within the close, curtilage, or precincts forming a factory” — Part of factory building—Factories Act, 1937 (c. 67), s. 151 (6).

Factory—Openings in floors—Space for hoist at edge of floor—Safe means of access—Factories Act, 1937 (c. 67), s. 25 (3), s. 26 (1).

A workman was employed by the second defendants on work of installing boilers in an electricity power station belonging to the first defendants. On the second floor where he worked five boilers had been installed in bays and were generating electricity. Beyond these five bays, there were four more bays into which boilers were to be put. There was a partly erected boiler in the sixth bay, and an unguarded open space in the seventh bay, in which a hoist was working, with a drop of forty-five feet through that open space to the ground floor. The workman was working in the ninth bay. Between the fifth bay, the last of the bays in which there were working boilers, and the sixth bay, the first of the bays in which installation was in progress, a tarpaulin had been put up to divide the operating part of the building from that part in which installation was in progress. When the workman was returning from his lunch to his work at the ninth bay, in some manner unexplained he fell through the open space in the seventh bay and was killed. In a claim by the workman's personal representatives, *inter alia*, against the first defendants for breach of statutory duty under the Factories Act, 1937,

HELD: the place where the accident happened did not form part of a factory, because, by reason of the separation therefrom of the operating

part of the factory, it was a place situate within the close, curtilage, or precincts forming a factory which was used solely for some purpose other than the processes carried on in the factory, within the meaning of s. 151 (6) of the Factories Act, 1937, and this was so notwithstanding that the place formed part of the factory building itself, and, therefore, the first defendants were not bound by the statutory duties imposed by the Factories Act, 1937.

Dictum of WYNN-PARRY, J., in *Cox v. Cutler & Sons, Ltd. & Hampton Court Gas Co.* ([1948] 2 All E.R. 673), approved.

Observations as to the meaning of "openings in floors" in s. 25 (3) and of "safe means of access" in s. 26 (1) of the Factories Act, 1937.

FOR THE FACTORIES ACT, 1937, s. 25 (3), s. 26 (1), and s. 151 (6), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 1018 and 1115.

Cases referred to:

- (1) *Lewis v. Gilbertson & Co., Ltd.*, (1904), 91 L.T. 377; 68 J.P. 323; 24 Digest 898, 4.
- (2) *Cox v. Cutler & Sons, Ltd. & Hampton Court Gas Co.*, [1948] 2 All E.R. 665; [1949] L.J.R. 294; 2nd Digest Supp.
- (3) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd. Ex. Ch.*, (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.

APPEAL by the plaintiffs from an order of SELLERS, J., dated Nov. 28, 1951.

The plaintiffs, as administrators of the estate of a deceased workman, Sydney Frank Street, claimed damages under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. The claim against the first defendants, to whom the generating station in which the deceased was working—the New Power Station, Ipswich—belonged, was for breach of statutory duty under s. 25 (1), s. 25 (3) and s. 26 (1) of the Factories Act, 1937, and for negligence at common law. The claim against the second defendants, the workman's employers, was for breach of statutory duty under reg. 30 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), and for negligence at common law. SELLERS, J., found against the plaintiffs on the ground that the place where the accident happened was not a factory within the meaning of the Factories Act, 1937, that there was no breach of statutory duty under the Building Regulations, 1948, and that the evidence did not establish negligence at common law. The plaintiffs appealed against the findings that there was no breach of statutory duty under the Factories Act, 1937, and no negligence at common law.

Jellinek for the plaintiffs.

Hines for the first defendants.

Burton, Q.C., and *J. W. Russell* for the second defendants.

SINGLETON, L.J., stated the facts and continued: The claim against the first defendants is set out in the statement of claim and is based both on breaches of statutory duty and on negligence. By way of particulars it is said:

"The first-named defendants were in breach of their duties under the Factories Act, 1937, in that: (1) Contrary to s. 25 (1) the said second floor was not of sound construction or properly maintained in that the surface of the floor was of rough concrete with metal reinforcing rods protruding above the surface. (2) Contrary to s. 25 (3) one side of the second floor had an opening therein which was not securely fenced. (3) Contrary to s. 26 (1) they failed to provide or maintain safe means of access to a place at which persons, including the said Sydney Frank Street, had to work. The means of access provided was unsafe both by reason of its proximity to the said open edge and by reason of the matters set out in para. 3 and

sub-para. (1) and (2) hereof. The first-named defendants were negligent in that they failed to give to the said Sydney Frank Street any or any sufficient warning of and/or to take any or any sufficient steps to prevent danger or injury to the said Sydney Frank Street arising from the unguarded opening in the said floor and/or from the condition of the floor and/or from the presence of obstruction thereon."

Regarding the second defendants, it is said that they were negligent in that:

"(1) they failed to provide a guard-rail or other suitable safeguard to prevent the fall of persons from the said second floor, (2) they failed to ensure that the surface of the said second floor was smooth and free of obstructions, (3) they failed to instruct the said Sydney Frank Street not to walk between the said trolley line and the said open edge, (4) they failed to warn the said Sydney Frank Street of the danger of walking between the said trolley line and the said open edge, (5) they, their servants or agents caused the floor between the said trolley line and the said wall to be obstructed by debris and other material, (6) they, their servants or agents permitted the said trolley to stand upon the said line adjacent to the said obstruction and (7) they failed to adopt a safe system of working."

One difficulty which arises in this case is to ascertain what was the true position as between the first and second defendants. In view of the evidence of the placing of the tarpaulin in the position in which it was, it would appear that at least some effort had been made to divide the building into two parts—(i) the part in which electricity was being generated, and (ii) the part in which the second defendants were installing boilers.

[Dealing with the allegation against the second defendants of liability at common law, HIS LORDSHIP considered the facts, agreed with the finding of SELLERS, J., that the second defendants had not been guilty of negligence at common law, and continued:] The claim against the first defendants which is based on alleged breaches of the Factories Act, 1937, presents much more difficulty. The first question for determination is: Is the place in which this accident took place a factory within the meaning of the Factories Act, 1937? It is unnecessary to look at the definition of "factory" in s. 151 (1), because an earlier section, s. 103, deals with electrical stations. Section 103 (1) provides:

"The provisions of this Act shall apply to any premises in which persons are regularly employed in or in connection with the processes or operations of generating, transforming or converting, or of switching, controlling or otherwise regulating, electrical energy for supply by way of trade, or for supply for the purposes of any transport undertaking or other industrial or commercial undertaking or of any public building or public institution, or for supply to streets or other public places, as if the premises were a factory and the employer of any person employed in the premises in or in connection with any such process or operation were the occupier of a factory."

It was not sought to bring the second defendants in under the later words of that sub-section. What is clear is that a generating station such as this is a factory for the purposes of the Factories Act, 1937.

Section 151 (6), is in these terms:

"Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes carried on in the factory, that place shall not be deemed to form part of the factory for the purposes of this Act, but shall, if otherwise it would be a factory, be deemed to be a separate factory."

It is said on behalf of the first defendants that the place at which Street fell was taken out of the factory by that sub-section and that it ought not to be regarded as a factory. Counsel for the plaintiffs submitted that sub-s. (6) did not apply at all, and that the place at which the accident took place was within the factory itself and could not be described by the words "within the close, curtilage, or precincts" in sub-s. (6). In this connection he drew attention to the words "close, curtilage, or precincts" which appear also in sub-s. (1).

The view which I hold on this is that, taking into consideration the words in sub-s. (6), "forming a factory", the words: "Where a place situate within the close, curtilage, or precincts forming a factory . . ." ought to be read as covering the whole of the premises, inside and out, so long as they are within the close, curtilage, or precincts forming a factory. Consequently, a part of the building, as distinct from something in the yard or outside the building, which is solely used for some purpose other than the processes carried on in the factory, may be taken out of the factory by the terms of s. 151 (6). Section 149 (4) of the Factory and Workshop Act, 1901, the predecessor of s. 151 (6), was discussed in a case before the Divisional Court in 1904—*Lewis v. Gilbertson & Co., Ltd.* (1). It was said, and rightly said, by counsel for the plaintiffs that certain observations of the members of the Divisional Court were obiter. Probably the same may be said with regard to passages in one or two of the judgments in *Cox v. Cutler & Sons, Ltd. & Hampton Court Gas Co.* (2). I will read a passage from the judgment of WYNN-PARRY, J., given in this court in the latter case. The learned judge, having referred to the judgments in *Lewis v. Gilbertson & Co., Ltd.* (1), said ([1948] 2 All E.R. 673):

"All three judgments proceed on the basis that 'place' in the sub-section means an area outside the factory, though within the close, curtilage or precincts forming the factory. LORD ALVERSTONE, C.J., proceeded on the basis that the 'place' was a place apart from the factory. WILLS, J., treated it as a place entirely outside the factory area. KENNEDY, J., held that a person on the new sheet mill site could not be described as being in the factory, although he might have been on the premises which were within the curtilage and precincts of the factory. No doubt, on the facts of that case, there was sound ground for holding that the site of the new sheet mill had never formed part of the factory, and that would be sufficient to support the decision, but, for myself, I have great difficulty in view of the language of sub-s. (6) of s. 151 of the Act of 1937 in accepting the view that in order that an area of land should qualify to be treated as a place within that sub-section, it must first be shown that it has never been part of the particular factory. The wording of the definition in sub-s. (1) makes the word 'factory' include not merely the area comprised by the walls of a building in which a manufacturing process is carried on, but the whole area comprised within the boundaries of, e.g., the close of the premises in question. This appears to me to be borne out by the wording of sub-s. (6) where the close, curtilage or precincts are described as forming the factory. In my view, it follows that any area which is within the close, curtilage or precincts of any premises, which are a factory within the definition of that word in s. 151, is qualified to be treated as 'a place' under sub-s. (6), provided it satisfies the other conditions of the sub-section as to user. I can find no ground for concluding that the factory area, to employ the phrase used in *Lewis v. Gilbertson & Co., Ltd.* (1) is less than co-terminous with the area comprised in the phrase 'close, curtilage, or precincts' of the premises, otherwise it would be difficult to give any effect to the word 'deemed' in the sub-section."

Respectfully, I agree with that part of the judgment of WYNN-PARRY, J. I think that, by reason of s. 151 (6) the place where this accident happened is not within the factory for the present purpose. I feel that it is only by so

reading the sub-section that you can get a reasonable view of the statutory provisions. If one could imagine a large building erected so that factory processes could be carried on in it, and in one corner, entirely separate from the rest of the premises, a factory process is carried out, on the argument put forward for the plaintiffs the whole building then becomes a factory. I think it does so under s. 151 (1), but if no other part is used for factory purposes at all, it may well be that sub-s. (6) can be applied, and thus the Factories Act and the regulations made thereunder would not apply to those parts of the building in which a wholly different process, not within the scheme of the Factories Act, was being carried on.

The question must depend on the facts. SELLERS, J., took that view, and he said:

“Another issue was raised, on which I shall make some brief observation. It was said on behalf of the first defendants that they were under no duty under the Factory Acts to the deceased man because they were, it was said, not the occupiers of the premises for the purpose of the Factory Act, and reliance was placed on s. 151 (6) of the Factories Act . . . I find as a fact that the first five boilers did form part of the factory, but that this particular area, shut off as it was, not by a permanent barrier, but by a tarpaulin which was dividing the area where work was being carried out by the second defendants fell within that sub-section, so that the area was deemed not to form part of a factory, and I do not find any evidence which would justify a finding that it was deemed to be a separate factory.”

That is a finding of fact. True, the submission was made that this is not a question of fact, but a question of construction of s. 151 (6) of the Act, still, one must look at the facts of each case. The finding of fact is based on the evidence and I am disposed to agree with the learned judge that the place at which this accident happened was not a factory or part of a factory.

In view of the importance of this case, it is desirable that I should say something on the other points which were raised on behalf of the plaintiffs, though strictly it is not necessary. It was said by counsel for the plaintiffs that, if this were a factory, s. 25 of the Act must be applied, and sub-s. (3) of that section reads:

“All openings in floors shall be securely fenced, except in so far as the nature of the work renders such fencing impracticable.”

It was submitted that the space down which Street fell was an opening in a floor and that it ought to have been fenced. The marginal note to the section is: “Construction and maintenance of floors, passages and stairs”, and sub-s. (1) provides:

“All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained.”

A question was raised on that. I do not think I need go into it except to say the learned judge found there was no breach of that sub-section. Whether this was an opening in a floor is another very difficult question. I do not regard it as an opening in a floor within the contemplation of the section as I understand it. In the case of a floor in a factory there must not be an open hole in it down which someone can fall. Steps must be taken to see that any opening in the floor is securely fenced. It is submitted on behalf of the first defendants that this was not an opening in the floor. I find that an unusually difficult question. What did the man fall down? Counsel for the plaintiffs submits he fell down an opening which was left in this space where the hoist was. True, it was a place at which a boiler was to be placed, and, had the boiler been placed there, there would not have been a hole. The boiler would have occupied

the open space. In that sense it is the end of the floor and not exactly a hole in the floor. It is difficult to find an apt illustration and not always helpful, but we have all heard of someone in excitement walking off a platform. He does not fall down a hole; he falls over the edge; and so it might be said that Street did not fall through an opening in the floor, but fell over the edge of the floor. I have grave doubt whether this can properly be described as a hole in the floor or an opening in a floor, but, as I have said, it is not necessary to come to any final decision on that point.

The other question raised is under s. 26 (1) of the Act, which provides:

"There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

[HIS LORDSHIP said that the terms of s. 26 were definite—"safe means of access". It was said that that was a relative term. It was meant to secure, so far as possible, safety for men working and on their way to work. A man approaching his work might be thinking of his work. He might not be looking at the ground on which he was walking, and he might trip and fall. A rail, or guard, of some sort, he thought, would have saved Street's life, but it was impossible for the court to say that the learned judge was not entitled to find on the evidence that the man had reasonably safe means of access to his work.]

It was said on behalf of the first defendants that it was not practicable to have a guard or a fence under either s. 25 or s. 26. The learned judge accepted that submission. The way it was put was this. The hoist was being used fairly continuously. It had been used for heavy materials, and the man in charge did not like heavy things being hoisted at a level which might be dangerous. It was said, further, that after this accident a gate of some kind was erected in front of this open space. If that gate had been erected sooner, I am inclined to think Street would have been alive today. I do not accept the learned judge's view that it was impracticable either by the nature of the work or for any other reason. If there is a place of this kind in works by which it is known that men pass frequently, someone ought, I think, to take steps to put up some sort of a guard. I have dealt with the legal duty, and I will not repeat what I said with regard to that matter, but I do believe it to be important, in the interests of employers and workmen, that where you have two bodies such as the first and second defendants in this case consideration should be given to that kind of thing. I think it right to say that, because, in my view, the duty created by s. 25 and s. 26, if it exists, cannot be met by saying: "Well, it was not very convenient." Those are not the words of the section. For the reasons that I have given, I feel with some regret that the only course which this court can take is to say that the appeal must be dismissed.

BIRKETT, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Gotelee & Goldsmith*, Ipswich (for the plaintiffs); *Bell, Brodrick & Gray*, agents for *Turner, Martin & Symes*, Ipswich (for the first defendants); *Carpenters, Birkett, Ridley & Bartley*, Ipswich (for the second defendants).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

PEGLER v. CRAVEN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), February 21, 1952.]

Landlord and Tenant—Shop—Renewal of tenancy—"Occupier" of premises—Company carrying on business—Tenancy held by managing director—Application for renewal by managing director—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 10 (1).

By a lease dated Feb. 4, 1947, the landlord let to the tenant shop premises and living accommodation thereon for a term of twenty-one years from Feb. 1, 1947, with an option to either party to terminate the lease at the end of five, ten, or fifteen years. By a notice expiring on Feb. 1, 1952, the landlord terminated the lease. The tenant, who resided in the living accommodation on the premises, was the managing director of a company to which he had assigned the goodwill of a business which was conducted on the premises. He held 437 out of the 887 issued shares in the company. On an application by the tenant under s. 10 (1) of the Leasehold Property (Temporary Provisions) Act, 1951, for a new lease of the premises,

HELD: as the company was conducting on the premises a business which belonged to it and was not conducting as the agent of the tenant a business which belonged to him, the company was the occupier of the premises within the meaning of s. 10 (1) and not the tenant, and, therefore, the application could not be maintained by the tenant and must be refused.

Quaere, whether, if the tenant had been the holder of all or substantially all the shares in the company by himself or his nominees, the company could have been regarded as his alter ego with the result that he could have been held to be the occupier of the premises occupying through the company.

FOR THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951, s. 10 (1), s. 12 (3), and s. 20, see HALSBURY'S STATUTES, Second Edn., Interim Service, 1951, pp. 137, 141, and 147, respectively.

Cases referred to:

- (1) *Paterson v. Gas Light & Coke Co.*, [1896] 2 Ch. 476; 65 L.J.Ch. 709; 74 L.T. 640; 60 J.P. 532; 25 Digest 476, 40.
- (2) *Clift v. Taylor*, [1948] 2 All E.R. 113; [1948] 2 K.B. 394; [1948] L.J.R. 1822; 2nd Digest Supp.
- (3) *Butlins, Ltd. v. Fytche*, [1948] 1 All E.R. 737; 2nd Digest Supp.
- (4) *Salomon v. Salomon & Co. Salomon & Co. v. Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 9 Digest 34, 11.

APPEAL by the landlord against an order of His Honour JUDGE SIR GERALD HURST, K.C., made at East Grinstead County Court on Nov. 27, 1951, granting the application of the tenant under the Leasehold Property (Temporary Provisions) Act, 1951, s. 10 (1), for a new lease of premises comprising a shop and living accommodation.

A. E. Holdsworth for the landlord.

Eastham for the tenant.

JENKINS L.J.: This is an appeal from an order made by His Honour JUDGE SIR GERALD HURST, K.C., at East Grinstead County Court, on Nov. 27, 1951, whereby he ordered that there should be granted to the tenant, Mr. R. H. Pegler, for the period of one year from February, 1952, at the existing rent and on the same terms and conditions, a new tenancy of the property comprising a shop and living accommodation and premises situate at Wilmington Bookshop, Portland Road, East Grinstead. Mrs. Craven, the landlord of the premises

in question, now appeals to this court on the ground that the tenant's application was not sustainable under the Leasehold Property (Temporary Provisions) Act, 1951, inasmuch as he did not possess the status necessary under that Act to enable a person to found such an application.

The story of the transactions between the parties begins with a memorandum dated Dec. 26, 1946, purporting to be an agreement between the tenant and the landlord for the purchase by him from her of the whole of the issued share capital of a company called Wilmington Bookshops, Ltd. There seems to have been trouble about that which led to the first litigation between the parties. The next material document is the lease, the termination of which gave rise to the application with which the present appeal is concerned. It is a lease of Feb. 4, 1947, of the premises for twenty-one years with an option to both parties to break at the expiration of the first five, ten or fifteen years. It appears that the landlord availed herself of the "break clause" by giving notice expiring on Feb. 1, 1952. The other material document is an assignment by the landlord, not to the tenant, but at his request to Wilmington Bookshops, Ltd., of the goodwill of the business of a bookshop conducted on the premises. That was expressed to be done as part of the terms of settlement of the litigation there had been between the parties. The landlord assigned to the company as beneficial owner by the direction of the tenant directing as beneficial owner. As to the company which thus acquired the goodwill, the position appears to be this. The tenant is managing director. He and his wife conduct the business of the company. The total issued share capital is 887 shares, of which the tenant holds 437, his wife, who is also secretary of the company, holds ten, and the remainder of the shares are held among friends and relations. It thus appears that, while the tenant has a majority interest in the company with the aid of his wife's shareholding, he cannot justifiably claim that the company is his alter ego, as for some purposes a man may be able to do where he holds all or substantially all the shares of a company by himself or his nominees. The company carries on business on the premises, and on those premises there is kept stock belonging to the company. The profits made from carrying on the business belong to the company, though the tenant benefits from those profits, which, I suppose, go to provide his salary and to pay dividends on his shareholding. The residential part of the premises is occupied by the tenant and his wife. Those are the circumstances to which the provisions of the Leasehold Property (Temporary Provisions) Act, 1951, have to be applied. The tenant is the tenant of the premises, but the business, on the other hand, is entirely carried on by the company on its own account. The relationship between the tenant and the company under which the company is in occupation and carrying on the business, was described by the county court judge as that of a gratuitous licensee.

The first section of the Act of 1951 to which it is necessary to refer is s. 10, the first section in Part II, which is headed "Shops." It is an enabling section, stating in effect in what circumstances the Act is intended to enable an application to be made. Sub-section (1) provides:

"The provisions of this Part of this Act shall have effect for enabling the occupier of a shop under a tenancy to which this section applies (hereinafter referred to as 'the expiring tenancy') to apply to the court for, and subject to the provisions of this Act to obtain, the grant of a new tenancy where apart from the next following section the expiring tenancy would come to an end immediately before the date of the commencement of this Act or within the period of two years beginning with that date, and would so come to an end by effluxion of time or by the expiration of a notice to quit given by the landlord, whether before or after the commencement of this Act."

It thus appears that the person who is enabled to make an application is the occupier of a shop under a tenancy to which the section applies. The argument for the tenant, which prevailed before the judge, was that there is no dispute that the premises are of a kind which come within the Act. The tenant is, undoubtedly, the tenant of the premises. He also claims to be the occupier. He says the section is not confined in its operation to cases of actual personal occupation by the tenant himself. It includes (he argues) occupation by a servant or by an agent or by a licensee. The company in this case is his licensee, and, therefore, he (the tenant) in this indirect fashion is himself the occupier of the shop within the meaning of s. 10 (1).

The judge, who accepted substantially that argument, said this:

"Physically of course the 'occupier' of the shop now in question is Wilmington Bookshops, Ltd., but that company does not occupy 'under a tenancy'. It occupies under a gratuitous parol licence from the [tenant] terminable at any moment. In my judgment, the [tenant] himself occupies the shop under a tenancy. His tenancy admittedly comprises the shop as well as the living accommodation enjoyed by himself and his family. He is also in possession or 'occupation' of the shop by his licensee, the company. The company pays no rent, and has no legal or beneficial interest whatever in the tenancy of the shop. Thus in law the company occupies the shop on behalf of the [tenant]."

He went on to say that it followed that the requirements of s. 10 (2) (b) were also satisfied. It will have been observed that in the passage I have read the judge referred to the tenant as being in occupation of part at all events of the premises himself. That refers to his occupation of the living quarters provided in the premises, in which he lives with his wife.

Section 10 (2) provides:

"This section applies to a tenancy the subject of which—(a) consists of a shop, or (b) consists of a shop and of living accommodation occupied wholly or mainly by the tenant or by a person who is employed by the tenant for the purposes of the retail trade or business carried on in the shop, or (c) includes a separate part which consists of a shop . . . and of such living accommodation as is mentioned in the last foregoing paragraph . . ."

So the judge could say that the premises consisted of a shop "and of living accommodation occupied wholly or mainly by the tenant," for there is no doubt that the living accommodation in the present case was in the actual physical occupation of the tenant himself.

The case is one on which I, for my part, have felt some difficulty, but I have reached a different conclusion from that of the judge. I agree that the conception of "occupation" is not necessarily and in all circumstances confined to the actual personal occupation of the person termed the occupier himself. In certain contexts and for certain purposes it obviously extends to vicarious occupation by a caretaker or other servant or by an agent. Clearly the tenant of a retail shop who, through persons in his employment, carried on business there for his own benefit under a tenancy with respect to which he was tenant would properly be described as the occupier of the shop and the person carrying on business there, though not himself in actual personal occupation of it. I cannot regard the words "the occupier of a shop" in s. 10 (1) as going so far as to include as "occupier" within the meaning of the sub-section a tenant who is not himself carrying on business on the premises in question at all, either personally or by a servant or agent, but who is tenant of premises, the shop portion of which is wholly taken up with the stock and the business of a limited company, i.e., of an entirely distinct and different legal person, though I would reserve for further consideration, if and when it arises, the case of

a tenant who is beneficial owner of all or substantially all the issued shares of such a company.

I think that conclusion is borne out by s. 10 (2) (b), for it is plain that where sub-s. (2) (b) speaks of a tenancy the subject of which

"consists of a shop and of living accommodation occupied wholly or mainly by the tenant or by a person who is employed by the tenant for the purposes of the retail trade or business carried on in the shop,"

the word "occupied" must clearly point to actual occupation either by the tenant himself or by a person employed by the tenant in the business carried on in the shop which by necessary implication means the business there carried on by the tenant. Further, it may be said that the reference to occupation by a person employed by the tenant for the purposes of the business carried on in the shop in itself suggests that the terms "occupier" and "occupation" are not used in the section in the unrestricted sense demanded by the argument put forward for the tenant, for, according to that argument, occupation, not merely by the tenant's servant, but by any third party with the tenant's consent, would be occupation by the tenant himself for the purposes of the section.

Some further light on the point at issue may be derived from some of the definitions in s. 20 (1) of the Act. "Shop" is defined as meaning

"premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business."

That definition, if it is read into s. 10 (1), makes the reference to a shop read (to put in shortly) as "premises occupied wholly for business purposes," and the critical phrase in the sub-section thus becomes, "for enabling the occupier of premises occupied wholly for business purposes under a tenancy . . ." Occupied by whom for business purposes? I should have thought the reasonable answer to be: "Occupied for business purposes by the occupier under the tenancy, that is to say, occupied by that occupier for his business purposes and not for the business purposes of somebody else." "The tenant" is defined in s. 20 (1) as the person for the time being entitled to the tenancy, and clearly, as is not disputed, a person holding under a mere licence from a tenant cannot answer that description.

The only other provision of the Act to which I think reference can usefully be made is to be found in s. 12 (3) (b). Section 12 deals with the cases in which it is proper for the court to make a grant of a new tenancy on an application under the Act. Section 12 (3) sets out a number of cases in which a new tenancy must not be granted, and so far as relevant for the present purpose, provides that:

"The court shall not order the grant of a new tenancy if it is satisfied . . . (b) that the landlord has offered to afford to the tenant, on terms and conditions which in the opinion of the court are reasonable, alternative accommodation which, in the opinion of the court, is suitable for the purposes of the tenant's business."

Plainly that provision contemplates that the business conducted on the premises must be the business of the tenant, and I think it reinforces the conclusion that, while, no doubt, a tenant of premises who carries on business there by agents may qualify for a new tenancy, the intention of the Act is that the businesses conducted on premises of which new tenancies may, in the appropriate circumstances, be granted should be the businesses of the tenants seeking new tenancies and not the businesses of strangers or third parties. By no stretch of imagination, so far as I can see, can the business carried on by the company on the premises here in question be regarded as the business of the tenant. It is the business of the company, and nobody else. Although the tenant is (with the aid of his wife's holding of ten shares) a majority shareholder, he

is not by any means the sole shareholder. The business is the company's, and the tenant manages it for the company and not on his own account.

Counsel for the tenant endeavoured to satisfy us that the expression "occupier" in s. 10 (1) extended to any person carrying on business on the premises by permission of the tenant, whatever the interest of the tenant in the business might be and even if the tenant had no interest in it at all. He founded that argument on the theory that where a tenant entitled to the possession of premises grants a third party a licence to occupy those premises, the premises are in the occupation of the tenant by his licensee. I think the answer to that argument is that the meaning of the word "occupation" is one which must be determined by reference to the context in which the expression is used, and, in my view, the context makes it reasonably plain that occupation by a third party under a licence otherwise than for the purpose of carrying on a business belonging to the tenant himself does not suffice to make the tenant the occupier of a shop under a tenancy within the meaning of the Act.

Counsel for the tenant referred us to *Paterson v. Gas Light & Coke Co.* (1), concerning the position of two persons appointed by the court to be joint receivers and managers of a company in relation to the supply of gas to the premises of the company, and, in particular, their liability to pay for gas supplied to the company before their appointment. He cited that case to us for this statement by LINDLEY, L.J. ([1896] 2 Ch. 482):

"It was strenuously contended that the plaintiffs could, simply as occupiers of the mill, have required gas to be supplied to it without requiring such supply in the name of the mill company, and this view was adopted by KEKEWICH, J. But the term 'occupier' is ambiguous. In one sense a caretaker is an occupier, but in another sense his occupation is that of some other person."

That well illustrates the general nature of the question arising in the present case.

Then counsel for the tenant referred to the decision of this court in *Clift v. Taylor* (2). The use he made of that was this. As will be remembered, one of the grounds on which a landlord can oppose the granting of a new lease under s. 5 of the Landlord and Tenant Act, 1927, is that the landlord requires the premises for occupation by himself or by a son or daughter of his over eighteen years of age. In this case the landlord was a member of a firm of auctioneers and surveyors, and the premises, so it was said, were required for the use of the firm, and the question had to be decided whether the landlord really required the premises for occupation by himself within the meaning of the section, inasmuch as the firm was going to be the actual occupier. This court held that the premises were none the less required for occupation by the landlord himself because he wanted to use them for occupation by the other members of his firm as well. I do not think that case really advances the matter any further, for (apart from the difference in the context with reference to which the expression "occupation" there fell to be construed) it was a case of a partnership, and each partner in a firm is an occupier jointly with his fellow partners of the partnership premises.

Butlins, Ltd. v. Fytche (3) is, I think, further removed from the present case than *Clift v. Taylor* (2). The question in *Butlins, Ltd. v. Fytche* (3), was whether for the purpose of the Landlord and Tenant Act, 1927, goodwill had attached to an area used as a fun fair or place of entertainment of that description by reason of a business having been carried on there by Butlins, Ltd. Butlins, Ltd., were tenants of the area, and they organised and laid it out as an amusement park. They let out pitches or spaces for various amusements to be conducted by sub-tenants or licensees, and that letting out seems to have been done sometimes by a wholly-owned subsidiary of Butlins, Ltd. In those circumstances, this court had no difficulty in holding that Butlins, Ltd., could

claim that, by reason of their carrying on business on the premises, goodwill had attached, and it was said by TUCKER, L.J., in referring to the report of the referee under the Act ([1948] 1 All E.R. 739):

"Looking at this report, it is clear that the whole lay-out and the scheme of these premises was devised by Butlins. They organised this place as an amusement park, and I think it is clear from the referee's report that goodwill did attach to these premises. It seems to me quite immaterial that the goodwill may have so attached in part as a result of sub-leases granted to other persons."

That seems to me to be an entirely different question from the one raised in the present case.

The point is a short one, and the arguments either way are not capable of any great elaboration. Although I feel some sympathy for the tenant, I am forced to the conclusion that by the severance which has been brought about between the tenancy and the business, the business being vested in and carried on by the company and the tenancy being the property of the tenant, it is impossible, on the true construction of the Act, to bring him into the category of persons who, as occupiers of shops under tenancies to which s. 10 (1) applies, are able to apply for new tenancies under the provisions of the Act. I would allow this appeal.

SIR RAYMOND EVERSHED, M.R.: I am of the same opinion. The question is what is the meaning of the formula "occupier of a shop under a tenancy" in s. 10 (1) of the Act of 1951, for, unless the tenant proves himself within that description, he is not a person enabled to apply for an extended tenancy. I should be repeating much that has fallen from JENKINS, L.J., if I elaborated the point. I, therefore, content myself by saying that, as a matter of English and having regard to the other passages in the statute to which allusion has been made, I feel forced to the conclusion that the occupier of the shop who may make the application must occupy it under a tenancy, that is to say, he must be the tenant and occupy by virtue of his tenancy. Further, I think that since the "shop" must comprehend premises which are occupied for the purpose (wholly or substantially) of a retail business, the business carried on must be the business of the tenant, and, therefore, at the same time and for the reasons I have indicated, of the occupier. The latter proposition, I think, is emphasised by the language of s. 10 (2) (b), which shows that a tenancy to which the section applies will cover the tenancy of premises, the living accommodation in which is occupied by a person employed by the tenant "for the purposes of the retail trade or business carried on in the shop", and so, clearly, as I think, carried on by the tenant. The same point is further emphasised by s. 12 (3) (b). It may be that in some circumstances it could be said that a company in actual occupation was but the alter ego of the tenant, and that that could be said consistently with the well-known decision of the House of Lords in *Salomon v. Salomon & Co.* (4), but, in my judgment, that view cannot be taken in this case for this company cannot be said to be a mere alter ego of the tenant. Though the company's right to occupy the premises is in law, no doubt, precarious, still it is not a wholly controlled company, and I think it is impossible, therefore, to accede to either of the arguments put forward by counsel for the tenant (who does not, I think, substantially dispute the view of the construction of the Act which I have expressed), namely (i) that the occupation here of the company is really an occupation for and on behalf of the tenant, and is, in truth, but an occupation of the tenant, and (ii) that the tenant and the company in some sense jointly occupy the shop.

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Thomas Eggar & Son* (for the landlord); *Nisbet, Drew & Loughborough* agents for *Pearless, De Rougemont & Co.*, East Grinstead (for the tenant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

MARTIN v. SCOTTISH TRANSPORT AND GENERAL WORKERS UNION.

[HOUSE OF LORDS (Lord Normand, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone, Lord Cohen), January 14, 15, March 6, 1952.]

Trade Union—Membership—Temporary membership for the duration of the war—No position for temporary membership in union's rules.

Until August, 1940, M., a dock worker in Glasgow, was not a member of a trade union. On Aug. 19, 1940, at the request of the secretary of the Scottish Transport and General Workers Union, he attended a meeting of the local branch committee which was held for the purpose of admitting new members to the union. On his expressing his willingness to join the union, he was asked to sign a letter in these terms: "I hereby apply for membership of the [union] for the duration of the present war. I agree to be bound by all the rules of the . . . union, and I admit, by my subscription hereto, that the executive of the . . . union shall be entitled to require me to forfeit my membership of the . . . union on or at any time after " the end of hostilities. He signed the letter under protest, on being told that it would not be used against him and that he could not be admitted a member unless he signed. On paying the usual member's entrance fee, he received his member's badge, a copy of the union's rules and a contribution card, and his name was entered on the register of members. From Aug. 19, 1940, until June, 1948, he performed all the obligations and enjoyed all the advantages of a member of the union. On June 23, 1948, he received a letter from the secretary of the union informing him that, pursuant to an order of the general executive council of the union dated May 24, 1948, in terms of a resolution and minute in accordance with the terms of the contract signed by M. on Aug. 19, 1940, he would cease to be a member of the union on June 26, 1948. By r. 20 of the union's rules, no rule was to be amended or rescinded, and no new rule was to be made, except in accordance with a resolution passed at the annual meeting of the general executive council. By r. 15, which was in force in August, 1940, and was not thereafter altered by any resolution passed at the annual meeting of the general executive council: "Every person upon being admitted a member of the union shall be deemed to agree to abide by the rules of the union . . . and be liable to forfeit membership at any time if in the opinion of the general executive council such person has failed to abide by the rules." The rules contained no other ground for forfeiture of membership and there was no rule providing for the admission of members on a temporary basis. In an action by M., claiming inter alia a declaration that he was a member of the union, as the condition affecting the duration of his membership was ultra vires,

HELD: (i) the letter of Aug. 19, 1940, was the basis on which M. was admitted to membership of the union, and the condition therein as to the duration of his membership was not separable from the rest of the letter so as to leave the letter standing as an unqualified application, but was an integral suspensive condition in the sense that he would not have been admitted unless he had signed the letter containing the condition as an integral part of his application.

(ii) by virtue of the provisions of the Trade Union Act, 1871, s. 14, para. (1), and sched. I, para. (2) and para. (3), any rule of the union governing the terms on which membership was granted had to apply to all admissions until it was altered by the method prescribed by the union's rules, and, as r. 15 was in force in August, 1940, and had not been altered, the officials of the union had no authority to admit M. to membership subject to a limitation of time; in purporting to do so they had acted in excess of their powers; and, therefore, M. had never been a member of the union.

AS TO TRADE UNION RULES, see HALSBURY, Hailsham Edn., Vol. 32, pp. 492-494, paras. 786, 787.

APPEAL by the pursuer, a dock worker in Glasgow, from an interlocutor of the First Division of the Court of Session (LORD COOPER (Lord President), LORD CARMONT and LORD RUSSELL), dated Nov. 23, 1950, recalling an interlocutor of LORD BLADES, Lord Ordinary, dated Feb. 25, 1950.

In August, 1940, the appellant was admitted a member of the Scottish Transport and General Workers Union after he had signed a letter applying for membership "for the duration of the present war" and admitting that the union could require him to forfeit his membership after the end of hostilities. In June, 1948, pursuant to a resolution and order of the general executive council of the union, dated May 24, 1948, he was informed that his temporary membership was revoked. He brought an action against the union claiming (a) a declaration that he was admitted a member of the union in August, 1940, and (b) reduction, quoad him, of the resolution and order of the general executive council, dated May 24, 1948. He contended, *inter alia*, that, as the rules of the union provided for forfeiture of membership only for failure to abide by the rules, the requirement that he should forfeit his membership at the end of the war was *ultra vires*. LORD BLADES (Lord Ordinary) held that the appellant was admitted to full membership of the union and that it was *ultra vires* of the committee (a) to make the signing of the form of contract contained in the letter of August, 1940, a condition precedent to membership, and (b) to found on it as a ground for terminating the appellant's membership, there being no provision in the union's rules for such procedure. The union appealed from this decision to the First Division of the Court of Session, who held that the appellant was never admitted to ordinary membership, that the union acted *ultra vires* in admitting him to war-time membership under a special contract, and that, therefore, he was never a member of the union.

T. P. M'Donald, Q.C., and *Sloan* (both of the Scottish Bar) for the appellant.
Walker, Q.C., and *Duffy* (both of the Scottish Bar) for the respondent union.

The House took time for consideration.

Mar. 6. LORD NORMAND read the following opinion. My Lords, this appeal is, as the Lord President (LORD COOPER) has said, of importance not only to the appellant and to the respondent trade union but also to a large group of Clyde dockers who are in the same position as the appellant and whose membership of the union is at stake equally with his.

The facts are set out in condescendence 2 and it is sufficient for the disposal of the appeal to summarise them. The appellant, who had previously been a dock worker in Glasgow, but not a member of a trade union, received in August, 1940, a letter from the respondents' secretary requesting him to attend a meeting of the Glasgow Docks No. 1 Branch Committee which was to be held for the purpose of admitting new members to the respondent trade union. He attended the meeting, which took place on Aug. 19, 1940, and he expressed his willingness to join the union. Thereupon an official of the union presented to him for his signature a letter in these terms:

"I hereby apply for membership of the Scottish Transport and General Workers Union, 27 Oswald Street, Glasgow, for the duration of the present war. I agree to be bound by all the rules of the said union, and I admit, by my subscription hereto, that the executive of the said union shall be entitled to require me to forfeit my membership of the said union on or at any time after the signing of an armistice by His Majesty's government."

The appellant protested against being asked to sign the document, but he was told that it would not be used against him. He still protested, but signed on being told that he could not be admitted a member unless he signed. The appellant was then, according to his own averment, admitted a member of Glasgow

Docks No. 1 branch, having paid the usual member's entrance fee of £2 10s., and he received his member's badge, a copy of the rules of the union, and a contribution card. His name was entered in the register of members. From his admission on Aug. 19, 1940, till 1948 he continued to perform all the obligations and to enjoy all the advantages of a member of the union. On June 23, 1948, the respondents' secretary wrote a letter to the appellant informing him that his temporary membership of No. 1 Docks Branch had been revoked and that he would cease to be a member of the branch and of the union on June 26, 1948. The letter intimated that the decision to terminate his membership was agreed to and ordered by the general executive council of the union on May 24, 1948, in terms of a resolution and minute in accordance with the terms of the contract signed by the appellant. In July, 1948, the appellant raised the present action, concluding for a declarator that he was admitted a member of the union on Aug. 17, 1940 (a mistake for Aug. 19, 1940), and for reduction of the resolution and order of the general executive council of May 24, 1948. The ground of the action is unambiguously averred in condescendence 2, where it is said that the appellant's letter of Aug. 19, 1940, in so far as it required him to forfeit his membership after the signing of an armistice, was invalid and illegal and *ultra vires* as not being in accordance with the rules of the union, because the rules provided for the forfeiture of membership only for failure to abide by the rules, and because there was at the material time no rule by which the conditions contained in the letter could be attached to the admission of a member. The Lord President (LORD COOPER) aptly and accurately summarised the issue presented by the record as a question:

“ . . . whether, without first altering their rules, the defenders had the power in 1940 to admit applicants to what I shall call ‘ war-time membership ’ by making a special bargain with them.”

The respondents' criticism that the plea of *ultra vires* is technically inappropriate when the trade union has the power to authorise the act complained of, if it first alters its rules, has no merits, for fair notice was given of the true case made by the appellant.

Before considering the only issue really arising on the record, I find it necessary to point out that there is no conclusion for the partial reduction of the letter of Aug. 19, and no plea that it should be partially reduced *ope exceptionis*, and, further, that there is no record for the admission of the appellant to membership by actings after Aug. 19. I say this because counsel for the appellant attempted to argue (i) that the letter of Aug. 19 should be so far reduced as to set aside any condition affecting the duration of his membership and to leave the application for membership standing in unqualified terms, and (ii) that his enjoyment of the rights and advantages of membership and his performance of its duties from 1940 to 1948 and other circumstances should be held to have impliedly conferred on him at some uncertain date an unqualified membership of the union. These arguments, which are on their merits open to grave criticism, I eliminate at the outset because they are not within the four corners of the record.

On the issue whether the condition affecting the duration of membership was valid, the Lord Ordinary (LORD BLADES) heard argument on the respondents' plea of relevancy in the procedure roll. He came to the conclusion that the rules did not allow of a membership subject to the condition that it should be temporary and forfeitable on the signing of an armistice. He then found that when the appellant paid the entry money and fulfilled the other obligations attached to full membership he became a full member of the union, by which, as the context shows, he means a member the duration of whose membership is unqualified. Having arrived at that conclusion on a consideration of the documents and of the admitted facts, the Lord Ordinary ought, I think, to have granted a decree in terms of the declaratory and reductive conclusions. Instead of that, he allowed a proof of the parties' averments and evidence was taken in

accordance with his interlocutor. We were not referred to a single page of the evidence and it was of so little assistance in the determination of the case that the opinion of the Lord Ordinary pronounced after the proof adds nothing to the opinion which he had already given after the procedure roll discussion. By his interlocutor of Feb. 25, however, he decreed in terms of the declaratory and reductive conclusions. This interlocutor was recalled by the First Division of the Court of Session by an interlocutor sustaining the respondents' plea to relevancy and dismissing the action. A

My Lords, in my opinion, the reasoning of the learned judges in the Inner House, particularly in the judgments of LORD COOPER, Lord President, and LORD CARMONT, is unassailable and conclusive of the action. The whole issue turns on the construction and effect of the letter of Aug. 19, 1940, and on the construction and effect of the respondents' rules, and I turn first to a consideration of the construction of the letter. The first sentence is, in terms, an application for membership "for the duration of the war" neither more nor less; the second sentence contains an express provision that the executive of the union should be entitled to require the appellant to forfeit his membership B

" . . . on or at any time after the signing of an armistice by His Majesty's government." C

Had the letter been a document drafted and adjusted by lawyers for the parties, there might have been difficult questions about the legal meaning of the "duration of the war" and of "the signing of an armistice by His Majesty's government", and the fact that hostilities ended, not by the signing of an armistice, but by the unconditional surrender of the King's enemies, would have given rise to special difficulty. But this was not a lawyer's document and the parties were agreed that it should not be made the subject of a legalistic interpretation. It was really common ground that "for the duration of the . . . war" meant no more than "till the end of hostilities" and that the "signing of an armistice" has the same meaning. I think that that is the sensible and correct way to construe the letter. What the application had in view was that the appellant should have the right to remain a member till hostilities ceased and that after that he might remain a member till the union executive chose to terminate his membership. The respondents' counsel did, indeed, offer another construction, that the letter was an application for membership without qualification as to duration accompanied by a standing offer of resignation capable of being made effective by acceptance at any time after the cessation of hostilities. The language of the document is not capable of bearing such a construction, and that is all that need be said about it. What, then, is the effect of the letter? It is, on the appellant's own averments, the basis of his admission, or purported admission, to membership. The appellant was reluctant to sign, but in the end he gave way and signed the document put before him. He then and there paid his entrance fee and was handed his membership card, a copy of the union's rules, and his contribution card. We were invited to ignore the letter and to treat the other incidents as an implied application for membership and an implied acceptance which were independent of the letter. But it is impossible to wipe out the express application which was followed by an act of acceptance and to substitute for it an implication from the tender of the entrance fee which was itself a consequence of the signing of the application in agreed terms. The real question is whether the condition affecting the duration of the membership is separable from the remainder of the letter. Again, I have no doubt that the condition was integral and cannot be separated and severed so as to leave the letter standing as an unqualified application. LORD CARMONT's observations on this aspect of the case are, in my opinion, most cogent. The learned judge says that the more the appellant emphasises his reluctance to accept the condition and his protests, the more he makes it impossible to adopt the suggestion that he put forward an overriding application for unqualified membership, the acceptance D E F G H

of which was qualified by a severable *ultra vires* condition. The first sentence in the letter, moreover, is incapable of being separated into an application unlimited in time with an added limitation. The two things are indissolubly connected grammatically. I, therefore, hold that the letter was the basis on which the appellant was admitted and that the condition as to duration was an integral suspensive condition in the sense that he would not have been admitted unless he had signed the letter containing the condition as an integral part of his application.

For a just appreciation of the respondents' rules it is important to consider the statutory provisions under which they were made. They are contained in the Trade Union Act, 1871, s. 14, and sched. I. Section 14 enacts:

"With respect to the rules of a trade union registered under this Act, the following provisions shall have effect: (1) The rules of every such trade union shall contain provisions in respect of the several matters mentioned in sched. I to this Act."

Schedule I contains the following:

"(2) The whole of the objects for which the trade union is to be established, the purposes for which the funds thereof shall be applicable, and the conditions under which any member may become entitled to any benefit assured thereby, and the fines and forfeitures to be imposed on any member of such trade union. (3) The manner of making, altering, amending, and rescinding rules."

It follows that any rule governing the terms on which membership is granted must apply to all admissions until it is altered by the method prescribed by the rules themselves, and I, therefore, reject the argument put forward for the respondents that *esto* the rules in August, 1940, provided only for the admission of members without any limit on the duration of their membership, some modification of the rule so as to provide for temporary membership could be brought about by an implied ratification of admissions purporting to have been made on a temporary basis. Now, r. 15 contains this:

"Every person upon being admitted a member of the union shall be deemed to agree to abide by the rules of the union in every respect, and be liable to forfeit membership at any time if in the opinion of the general executive council such person has failed to abide by the rules."

There is no rule providing for the admission of members on a temporary basis or for forfeiture for any reason except that prescribed by r. 15. Rule 20 provides:

"No new rule shall be made, nor shall any rule herein contained or hereafter to be made (*sic*), or amended, or rescinded except in accordance with a resolution duly passed at the annual meeting of the general executive council."

In spite of imperfections of drafting, the sense of this rule is clear. It is common ground that r. 15 was in force in August, 1940, and that it was not thereafter altered by any resolution passed at the annual meeting of the general executive council. Therefore, the officials of the branch or of the union had no authority in August, 1940, or later, to admit the appellant to membership subject to a limitation of time, and when they purported to do so they acted in excess of their powers and their act had and has no validity. I agree with the view expressed by LORD CARMONT that there was an attempt to create a class of member outside the provisions of the rules and that it necessarily fails. The conclusion that the appellant never was a member may be inconvenient to both parties, because it may be difficult to work out the equitable adjustment of rights, but that is not a consideration which can affect the decision of the present appeal. I would dismiss the appeal with costs.

LORD REID: My Lords, I have had an opportunity of reading the speech which my noble and learned friend, **LORD NORMAND**, has just delivered. I am in complete agreement with it and I cannot usefully add anything to it.

LORD TUCKER: My Lords, I agree.

LORD NORMAND: My Lords, **LORD ASQUITH OF BISHOPSTONE**, who is, unfortunately, not able to be present today, has asked me to state that he concurs with the opinion which I have delivered.

LORD COHEN: My Lords, I also agree with the opinion which has been delivered by my noble and learned friend, **LORD NORMAND**. *Appeal dismissed.*

Solicitors: *Smith & Hudson*, agents for *Thos. J. Addy, Son & Co.*, Edinburgh (for the appellant); *O. H. Parsons*, agent for *Herbert Macpherson*, Edinburgh, and *L. and L. Laurence*, Glasgow (for the respondent union).

[Reported by **J. D. PENNINGTON**, Esq., *Barrister-at-Law*.]

NOTE.

HUTCHISON v. COCKSEGE & CO., LTD.

[SUFFOLK ASSIZES (Croom-Johnson, J.), February 1, 1952.]

Building—Installation of plant in factory—“Working platform”—Steel platform of plant—“Construction, structural alteration, repair or maintenance of a building”—Installation of plant by contractors—Safe system of working—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 2 (1), reg. 22.

ACTION for damages for negligence, and, alternatively, breach of statutory duty.

The plaintiff was a steel erector employed by the defendants, engineering contractors, who designed and manufactured plant for use in sugar beet factories. On Sept. 1, 1950, while the defendants were erecting a pulp bagging plant in a factory, the plaintiff was required to drill holes in the casing of a long worm of the plant which was placed on a steel platform, some sixteen or seventeen feet above the floor of the plant. This platform, which was a fixed structure, was part of the plant. When finished, it was to have a set of railings, but they had not yet been fitted in. As the permanent ladder to the platform was not yet securely fixed, the plaintiff and other workmen climbed to the platform by means of a wooden ladder which was then removed. The worm was placed about eighteen inches from the edge of the platform. Finding that he had not got a suitable drill, the plaintiff asked L., a workman employed by the occupiers of the factory, who was on the ground, to get one for him. L. threw up the drill and, in trying to catch it, the plaintiff bumped against the worm casing, and, fearing that he would over-balance and fall, tried to jump down to the ground and sustained injuries. He contended (i) that the operations on which he was engaged were within the ambit of the Building (Safety, Health and Welfare) Regulations, 1948, and that the defendants had failed to comply with reg. 22, in particular; and (ii) that the defendants were negligent at common law in that they had failed to maintain a safe system of working.

Cases referred to:

- (1) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (2) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; *revsd. on other grounds*, [1936] A.C. 206; Digest Supp.

W. M. F. Hudson for the plaintiff.

J. W. Russell for the defendants.

CROOM-JOHNSON, J., held (i) that a "working platform", within the meaning of reg. 22 of the regulations of 1948, was part of what was commonly known as the scaffolding which was used in building operations, that the platform on which the plaintiff was working was not a "working platform" within the meaning of the regulation, and, therefore, the defendants were not in breach of reg. 22; (ii) that the defendants were engaged, not in "the construction, structural alteration, repair or maintenance of a building", within reg. 2 (1) of the regulations, but in providing plant for a building, and, therefore, there was no breach of any statutory duty by them as the operations on which they were engaged did not come within the ambit of the regulations; (iii) that, as there was nothing dangerous in what the plaintiff was required to do and there was ample room for persons accustomed to such work to move on the platform, the defendants had not failed to maintain a safe system of working; and (iv) that, assuming that there was negligence on their part, it was not the cause of the plaintiff's accident, which was an "accident" in the original sense of the word, and, therefore, the defendants were not liable at common law.

Judgment for the defendants.

Solicitors: *Turner, Martin & Symes*, Ipswich (for the plaintiff); *Birkett, Ridley & Bartley*, Ipswich (for the defendants).

R.G.

R. v. TRONOH MINES, LTD., AND OTHERS.

[CENTRAL CRIMINAL COURT (McNair, J.), February 14, 18, 1952.]

Elections—Expenses—Advertisement "promoting . . . election of . . . candidate"
—Criticism of political party in general—Representation of the People Act, 1949 (c. 68), s. 63 (1) (b).

After writs had been issued in respect of a parliamentary general election a company, through its secretary, caused to be inserted in a newspaper circulating throughout the country an advertisement condemning the financial policy of the Labour Party, and, in particular, that party's proposal to control the dividends of companies. The advertisement continued: "The coming general election will give us all the opportunity of saving the country from being reduced, through the policies of the Socialist government, to a bankrupt 'Welfare State'. We need a new and strong government with Ministers who may be relied upon to encourage business enterprise and initiative . . ." The company, the secretary, and the proprietors of the newspaper, were jointly charged with unlawfully incurring expenses with a view to promoting or procuring the election of a candidate other than the Labour candidate at the parliamentary election to be held in the constituency in which the company had its office and the newspaper was published, contrary to s. 63 (1) (b) and s. 63 (5) of the Representation of the People Act, 1949.

HELD: section 63 (1) (b) was designed to prohibit expenditure on advertisements supporting a particular candidate in a particular constituency, which, if authorised by the election agent, would form part of the election expenses for that constituency as distinct from supporting the interests of a party generally in all constituencies, and, therefore, there was no case to go to the jury.

FOR THE REPRESENTATION OF THE PEOPLE ACT, 1949, s. 63 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 8, p. 631.

Cases referred to:

- (1) *Howell v. Falmouth Boat Construction, Ltd.*, [1951] 2 All E.R. 278; [1951] A.C. 837.
- (2) *Lambeth, Kennington Division Case, Crossman v. Davis*, (1886), 54 L.T. 628; 4 O'M & H. 93; 20 Digest 117, 944.

(3) *Shoreditch, Haggerston Division Case, Cremer v. Lowles*, (1896), 5 O'M & H. 68; 20 Digest 93, 711.

SUBMISSION ON POINT OF LAW on a charge under the Representation of the People Act, 1949, s. 63 (1) (b).

On Oct. 19, 1951, the defendant, Tronoh Mines, Ltd., by its secretary, the defendant, Harold Edgar Barrenger, caused to be inserted in a newspaper owned by the defendants, The Times Publishing Co., Ltd., an advertisement which was headed "Tronoh—Malayan Tin Group of Companies. Interim statement on dividend limitation," and contained criticisms of the Labour Party's financial policy—in particular, that relating to a proposal to control the dividends of companies. The advertisement concluded with these words:

"The coming general election will give us all the opportunity of saving the country from being reduced, through the policies of the Socialist government, to a bankrupt 'Welfare State'. We need a new and strong government with Ministers who may be relied upon to encourage business enterprise and initiative, under the leadership of one who has, through the whole of his life, devoted himself to national and not sectional interests . . ."

The three defendants were charged under s. 63 (1) (b) and s. 63 (5) of the Act of 1949 that in the city of London they unlawfully incurred expenses on account of issuing in the "The Times" newspaper an advertisement with a view to promoting or procuring the election of a candidate other than the Labour Party's candidate at the parliamentary election held in the constituency of the cities of London and Westminster during the general election on Oct. 25, 1951, for which the writ had been issued on Oct. 6. By a second count it was alleged that the expenses were incurred with a view to promoting or procuring the election of the Conservative candidate in the constituency referred to. At the conclusion of the case for the prosecution the defendants submitted that for an advertisement to offend against s. 63 (1) (b) it must be directed to a particular candidate in a particular constituency and not be in the general terms of the advertisement complained of, and that, as the prosecution had not tendered any evidence to that effect, there was no case to go to the jury against the defendants who were entitled to be acquitted.

Winn and H. E. Perkins for the Tronoh Mines, Ltd., and Mr. Barrenger.

Howard, Q.C., and *J. M. G. Griffith-Jones* for The Times Publishing Co., Ltd.
Christmas Humphreys and *Bass* for the Crown.

McNAIR, J.: On the view I take of the construction of s. 63 (1) of the Representation of the People Act, 1949, this is not a case which I can properly leave to the jury. For the purpose of the observations which I am about to make, I assume that the jury could properly find on the evidence that the object, or, possibly, the primary object, of incurring the expenditure in question was to advance the prospects of the anti-Socialist cause generally, that those who incurred those expenses had in mind the general election of 1951, and that they desired to achieve their object by securing the election of a majority of candidates who were against the Socialist government, though, if the matter had been left to the jury, the jury might well have taken the view that they were not the objects or the primary object. The indictment contains two counts, charging the defendants with acting contrary to s. 63 (1) (b) and s. 63 (5) of the Act of 1949.

The Act of 1949 is a consolidating statute embracing the whole of the electoral law. So far as is material, s. 63 (1) provides:

"No expenses shall, with a view to promoting or procuring the election of a candidate at an election, be incurred by any person other than the candidate, his election agent and persons authorised in writing by the election agent on account—(a) of holding public meetings or organising any public display; or (b) of issuing advertisements, circulars or publications; or (c) of otherwise presenting to the electors the candidate or his views or the extent or nature of his backing or disparaging another candidate . . ."

Counsel for the defendants have submitted that, on the proper or reasonable construction of that section, the evidence tendered by the Crown does not establish any act which is prohibited by it. Section 63 (1) prohibits the incurring of expense on account of (a) holding public meetings, (b) issuing advertisements, or (c) "otherwise presenting to the electors the candidate or his views or the extent or nature of his backing or disparaging another candidate". It seems to me that (c) necessarily imports that the particular items specified in (a) and (b) must also, if they are to be caught by the prohibition, be items which have the effect of "presenting to the electors the candidate or his views or the extent or nature of his backing or disparaging another candidate." If this result had not been intended, it seems to me that para. (c) would have run: "of presenting to the electors, whether by means specified in para. (a) or para. (b), or in any other way, the candidate or his views . . ." Furthermore, the Interpretation Act, 1889, s. 1 (1), provides that, unless the context otherwise requires, words importing the singular include the plural, and I think that the context here does necessarily require that references to the election of a candidate at an election means a candidate at a particular election and not candidates at elections generally. On the whole, therefore, although I appreciate that the point is fully arguable, I think that the construction contended for by the defence on this point is correct. It is not, however, necessary in a criminal case such as this to go to that length. It is sufficient to say that, in my judgment, it is a reasonable and possible construction. For, in the construction of a penal statute—to use the words of LORD SIMONDS in *Howell v. Falmouth Boat Construction, Ltd.* (1) ([1951] 2 All E.R. 281)—

"a man should not be put in peril on an ambiguity."

I have reached the decision that on the evidence no reasonable jury could find that the advertisement in question was presenting to the electors of any constituency any particular candidate, still less presenting to the electors of the constituency of the cities of London and Westminster either the Conservative candidate or any candidate other than a Socialist candidate or his views.

Counsel for the defendants, Tronoh Mines, Ltd. and Mr. Barrenger, also contended that this construction is supported by the consideration that s. 63 (1) does not prohibit the incurring of expenditure of the nature covered by the section absolutely, but only sub modo, and, therefore, the fact that the section itself provides no way in which the particular form of advertisement in question, namely, an advertisement in a national newspaper, which circulates generally throughout the country, supporting the views of a particular party and not those of a particular candidate, can be authorised, lent strong support to the view that the particular form of advertisement in question was not prohibited. If expenses incurred on account of the items specified in (a) (b) and (c), being supported in writing by the election agent, are permissible and authorised by the election agent, then, by virtue of sub-s. (2), the person who incurs them has to make a return to the returning officer of the amount of those expenses, stating the election at which and the candidate in whose support they were incurred. The prescribed form referred to in sub-s. (3) is set out in the Representation of the People Regulations, 1950 (S.I., 1950, No. 1254), which took effect after approval by resolution of both Houses of Parliament, and is Form W., and it is clear that that form is inappropriate for making a return of expenses of the kind with which we are here concerned. There is no way in which the expenditure, on the hypothesis I have stated, incurred in relation to all elections can be apportioned for the purpose of any particular return for a particular election. That consideration alone seems to me to lend strong support to the view that the section is not intended to prohibit expenditure incurred on advertisements designed to support, or having the effect of supporting, the interest of a particular party generally in all constituencies, at any rate at the time of a general election, and not supporting a particular candidate in a particular constituency.

Counsel for The Times Publishing Co., Ltd. has based an argument on the general structure of the group of sections—ss. 60 to 78—headed “Election expenses”. Those words, “Election expenses”, are, according to recognised canons of construction, to be regarded as forming part of the statute itself, and may, at any rate in the case of doubt, but, probably in all cases, be used to provide the key to the general construction of each section which follows under that heading. Election expenses are defined in s. 103 as follows:

“ ‘Election expenses’ in relation to an election means expenses incurred, whether before, during or after the election, on account of or in respect of the conduct or management of the election.”

The result of s. 171 (1) is that “election” here means a parliamentary election, and that term “parliamentary election” is itself defined by s. 17 (1) of the Interpretation Act, 1889, in terms which make it plain that it means an election for a particular constituency and not a panoply of elections commonly known as a general election. Accordingly, it seems to me that this group of sections is dealing with an election for a particular constituency, and it would be contrary to the ordinary canons of construction to impose the prohibition of s. 63 (1) in the circumstances of the present case. In other words, what is prohibited by this section is the incurring of expenditure of one of these particular categories which has the effect of supporting a particular candidate or candidates in a particular constituency, which, if authorised by the election agent, would form part of the election expenses for that constituency and thus be subject to the statutory maximum of expenditure for that constituency. I, therefore, accept the submission of counsel for The Times Publishing Co., Ltd. that s. 63 (1) does not prohibit expenditure, the real purpose or effect of which is general political propaganda, even although that general political propaganda does incidentally assist a particular candidate among others. There may be instances where there has been an incursion by a party or body into an election, but there is no evidence or suggestion of anything of that kind in the present case. Certain of the cases to which I have been referred (including *Lambeth, Kennington Division Case*, *Crossman v. Davis* (2) and *Shoreditch, Haggerston Division Case*, *Cremer v. Lowles* (3)), draw this distinction, and, although those were decisions on earlier legislation, it does not seem to me that in any relevant respects their validity has been altered by the Act of 1918, the Act of 1948, or the consolidated Act of 1949.

I have come to the conclusion that no reasonable jury could find that the expenditure in question here was prohibited on this construction of the Act. That being so, I need not pause to consider the special position of the third defendants, The Times Publishing Co., Ltd., and the question whether, on any view of the statute, it could be said that there was any evidence against them. Furthermore, the conclusion which I have reached on the general construction of the section renders it unnecessary for me to express any final view on the question whether the proof of intention, object, or view to promote or procure the election of candidates generally of one particular party or in opposition to one particular party in all elections held at one general election could be sufficient evidence, on which a jury could act, of specific intent such as is charged in the present case, viz., the intent of promoting or procuring the election of a particular candidate or candidates at a particular election. But I must say, having listened to the arguments on this point, I am strongly of the opinion that in a case such as this it would be necessary to prove affirmatively the specific intent relating to the particular election.

Verdict: “Not Guilty” on both counts.

Solicitors: *Stephenson, Harwood & Tatham* (for the first and second defendants); *Charles Russell & Co.* (for the third defendant); *Director of Public Prosecutions* (for the Crown).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

DRINKWATER AND ANOTHER v. KIMBER.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.J.J.), January 22, 23, 24, February 29, 1952.]

Negligence—Contributory negligence—Action by two plaintiffs—Wife and husband—Judgment for first plaintiff against defendant—Second plaintiff one third to blame—Right of defendant to recover from second plaintiff one third of damages payable to first plaintiff—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1).

The female plaintiff was injured in a collision between a motor van, in which she was being driven by the male plaintiff (her husband), and a motor car driven by the defendant. In an action for damages brought by the plaintiffs against the defendant the judge found the male plaintiff one third to blame for the accident and the defendant two thirds to blame. With regard to the female plaintiff's claim, he gave judgment in her favour for £405. On a counterclaim by the defendant against the male plaintiff for one third of the sum awarded to the female plaintiff,

HELD: the defendant's counterclaim being based on the judgment against him and not arising directly from the accident was not a "claim" within s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, nor was his liability to the female plaintiff, which also arose under the judgment and not directly from the accident, "damage" within the sub-section, and, therefore, the defendant could not recover against the male plaintiff under the sub-section.

Per MORRIS, L.J.: the defendant was not held liable to the wife because her husband was negligent towards her, but because he himself was negligent and caused her damage; the defendant and the husband were not joint tortfeasors but separate tortfeasors whose concurrent acts caused injury to the wife; and, therefore, the defendant had not suffered damage partly through the fault of the husband and his counterclaim was not a "claim" within s. 1 (1).

Decision of DEVLIN, J. ([1951] 2 All E.R. 713), affirmed.

FOR THE LAW REFORM (MARRIED WOMEN AND TORTFEASORS) ACT, 1935, s. 6, see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 359; and FOR THE LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT, 1945, s. 1 (1), see *ibid.*, Vol. 17, p. 12.

Cases referred to:

- (1) *The Koursk*, [1924] P. 140; 93 L.J.P. 72; 131 L.T. 700; 41 Digest 798, 6591.
- (2) *The Cairnbahn*, [1914] P. 25; 83 L.J.P. 11; 100 L.T. 230; 41 Digest 799, 6597.

APPEAL by the defendant from an order of DEVLIN, J., dated July 31, 1951 (reported [1951] 2 All E.R. 713).

An action for damages for negligence was brought by a husband and wife against the defendant who counterclaimed for contribution in respect of contributory negligence. The wife was injured in a collision between a van in which she was being driven by her husband and a motor car driven by the defendant. The husband's claim was settled and liability was admitted for the wife's damage, but the amount of damages was not agreed, the defendant contending that the husband was partly responsible for the accident and therefore liable to make a contribution towards the damages recovered by the wife. DEVLIN, J., awarded the wife £405, and found that the husband was partly to blame, but dismissed the counterclaim on the ground that the defendant had not suffered any damage within the meaning of the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1).

*P. M. O'Connor and M. McLaren for the defendant.
Glyn-Jones, Q.C., and F. G. Paterson for the plaintiffs.*

Cur. adv. vult.

Feb. 29. The following judgments were read.

SINGLETON, L.J.: This appeal arises on a counterclaim by the defendant in an action tried before **DEVLIN, J.** The judge decided against the defendant on claim and counterclaim, and he appeals against the judgment on the counterclaim. A

On June 4, 1950, the plaintiffs, Mr. and Mrs. Drinkwater, were in a motor van driven by Mr. Drinkwater, and when they were at cross-roads in Clapton there was a collision between the van and a motor car driven by the defendant. Mrs. Drinkwater was injured and the van was damaged, and Mr. Drinkwater was put to expense. The plaintiffs commenced an action against the defendant claiming damages for negligence. In respect of Mr. Drinkwater's claim a sum was paid into court and accepted by him, so that nothing remains to be said on it. Mrs. Drinkwater's claim for damages for personal injuries was heard, and the judge awarded £405 damages against the defendant on that claim. In his defence the defendant alleged that the collision was due solely to negligence on the part of Mr. Drinkwater, and he gave particulars. Alternatively, he alleged that Mr. Drinkwater was guilty of contributory negligence. By way of counterclaim he said: B

"If (contrary to the defendant's contention) the defendant is held to have been guilty of negligence contributing towards the happening of the matters complained of so that he is adjudged to pay damages to the female plaintiff, the defendant will contend that he has suffered damage within the meaning of s. 1 of the Law Reform (Contributory Negligence) Act, 1945, caused partly by his own fault and partly by the fault of the male plaintiff." C

It will be seen that the counterclaim is based on s. 1 of the Law Reform (Contributory Negligence) Act, 1945, which provides: D

"(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: Provided that—(a) this sub-section shall not operate to defeat any defence arising under a contract; (b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this sub-section shall not exceed the maximum limit so applicable. (2) Where damages are recoverable by any person by virtue of the foregoing sub-section subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault. (3) Section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935 (which relates to proceedings against, and contribution between, joint and several tortfeasors), shall apply in any case where two or more persons are liable or would, if they had all been sued, be liable by virtue of sub-s. (1) of this section in respect of the damage suffered by any person. (4) Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act, 1934, the damages recoverable would be reduced under sub-s. (1) of this section, any damages recoverable in an action brought for the benefit of the dependants of that person under the Fatal Accidents Acts, 1846 to 1908, shall be reduced to a proportionate extent. E

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(5) Where, in any case to which sub-s. (1) of this section applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading the Limitation Act, 1939, or any other enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages or contributions from that other person or representative by virtue of the said sub-section. (6) Where any case to which sub-s. (1) of this section applies is tried with a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced."

Ten years earlier the Law Reform (Married Women and Tortfeasors) Act, 1935, had been passed and by s. 6 provided:

"(1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage; (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child, of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action; (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought. (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

Under s. 6 (1) (c) a tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would, if sued, have been, liable in respect of the same damage. A wife cannot succeed in an action against her husband for a tort of this nature, hence no claim by Mr. Kimber for contribution under s. 6 could succeed. The claim of the defendant is really a claim to contribution, but, as such a claim cannot succeed under s. 6 of the Act of 1935, he seeks to achieve the same end by claiming damages against Mr. Drinkwater and bringing into play s. 1 of the Law Reform (Contributory Negligence) Act, 1945. That section does not create a right of action; it removes an obstacle. The fact that the defendant was himself negligent ceased to be a bar to his succeeding to some degree against someone else who was negligent if he proved damage. *DEVLIN, J.*, awarded Mrs. Drinkwater £405 damages in her action against the defendant on the ground of negligence. On the defendant's counterclaim he formed the opinion that Mr. Drinkwater was one third to blame and the defendant two thirds, and he held that the defendant could not recover on his counterclaim.

The fact that a person might in certain circumstances be liable to contribute one third of the damages awarded does not mean that of necessity the person

who pays the whole amount of damages has a right of action for damages against him. The defendant's counterclaim is that, if he is adjudged guilty of negligence in the action, he will contend that he has suffered damage within s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, caused partly by his own fault and partly by the fault of the male plaintiff, and at the hearing he asked for judgment for £135, that is, one third of the damages he was ordered to pay to the female plaintiff. The answer to the problem would seem to be that the defendant has not shown that he suffered damage within the meaning of s. 1 (1). There was no proof of any damage to him or to his property in the accident. If there had been he would have been entitled to contribution in respect of it. He was subsequently found responsible in damages, and judgment was given against him for £405 for negligence. His liability arose on that judgment, and I do not think that it is damage within s. 1 (1).

This can be tested by asking when, if ever, the right of action of the defendant arose. The purpose of s. 1 was to remove the bar which stood in the way of someone who was at fault or who was negligent. It does not extend the right to contribution. The submission on behalf of the defendant is that it does so, or, at least, that it enables him to obtain as damages an amount which is equivalent to the contribution to which he would have been entitled but for the words in s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935

"who is, or would if sued have been, liable in respect of the same damage."

I cannot accept the submission of counsel for the defendant. Section 1 (3) of the Law Reform (Contributory Negligence) Act, 1945, which introduces s. 6 of the Act of 1935 is directly opposed to the construction which he puts forward. Section 1 (3) preserves the limitation on contribution in the Act of 1935: it cannot be that that limitation is abolished inferentially by s. 1 (1). Further light is thrown on the matter by examination of sub-s. (2) and sub-s. (4) of s. 1 of the Act of 1945. It is sufficient to take the former. Where damages are recoverable by a person in a case to which sub-s. (1) applies, judgment is given for that amount. Under sub-s. (2)

"... the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault."

Counsel for the defendant submitted that judgment should be entered for the defendant for £135 damages, but if the defendant had not been negligent no damages would have been recoverable by Mrs. Drinkwater and the court in such case would be bound to record the damages which would have been recoverable if the defendant had not been negligent as nil.

That satisfies me that this claim to damages, based on a judgment against a defendant and not arising directly from the accident, either is not a claim within the ambit of the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), or that that which is claimed is not "damage" within the meaning of that word as used in the sub-section. I do not think that any help is given by the decisions in Admiralty cited to us. In the result, I reach the same conclusion as *DEVLIN, J.*, reached, though he took a narrower view of the word "damage" than I do. I realise the difficulty which arises from s. 4 of the Act of 1945, and yet I cannot see why "damage" in the Act should be read in a different way from that in which it has always been treated under s. 6 of the Act of 1935. In my opinion, the appeal should be dismissed.

BIRKETT, L.J.: I agree with the judgment which has just been delivered. I have also had an opportunity of reading and considering the judgment which is about to be delivered by *MORRIS, L.J.*, and I agree with that judgment, too. In those circumstances I do not desire to deliver a judgment of my own.

MORRIS, L.J., stated the facts and continued: *DEVLIN, J.*, dismissed the counterclaim, and, in dealing with it, he held that Mr. Drinkwater was to

be blamed for the collision in the proportion of one third, and that the defendant was to be blamed in the proportion of two thirds. On these facts the defendant was a tortfeasor who was liable in respect of the damage suffered by the female plaintiff as a result of a tort. The opening words of s. 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, are:

"Where damage is suffered by any person as a result of a tort . . ."

The female plaintiff was such a person. The opening words of para. (c) of s. 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935, are:

"any tortfeasor liable in respect of that damage may recover contribution . . ."

The defendant was a tortfeasor liable in respect of the female plaintiff's damage. He would, without doubt, have wished to receive a contribution from the male plaintiff of one third of his liability. He could not, however, avail himself of the later words of s. 6 (1) (c)—that is, the words

". . . may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . ."

He could not do so for the reason that the male plaintiff was not liable to the female plaintiff, and could not have been sued by her. Being unable to avail himself of s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, which section would, in regard to the present facts, denote Mrs. Drinkwater as one who has suffered damage as the result of a tort, the defendant turns to s. 1 of the Law Reform (Contributory Negligence) Act, 1945, and claims that he is the person who has suffered damage. In effect, he claims to have suffered damage because he has been held liable for having caused damage.

Conceding that the Act of 1945 could hardly have been designed to cover the claim that he makes against Mr. Drinkwater, the defendant contends, nevertheless, that he can contrive to accommodate himself within the language used in the Act. Being thwarted in his not unnatural quest for contribution by the terms of the Act of 1935, he claims that the words of the Act of 1945, which was an Act passed to amend the law relating to contributory negligence, are wide enough to assist him. In my judgment, the counterclaim rightly failed. The Act of 1945 does not give the defendant a cause of action against Mr. Drinkwater. The Act does not purport to create any new variety of claim. The only claim which the defendant asserts by his counterclaim is in the terms which have been recited by SINGLETON, L.J., but the reason why the defendant has been held liable to Mrs. Drinkwater is because he himself was negligent towards her and caused her damage. He has not been held liable to her because Mr. Drinkwater was negligent towards her. Indeed, he was not a person responsible in law for the negligence of Mr. Drinkwater. The defendant and Mr. Drinkwater would not appear to have been joint tortfeasors: see *The Koursk* (1). They were separate tortfeasors whose concurrent acts caused injury to Mrs. Drinkwater. By operation of law, once she proves negligence against the defendant, then she may recover from him the full amount of the resultant damage she suffered. It is no defence to the defendant, as against her, to say that Mr. Drinkwater was also negligent.

If the defendant had by counterclaim against Mr. Drinkwater made a claim in respect of some damage done to his motor car he would have established, on the judge's findings, that Mr. Drinkwater was negligent, and that such negligence did cause him damage. Though he would himself have been the main author of the damage he would, as a result of the Law Reform (Contributory Negligence) Act, 1945, have been able to recover one third of the amount of his necessary loss and expense. In the counterclaim that was presented, though it was asserted (and rightly so) that Mr. Drinkwater was negligent towards the defendant, it was not alleged that because of such negligence the

defendant was caused to be negligent towards Mrs. Drinkwater. It is only because of his own negligence that the defendant has been held liable to her. That Mr. Drinkwater's negligence towards the defendant caused him to be negligent towards Mrs. Drinkwater was not alleged, and was not proved, and was not held. The defendant does not, therefore, establish any cause of action against Mr. Drinkwater, and, in my judgment, s. 1 of the Act of 1945, in dealing with the topic of contributory negligence, does not purport to bring into existence some new species of claim. Section 1 of that Act provides that a claim is not to be defeated in one particular way, that is, by setting up the defence of contributory negligence. The section does not touch the questions whether a claim exists at all or whether a claim can be met by any other defence.

Apart from these considerations, the defendant does not, in my judgment, bring himself within the language of s. 1 of the Act of 1945 in connection with the claim that he makes. In regard to his liability to Mrs. Drinkwater—which is the only subject of the counterclaim—he is not a person who has suffered damage. He is a person who has caused damage, but even if it could be said that because he has been adjudged by the court to be liable to pay damages to her he then comes within the words “where any person suffers damage”, it would be very doubtful whether he would come within the words which follow, that is, the words “as the result partly of his own fault and partly of the fault of any other person”. The legal liability to Mrs. Drinkwater would have flowed only from his own fault. The word “fault” is defined in s. 4 to mean

“negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence”.

In my judgment, it is not necessary to endeavour to define the word “damage” as used in the phrase “where any person suffers damage”. The Act does not define the word save to the extent that s. 4 provides that “‘damage’ includes loss of life and personal property”. The omission further to define was probably for the reason that the word is one which is well understood in legal parlance as being in many cases one of the elements to be proved in establishing liability in law. A plaintiff, for example, who shows that a defendant was guilty of some negligent act or omission towards him must also show that damage resulted to the plaintiff which was not too remote a consequence of the defendant's conduct. Section 1 (1) of the Act of 1945 uses the words

“... a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced . . .”

It seems clear that the word “damage” refers to that which is suffered and for which a “claim” may be made and for which “damages” are recoverable. All this language is quite inapt to cover the liability of the defendant to Mrs. Drinkwater. Furthermore, even if such liability could be brought within the word “damage”, it is difficult to see how a “claim in respect of that damage” could be asserted, or how “damages” could be recoverable “in respect thereof”, that is, damages in respect of that damage. The counterclaim only arises if and when the defendant has been held liable to the female plaintiff because he has been negligent, and he could not, on any view, seek to recover from the male plaintiff the whole amount of the liability to Mrs. Drinkwater.

Further exemplification of the entire inaptness of the language of s. 1 of the Act of 1945 to cover the defendant's attempted counterclaim is found by considering the terms of sub-s. (2) and sub-s. (6). If the defendant had not been at fault and had not been liable to Mrs. Drinkwater the damages on the counterclaim would have been nil. Indeed, the counterclaim would not have arisen at all. If the counterclaim had been tried with a jury it would have

been the duty of the judge to direct them that if the defendant were not at fault the damages would be nil. On the findings of the judge in this case the argument of the defendant involves that damages have to be "reduced" from nothing to £135, and that the court must duly record this strange phenomenon of contraction. That it was never intended by the Act of 1945 to vary the law as to contribution as it was left by the Law Reform (Married Women and Tortfeasors) Act, 1935, is shown by the fact that the later Act recites certain provisions of the former one without enacting any modifications or repeals. That the language used by the legislature in the Act of 1945 has undesignedly produced an unexpected result has not been established by the defendant.

On behalf of the defendant reliance was much placed on the decision in this court in *The Cairnbahn* (2). That decision does not advance the defendant's contentions. The steamer, Cairnbahn, had come into collision with one of two hopper barges which were in tow of the tug Nunthorpe. Damage was done to the hopper, and the Cairnbahn sustained damage to herself. No collision occurred with the Nunthorpe. Two actions were brought. One was by the owners of the hopper against the owners of the Cairnbahn; in that action the owners of the Nunthorpe were afterwards added as defendants. The second action was by the owners of the Cairnbahn against the owners of the Nunthorpe. The actions were consolidated. It was held that the Cairnbahn and the Nunthorpe were equally to blame, but that no blame attached to the hopper. The hopper recovered from the Cairnbahn alone the whole of her claim for damages. That judgment was satisfied. The owners of the Nunthorpe were then ordered by the President to pay to the owners of the Cairnbahn: (i) One half of the damage occasioned by the collision to the Cairnbahn; and (ii) one half of the damages paid by the owners of the Cairnbahn to the owners of the hopper. From that order of the President the owners of the Nunthorpe unsuccessfully appealed to this court. They contended that s. 1 of the Maritime Conventions Act, 1911, regulated only the mode of apportioning a liability existing independently of the Act, and submitted that they were under no such liability. The defendant in the present appeal seeks to argue that just as the owners of the Cairnbahn were entitled to recover from the owners of the Nunthorpe a part of what had been paid to the innocent owners of the hopper, so here the defendant should be allowed to recover from Mr. Drinkwater a part of what has to be paid to Mrs. Drinkwater. The decision in *The Cairnbahn* (2) depended on the view formed of the effect of s. 1 of the Maritime Conventions Act, 1911—the wording and scope of which differ materially from the wording and scope of s. 1 of the Law Reform (Contributory Negligence) Act, 1945. Section 1 (1) of the Act of 1911 begins with the words

"Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault . . ."

With the main point of controversy debated in *The Cairnbahn* (2) the present defendant has no concern, but he points to the fact that the payment made by the owners of the Cairnbahn to the owners of the hopper came within the words "damage or loss is caused to one or more of those vessels". The defendant can really derive no help from this circumstance, for there is an obvious material difference between the phrases "where any person suffers damage" and "damage or loss is caused to one or more of those vessels". On further examination it would appear that the payment made by the owners of the Cairnbahn was within the word "loss" rather than the word "damage". No point arose in fact as to the payment being within the words of the section. In his judgment, SIR SAMUEL EVANS, P., said ([1914] P. 28):

"It was admitted in terms by counsel for the owners of the tug Nunthorpe that if the owners of the steamship were entitled to claim any damage

from them, they, the owners of the steamship, were entitled to include in their damage or loss the amount of the judgment obtained against them by the innocent tow . . ."

In this court the matter seems to have been regarded as coming within the word "loss". LORD PARKER OF WADDINGTON, said (*ibid.*, 31):

"This being so, the only remaining question is whether the sum recovered by way of damages against the owners of the Cairnbahn, by the owners of the hopper barge, damaged through the fault of the Cairnbahn and the Nunthorpe, is loss caused to the owners of the Cairnbahn within the meaning of the section. In my opinion it is."

LORD SUMNER, at the start of his judgment said (*ibid.*, 32):

"The owners of the Cairnbahn suffered 'damage' because their ship ran into the hopper which was in tow of the tug Nunthorpe. They suffered 'loss' because the owners of the hopper sued them for her injuries and won."

Later he said (*ibid.*, 33):

"The word 'loss' is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose misconduct the party prejudiced must answer."

WARRINGTON, J., said (*ibid.*, 38):

"There remains the question as to the damages paid to the owners of the hopper by the owners of the Cairnbahn. I fail to see why the sum so paid should not be properly held to come within the expression 'loss caused to that vessel'—treating the word 'vessel' in this part of the Act as used figuratively for the owners of the vessel."

I, therefore, consider that the decision in *The Cairnbahn* (2) affords no assistance to the argument of the defendant, but, even if he could bring his liability to Mrs. Drinkwater within the word "damage", the counterclaim would, for the reasons which have been given, nevertheless fail. I concur, therefore, in the conclusion that the appeal fails.

Appeal dismissed.

Solicitors: *Hewitt, Woollacott & Choun* (for the defendant); *R. I. Lewis & Co.* (for the plaintiffs).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ARAB BANK, LTD. v. ROSS.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), January 28, 29, 30, 31, February 1, 29, 1952.]

Bill of Exchange—Indorsement—Promissory note—Payable to "F. and F.N.Co."—Indorsement, by partner of firm, "F. and F.N."—Incomplete and irregular on its face—Plaintiffs suing as holders in due course—Entitled to succeed as holders for value—Bills of Exchange Act, 1882 (c. 61), s. 29 (1).

In pursuance of an agreement between the defendant and a firm for the purchase of shares the defendant made two promissory notes payable on demand on specified dates to "Fathi and Faysal Nabulsy Co. or order", the name being that of a firm in which Fathi Nabulsy and Faysal Nabulsy were the partners. The notes were indorsed to the order of the plaintiffs by Faysal Nabulsy, who had authority to sign for the firm, with the words: "Fathi and Faysal Nabulsy", the word "company" being omitted. This was the recognised signature of the partnership, and the plaintiffs discounted the notes in good faith and without notice of any defect in the title of the payees. On presentation the notes were dishonoured. On a claim against the defendant, as drawer of the notes, by the plaintiffs, as holders in due course,

HELD: (i) although the indorsement was valid to pass the title in the notes to the plaintiffs, the omission of the word "company" would give rise to a reasonable doubt whether the payees and the indorsers were necessarily the same, and, therefore, the notes could not be said to be complete and regular on the face of them and the plaintiffs could not succeed as holders in due course within s. 29 (1) of the Bills of Exchange Act, 1882, but

(ii) the plaintiffs having pleaded that they were holders in due course were entitled to rely on the more limited allegation, although not pleaded, that they were holders for value; the defendant had failed to plead any defect in their title; and, therefore, he was liable to the plaintiffs on the notes.

AS TO TRANSFER OF BILL BY INDORSEMENT, see HALSBURY, Hailsham Edn., Vol. 2, pp. 655, 656, paras. 902, 903; and FOR CASES, see DIGEST, Vol. 5, pp. 210-219, Nos. 1294-1365.

Cases referred to:

- (1) *Slingsby v. District Bank, Ltd.*, [1931] 2 K.B. 588; 100 L.J.K.B. 665; 145 L.T. 644; *affd.* C.A., [1932] 1 K.B. 544; 101 L.J.K.B. 281; 146 L.T. 377; Digest Supp.
- (2) *Forbes v. Marshall*, (1855), 11 Exch. 166; 24 L.J.Ex. 305; 25 L.T.O.S. 147; 156 E.R. 788; 6 Digest 42, 309.
- (3) *Kirk v. Blurton*, (1841), 9 M. & W. 284; 12 L.J.Ex. 117; 152 E.R. 120; 6 Digest 101, 709.
- (4) *Leonard v. Wilson*, (1834), 2 Cr. & M. 589; 3 L.J.Ex. 171; 149 E.R. 895; 6 Digest 212, 1313.
- (5) *Hadley & Co. v. Henry*, (1896), 22 V.L.R. 230; 6 Digest 210, d.
- (6) *Bank of Montreal v. Exhibit & Trading Co., Ltd.*, (1906), 22 T.L.R. 722; 11 Com. Cas. 250; 6 Digest 376, 2475.
- (7) *Agra & Masterman's Bank v. Leighton*, (1866), L.R. 2 Exch. 56; 36 L.J.Ex. 33; 6 Digest 165, 1052.
- (8) *Bird & Co. (London), Ltd. v. Cook (Thomas) & Son, Ltd., & Cook (Thomas) & Son (Bankers), Ltd.*, [1937] 2 All E.R. 227; 156 L.T. 415; Digest Supp.
- (9) *Bank of England v. Vagliano Brothers*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; *sub nom.* *Vagliano v. Bank of England*, 55 J.P. 676; 3 Digest 244, 703.

(10) *Brown v. Davies*, (1789), 3 Term Rep. 80; 100 E.R. 466; 6 Digest 199, 1226.

APPEAL by defendant from an order of McNAIR, J., dated July 27, 1951, in an action on two promissory notes made by the defendant of which the plaintiffs were holders.

The defendant had made the notes, each for £10,000, in favour of "Fathi and Faysal Nabulsy Co. or order", a firm of which Fathi Nabulsy and Faysal Nabulsy were partners. The notes were given in part payment for certain shares. The plaintiffs claimed that the notes were duly indorsed to the order of the plaintiffs, who held them as holders in due course, and that they were duly presented for payment and were dishonoured. By his defence the defendant admitted that the notes had been dishonoured, but alleged that he was induced to make and deliver the notes by the fraud of the payees in that the shares were charged to a bank to secure an overdraft, and that he had had to pay £20,000 to this bank to obtain the shares. The defendant further denied that the plaintiffs were holders in due course or that they had given value and alleged that they were only agents for collection on behalf of the payees. It was further alleged that the plaintiffs had knowledge of the fraud of the payees and, therefore, did not take the notes in good faith. At the hearing the defendant sought to raise a new point, viz., that the notes were not complete and regular on their face in that the indorsement by one of the partners of the payee firm was "Fathi and Faysal Nabulsy" the word "company" having been omitted. McNAIR, J., refused leave to amend the defence to include this point, but allowed the defendant to argue it as a point of law. He found that there was no fraud; that the plaintiffs had acted in good faith and without notice of any defect in the notes; and that, there being no evidence that the payee firm constituted a legal entity distinct from the two partners, the notes were complete and regular on their face and the defendant was liable to the plaintiffs on them.

Nelson, Q.C., and *F. Atkinson* for the defendant.

Gardiner, Q.C., *F. A. Stockdale* and *J. J. Nasir* for the plaintiffs.

Cur. adv. vult.

Feb. 29. The following judgments were read.

SOMERVELL, L.J.: The plaintiff bank sues the defendant as maker of two promissory notes both dated July 12, 1946, and each for £10,000 payable on demand on July 1, 1947, and Dec. 31, 1947. The payee was "Fathi and Faysal Nabulsy Co. or order". That was the name of a firm registered in Palestine in which Fathi Nabulsy and Faysal Nabulsy were the two partners. The statement of claim goes on to allege that the notes were duly indorsed to the order of the plaintiffs, who have also indorsed them, and are held by the plaintiffs as holders in due course, and that the notes were duly presented for payment and were dishonoured. The defendant admits that he is the maker and that the notes were dishonoured. He then sets out, and this is not disputed, that the notes were given in pursuance of an agreement between the defendant and the payee firm as part of the purchase price for shares in the Lostock Hall Spinning Co., Ltd. Transfer certificates were executed on the signing of the agreement and the payees undertook to forward the share certificates to the defendant. In his defence the defendant denies that the plaintiffs are holders in due course, denies that they gave value, and alleges that they were agents for collection only on behalf of the payees.

[HIS LORDSHIP dealt with issues which do not call for report, and continued:] The point with which we are concerned was not pleaded. It was produced by counsel on the second day of the hearing. It was this. The indorsement which was in Arabic and English was "Fathi and Faysal Nabulsy", the final word "company" being omitted. It was submitted that the notes, when taken by the plaintiffs, were, therefore, not complete and regular on their face,

and, therefore, the plaintiffs were not holders in due course. The learned judge originally ruled that this point should have been pleaded and he refused leave to amend. He later held that it could be argued as a point of law. I will come back to these rulings later.

Section 29 (1) of the Bills of Exchange Act, 1882, provides:

"A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely, (a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact: (b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

Other relevant sections of the Act are s. 30 (1) and (2) and s. 38, paras. (1) (2) and (3). The indorsements, according to the evidence as accepted by the learned judge, were written by Mr. Faysal Nabulsy, who had authority to sign for the firm, at the Jerusalem branch of the plaintiffs in the presence of its manager. This followed on an interview at which the plaintiffs, having made inquiries as to the defendant's financial standing, agreed to discount the notes. The learned judge, having allowed the point to be argued, found that the bills were complete and regular on their face notwithstanding the discrepancy. I will set out his conclusion before considering the authorities.

"None of the cases to which I was referred dealt in terms with the question whether a deviation in the form of the indorsement from the exact description of the payee in the bill prevented the bill from being complete and regular on the face of it; but, holding, as I do, that the signature of the names of the two partners Fathi and Faysal Nabulsy by the hand of the one partner Faysal was the known and recognised signature of the partnership and would leave nobody in any reasonable doubt that the named payee intended to pass property in the bill to the bank, and there being no evidence that Fathi and Faysal Nabulsy Co. constituted a legal entity distinct from the two natural persons Fathi and Faysal Nabulsy, I find nothing in the decided cases which compels me to hold that an indorsement in this form involves that the bills were not complete and regular on their face. Accordingly, I hold that the defendant fails on this issue."

Counsel for the defendant relied on the decision of this court in *Slingsby v. District Bank, Ltd.* (1), affirming and approving a judgment of WRIGHT, J. In that case the plaintiff had made out a cheque to John Prust and Co., a firm of London stockbrokers. A partner in the firm of solicitors who acted for the plaintiff, Messrs. Cumberbirch and Potts, fraudulently inserted after the name of the payee the words "per Cumberbirch & Potts". He then indorsed the cheque "Cumberbirch & Potts" and paid it dishonestly into the account at the Westminster Bank of a company in which he was interested. The cheque was presented to and paid by the defendant bank who claimed to debit the plaintiffs' account. The plaintiff brought the action claiming to be relieved from the debit. Various points were raised. The defendant bank sought to invoke, inter alia, the protection of s. 64 of the Bills of Exchange Act, 1882. This protection was only available if the Westminster Bank was a holder in due course. WRIGHT, J., held ([1931] 2 K.B. 600) that, if his view of the incorrectness of the indorsement was right, the cheque was not complete and regular on its face. There was evidence that in a certain class of case a practice had arisen of drawing cheques "Pay A.B. per X". This was done in cases where dividends are collected by a bank for its customer. Evidence was called that such cheques were indorsed, not "A.B. per X", but simply "X." The witnesses were confronted with publications, admittedly organs of the profession,

which stated that the proper indorsement was "A.B. per X." This latter was the conclusion of WRIGHT, J., and of this court. The representative capacity of X which appears on the face of the bill must appear in the indorsement. If X alone appears he is purporting to indorse as principal, which is "a departure from the terms of the mandate appearing on the face of the cheque". In this court, SCRUTTON, L.J., held ([1932] 1 K.B. 559) that the cheque was not properly indorsed, and that the indorsement should have been "John Prust & Co. per pro Cumberbirch & Potts". GREER, L.J., held (*ibid.*, 564) that

"... the indorsement was ineffective, and that the defendants cannot rely upon the payment made to an indorsee who is some person other than the payee."

A number of cases were referred to. In some of them the question was whether partners were liable on bills or notes which were made in a name which varied to some extent from the true name of the firm. Such a point was taken in *Forbes v. Marshall* (2). POLLOCK, C.B., held (11 Exch. 176) that the name used was substantially the name of the firm and that was sufficient. The other members of the court agreed. MARTIN, B., said (*ibid.*, 180):

"... if the name, though inaccurately stated, substantially describes the firm, that is sufficient."

It is interesting, as the learned judge pointed out, that in that case MARTIN, B., expressed a doubt as to an earlier decision, *Kirk v. Blurton* (3). That case was in its area the converse of the present case. The name of the firm was John Blurton. The bill was signed and indorsed John Blurton & Co. The court held the partners not bound. MARTIN, B., in *Forbes v. Marshall* (2), said (11 Exch. 180):

"I think that 'John Blurton & Co.' meant the firm of 'John Blurton'."

These cases are, of course, in a different area, but they show that in that area the courts have adopted the test as stated by MARTIN, B. Precise correspondence is not required.

I will refer briefly to some of the cases dealing with indorsements. In *Leonard v. Wilson* (4) a cheque payable to "Terney and Farley" was indorsed "Terney and Farely". The facts were complicated, but LORD LYNDHURST, C.B., held that the indorsement, which, though mis-spelt, was authorised, passed the property in the bill. The indorsee might have maintained an action. It is worth noting that a custom of London bankers to refuse bills where there is a letter wrong in an indorsement was admitted. I agree with the learned judge who, referring to this case, held that the indorsement of the notes here was valid and passed the property. In *Hadley & Co. v. Henry* (5) a bill made payable to the Union Bank of Australia was indorsed by a sub-manager in the name of the Union Bank of Australia, Ltd. It was argued this was not an indorsement. HOOP, J., held that it was. It was plain that the drawer intended the bill to be payable to the Union Bank of Australia, Ltd. On the other hand, in *Bank of Montreal v. Exhibit & Trading Co., Ltd.* (6), a promissory note was made by the defendants payable to the Goderich Organ Co. That was the name of a firm with which, one gathers, the defendants had done business. When it reached the payees the business of the firm had been transferred to a limited company, the Goderich Organ Co., Ltd. An official of the limited company added the word "Limited" on the face of the note and indorsed it in the limited company's name to the plaintiffs who claimed as holders in due course. Under s. 64 (1) of the Bills of Exchange Act, 1882, the note was payable according to its original tenor, and it was argued that the limited company was the same as the firm. This was, of course, wrong. PHILLIMORE, J., held that, as there were two legal entities involved, a bill payable to one could not be validly indorsed by the other. The distinction

between the two cases is clear. In the first there was only one legal entity in fact, named on the face by words which identified it to anyone. An indorsement in its full and proper name though different was valid. In the second there were two legal entities, the note being intended for the one which had not indorsed it.

Evidence was tendered in the present case and led for the defendant *de bene esse* by bankers who said that it was against the practice of bankers to accept indorsements unless there was an exact correspondence. The practice of bankers is, or may be, relevant when a court has to consider whether a bank has been negligent or has acted in the ordinary course of business under s. 60, s. 79, s. 80 or s. 82 of the Act of 1882. It is also, no doubt, relevant in considering the relation of banker and customer. That relation will ordinarily be subject to universal practice. It does not, however, I think, solve the present problem any more than it does the question whether an indorsement is valid to pass the property: *Leonard v. Wilson* (4).

I have referred to these cases as they were discussed before us, but I agree with the learned judge that none of them is conclusive on the point raised in the present case. The point as sought to be taken here by the defendant has a certain unreality. In CHALMERS' BILLS OF EXCHANGE, 11th ed., p. 93, the learned author, in considering the words "complete and regular on the face of it", expresses their intention in this sentence:

"If the bill itself conveys a warning, *caveat emptor*."

Here the notes were indorsed by a person authorised to indorse for the payee in the presence of the "emptor", and, as the learned judge found, the signature as indorsed was known to the defendant as the ordinary and recognised signature of the partnership. Is this, as the learned judge thought, relevant? I have with reluctance come to the conclusion that it is not and that one must consider whether, disregarding the circumstances as set out above, the bill as a document is regular on the face of it. Considered from this angle, is the discrepancy one which on the face of it is an inadvertent discrepancy—"John Williams" as payee indorsing "J. Williams"? Though this would entitle a bank or anyone else to refuse to buy or discount a bill, it would not, in my opinion, make it irregular on its face. I was inclined at first to think that the omission of the word "company" was such a discrepancy. I have had the advantage of reading the judgment about to be delivered by ROMER, L.J. I need not repeat but I agree with what he says as to the legal significance of the word "company". The learned judge clearly considered this point as he relied on the fact that there was no evidence that Fathi & Faysal Nabulsy Co. constituted a legal entity distinct from the two natural persons, Fathi and Faysal Nabulsy. The absence of such evidence would clearly be relevant to the question whether it was a valid indorsement to pass the property, but I think completeness and regularity must be determined by looking only at the bill, with a realisation that there might be evidence that there were two legal entities, one "A. and B." and the other "A and B. Co." I have, therefore, with some hesitation come to the conclusion that these notes were not regular and complete on their face by reason of the omission of the word "company". I do not, for reasons which will appear, think that this entitles the defendant to succeed, but, as the learned judge dealt with the point, I thought it right to express my conclusion on it.

Counsel for the defendant took a further point and submitted that the signature should have been "for Fathi and Faysal Nabulsy Co.", and signed by one of the partners. No authority was cited for this proposition and it seems to me inconsistent with the indorsement which SCRUTTON, L.J., said should have been on the bills in the *Slingsby* case (1).

I now come to the question whether the learned judge should have allowed the point to be raised or whether, in any event, it entitles the defendant to succeed. The learned judge decided that the point was available to the

defendant and could be taken on the basis that it was a bare point of law arising from the facts apparent on the notes. In the first place I am clear that this point should have been pleaded. A holder of a bill is, *prima facie*, presumed to be a holder in due course: s. 30 (2) of the Act of 1882. R.S.C., Ord. 21, r. 2, provides:

"In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact, e.g. . . . indorsing . . ."

The predecessor of this rule can be found set out in BULLEN & LEAKE, 3rd ed., at p. 520, note (a):

"in all actions upon bills of exchange and promissory notes, the plea of 'non assumpsit' and 'never indebted' shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact."

Examples are given as they appear in Ord. 21, r. 2. The fact relied on here is the absence of the word "company" in the indorsement and its presence on the face of the bill. It seems to me quite plain that, if this had been the only point in answer to the plaintiffs' claim as holders in due course, it must have appeared in the defence. But it does not in itself establish the non-liability of the defendant. It means that the plaintiffs' claim may be defeated by defects of title of prior parties or personal defences available to prior parties among themselves. The principle to be gathered from the rule and its predecessor is that a defendant sued on a bill must allege the facts on which he relies in disputing his liability on the bill or note. In the old days, as the cases show, bills passed through many hands. Fraud or defects in title or personal defences affecting prior parties might be relevant to liability or shift the onus. It was for the defendant to make out a defence. In *Agra & Masterman's Bank v. Leighton* (7) BRAMWELL, B., said (L.R. 2 Exch. 61):

"The intention of the Bills of Exchange Act was, that where there was no pretence for a defence, the party sued should not be allowed to defend, and the holder should have judgment as of course; but that, if the defendant had a real, I do not say good, defence, he should have leave to appear and set it up."

That decision was on the Bills of Exchange Act, 1855, which applied in substance to actions on bills of exchange and promissory notes the existing Ord. 16 procedure.

On a claim on a bill of exchange or promissory note the defendant cannot simply put the plaintiff to the proof. Now, the learned judge on re-consideration allowed the defendant to challenge the indorsement so long as he did not rely on any specific facts other than those appearing on the bills, and I would myself have been inclined to add, and probably the learned judge intended this, facts already to be found in the defence if proved. If it had been established that the indorsement was invalid to pass the property, that would have been one thing. I agree with the learned judge, as I have said, that it was plainly valid to pass the property. The plaintiffs were holders who on the facts as found gave value in good faith. Counsel for the plaintiffs, when he had time to consider the matter, submitted to the learned judge that the plaintiffs could succeed as holders. The learned judge disallowed this on the ground that the plaintiffs had claimed as holders in due course and could not claim in the alternative as holders. It was, as I understand it, agreed before us that on the learned judge's judgment a further claim could be brought in other proceedings on the basis that the plaintiffs were holders. I do not think with respect that this is right. Assume that the only case which the defendant here desired to put forward was that the plaintiffs, though holders for value in good faith, had discounted a bill incomplete on its face and took it, therefore, subject to a defect in title of a prior party, he would have had to allege, not only the incompleteness, but the facts establishing the defects of title. I do not agree that he could have

pleaded the incompleteness and defeated the plaintiffs' claim unless they, the plaintiffs, amended by claiming in the alternative as holders. The object of the proceedings is to determine whether the defendant is liable on the bill. He may be, although the plaintiffs are holders, but not in due course. This shows that the point is a bare point of law only if, quoad defects of title, the defendant is restricted to the allegations in his defence. If he had succeeded in establishing that the notes had been obtained by fraud, but failed to establish the plaintiffs' knowledge, it may be that he could have succeeded once he had shown that by reason of the incompleteness of the notes the plaintiffs were not holders in due course. But he failed to establish the only fraud or defect in title he alleged. I have, therefore, come to the conclusion, first, that the point did require an amendment, and on this basis the learned judge was not prepared to allow it, and with that decision I agree. Secondly, it fails to avail the defendant on the only basis on which he was allowed to argue it, namely, as a bare point of law.

In these circumstances the only points open to the defendant are those raised in his defence and on these he failed. In differing from the learned judge on this aspect of the case, I would like to say this. The case as raised in the defence and as fought was a difficult and complicated one. Into this field was inserted the present intricate, and, to me, difficult, point—difficult in itself and difficult in its relation to pleading. It is one of those cases in which the court which hears a second argument, when the plaintiffs' counsel had had time to consider the implications, has a great advantage from which I, at any rate, tried to benefit. In my opinion, the appeal should be dismissed.

DENNING, L.J.: The first question in this case is whether the Arab Bank, Ltd., were holders in due course of the promissory note, and that depends on whether, at the time they took it, it was "complete and regular on the face of it" within s. 29 (1) of the Bills of Exchange Act, 1882. Strangely enough, no one doubts that the "face" of a bill includes the back of it. I say strangely enough, because people so often insist on the literal interpretation of Acts of Parliament, whereas here everyone agrees that the literal interpretation must be ignored because the meaning is obvious. The meaning is that, looking at the bill, front and back, without the aid of outside evidence, it must be complete and regular in itself.

Now, regularity is a different thing from validity. The Act itself makes a careful distinction between them. On the one hand, an indorsement which is quite invalid may be regular on the face of it. Thus, the indorsement may be forged or unauthorised, and, therefore, invalid under s. 24 of the Act, but, nevertheless, there may be nothing about it to give rise to any suspicion. The bill is then quite regular on the face of it. Conversely, an indorsement which is quite irregular may, nevertheless, be valid. Thus, by a misnomer, a payee may be described on the face of the bill by the wrong name, nevertheless, if it is quite plain that the drawer intended him as payee, then an indorsement on the back by the payee in his own true name is valid and sufficient to pass the property in the bill: *Leonard v. Wilson* (4); *Bird & Co. (London), Ltd. v. Thomas Cook & Son, Ltd.* (8); *Hadley & Co. v. Henry* (5), but the difference between front and back makes the indorsement irregular unless the payee adds also the misnomer by which he was described on the front of the bill. That is what he eventually did in *Leonard v. Wilson* (4). Regularity is also different from liability. The Act makes a distinction between these two also. On the one hand, a person who makes an irregular indorsement is liable thereon despite the irregularity. Thus, if a payee, who is wrongly described on the front of the bill, indorses it in his own true name, the indorsement is irregular, but he is liable to any subsequent holder and cannot set up the irregularity as a defence, or, if he is rightly described on the front of the bill, but indorses it in an assumed name, the indorsement is irregular, but he is liable thereon as if he had indorsed

it in his own name: see s. 23, para. (1) and s. 55 (2) of the Act. Conversely, a regular indorsement will not impose liability if it is forged or unauthorised. Thus, where a firm is the payee, but is described in an unauthorised name which is substantially different from its real name, an indorsement by one partner in that name does not impose liability on the other partners: *Kirk v. Blurton* (3). It would be otherwise if the name was substantially the same, *Forbes v. Marshall* (2).

Once regularity is seen to differ both from validity and from liability, the question is: When is an indorsement irregular? The answer is, I think, that it is irregular whenever it is such as to give rise to doubt whether it is the indorsement of the named payee. A bill of exchange is like currency. It should be above suspicion. But if it is asked: When does an indorsement give rise to doubt?, then I would say that that is a practical question which is, as a rule, better answered by a banker than a lawyer. Bankers have to consider the regularity of indorsements every week, every day of every week, and every hour of every day, whereas the judges sitting in this court have not had to consider it for these last twenty years. So far as I know, the last occasion was in *Slingsby's* case (1). The law merchant is founded on the custom of merchants, and we shall not go far wrong if we follow the custom of bankers of the city of London on this point. They have given evidence that they would not accept the indorsements in the present case as regular indorsements. They said that, if a bill is made payable to "Fathi and Faysal Nabulsy Co." they would not accept an indorsement "Fathi and Faysal Nabulsy". I think there is good sense in their view. For aught they know, in Palestine the word "company" may be of vital significance. It may there signify a different legal entity just as the word "limited" does here: *Bank of Montreal v. Exhibit & Trading Co.* (6); or it may signify a firm of many partners and not merely two of them. I agree with the bankers that this indorsement does give rise to doubt whether it is the indorsement of the named payee. It was, therefore, irregular. It was suggested that this attitude of bankers was an excess of caution in their own interests. They insist on strict conformity, it was said, so as to be able to avail themselves of the protection of s. 60, s. 79, s. 80 and s. 82 of the Act of 1882, which they fear they may lose if they pay on an indorsement which does not correspond exactly with the name of the payee. But it is to be noticed that this usage of bankers goes back to times long before those sections were part of the law. The usage certainly existed in 1834: see *Leonard v. Wilson* (4); whereas s. 60 did not appear, even in its original form, until 1853, and s. 79, s. 80 and s. 82 until 1878. The truth is, I think, that the bankers adopted this strict attitude both in their own interests and also in the interests of their customers. It would be quite impossible for them to make inquiries to see that all the indorsements on a bill are, in fact, genuine, but they can at least see that they are regular on the face of them: see *Bank of England v. Vagliano Brothers* (9) ([1891] A.C. 157 per LORD MACNAGHTEN). That is some safeguard against dishonesty. It is a safeguard which the bankers have taken for the past one hundred and twenty years at least, and I do not think we should throw any doubt today on the correctness of their practice.

I do not stay to discuss the regularity of indorsements by married women or titled folk, except to say that titles and descriptions can often be omitted without impairing the regularity of the indorsement. The word "company" in this case is not, however, mere description. It is part of the name itself. It was suggested that an indorsement in Arabic letters would be regular. I cannot accept this view. The indorsement should be in the same lettering as the name of the payee, for otherwise it could not be seen on the face of it to be regular. My conclusion is, therefore, that the promissory notes, when they were taken by the plaintiffs, were not complete and regular on their face. They were not, therefore, holders in due course.

Now I must come to the pleadings. The plaintiffs claimed that they were "holders in due course". They have failed to make good that claim because the indorsement was not regular on the face of it. But, nevertheless, it is, I think, open to them to claim as "holders". The difference between the rights of a "holder in due course" and those of a "holder" is that a holder in due course may get a better title than the person from whom he took, whereas a holder gets no better title. In this regard a person who takes a bill, which is irregular on the face of it, is in the same position as a person who takes a bill which is overdue. He is a holder, but not a holder in due course. He does not receive the bill on its own intrinsic credit. He takes it on the credit of the person who gives it to him: cf. *Brown v. Davies* (10), per BULLER, J. (3 Term Rep. 82). He can sue in his own name but he takes it subject to the defects of title of prior parties: see s. 38 of the Act of 1882. Under the rules of pleading, as I have always understood them, a pleader who has pleaded more than he strictly need have done can always disregard the unnecessary or surplus averments and rely simply on the more limited ones. Thus, the plaintiffs here who have alleged that they are "holders in due course" can rely on the more limited allegation that they are "holders", because the greater allegation of "holders in due course" include the lesser allegation of "holders".

Counsel for the defendant argued strongly to the contrary, but he was forced to admit that, if he were right, the result would be that the plaintiffs would lose this action as "holders in due course", but could then immediately bring another action as "holders" and fight the battle over again. I would be sorry if the rules of pleading led to such a result, but I do not think they do. On these pleadings I think the plaintiffs were clearly entitled to rely on the fact that they were "holders" and the defendant has to meet a claim on that footing. I see no injustice to the defendant in this. When he was faced with the claim by the plaintiffs as "holders in due course", neither he nor his advisers noticed that there was any irregularity on the face of the note. He would, therefore, as a matter of course, plead any defects of title which he thought he could prove, for, by so doing, he would put the burden of proof on the plaintiffs. When faced with a claim as "holders", he would plead the self-same defects, not merely to alter the burden of proof, but to defeat the claim altogether. In either case he would plead all the defects which he thought he could prove. He did, in fact, plead one defect of title in the Nabulsy brothers. He pleaded that they obtained the notes by fraud. He failed to prove that plea. He now seeks to allege another defect. He says that they negotiated the notes in fraud of him, knowing they could not hand over the share certificates. That allegation was neither pleaded nor proved. If it was to be relied on, it certainly should have been pleaded. Not having been pleaded, it cannot now be raised. It has been repeatedly said in this court that fraud must be distinctly alleged and as distinctly proved. The result is that no defect has been shown to exist in the title of the Nabulsy brothers. There is no answer to the plaintiffs' claim as holders, and the appeal must be dismissed.

ROMER, L.J., dealt with the pleadings and continued: I think myself that the proper view to take is that the defence must be treated as having been amended to the extent that an amendment was necessary, with the result that it was open to the defendant to rely at the hearing on the "want of conformity point" and that it was open to him to rely on it before this court. It, accordingly, becomes necessary to consider whether the plaintiffs became holders in due course of the bills notwithstanding the omission of the word "company" from the indorsement. My brethren have so fully reviewed such authority as exists on this matter that I will not take up time in considering the cases myself. None of them is decisive of the present problem.

The question depends on whether the bills were "complete and regular on the face of" them in spite of the omission to which I have referred. In the

absence of any direct authority on the point the learned judge held that the absence of the word "company" from the indorsement was immaterial and it seems that he founded his decision on the combined effect of three elements, viz., (i) that the signature of the names of the two partners, Fathi & Faysal Nabulsy, by the hand of the one partner, Faysal, was the known and recognised signature of the partnership, (ii) that such signature would leave nobody in any reasonable doubt that the named payee intended to pass property in the bills to the bank, and (iii) that there was no evidence that Fathi and Faysal Nabulsy Co. constituted a legal entity distinct from the two natural persons Fathi and Faysal Nabulsy. It is to be observed that of these three considerations the first and the third are peculiar to the circumstances of this particular case, and are, therefore, not germane to counsel's point of law, which is a perfectly general one. As to the second consideration I agree that the indorsement, which in no way transgressed s. 32 of the Act, passed to the bank the title of the indorsers. But if (as I think is the case) the learned judge intended to convey that, because the indorsement sufficed to pass the title, it necessarily follows that it was "complete and regular" within the meaning of s. 29 (1) I find a difficulty in agreeing. It seems to me that that question depends, not so much on whether the indorsers intended to pass the title and succeeded in doing so as between themselves and the indorsees, but on whether it is apparent from the indorsement that they were the same persons as the payees, and were, accordingly, the proper persons to make the indorsement. The argument of counsel for the defendant as to this is that (apart from titles of courtesy such as "The Hon.", "Mr.", etc.) there must be absolute conformity between the name or description of the payees and the name or description of the indorsers, and that, in the absence of such conformity, a holder of a bill cannot claim the special privileges which the Act confers on holders in due course whatever rights he may have as a holder for value.

Now, whether or not counsel is right in the full scope of his contention, the word "company" clearly is, or may be, one of considerable legal significance. Following on the names of individuals and preceded by the word "and" it would probably denote a partnership. Without the word "and" (as in the case before us) it might (where the concern was an English one) denote either an unlimited company or an unregistered company or (in the case of a foreign enterprise) a body possessing under the law of its domicile a legal entity of its own resembling that of a limited liability company in England. I think that one or other of these interpretations would be quite likely to appeal to the ordinary business man or banker, and I cannot think that the common sense view of the matter is that the word "company" adds nothing of significance to the individual names which precede it. In my opinion, the average person would assume that the addition of the word "company" to, e.g., "John & James Smith", was intended to have some meaning, and he would visualise from its presence something in the nature of a corporate entity, or, at all events, some juridical conception which would not have occurred to him had the individual names stood alone. It would, accordingly, follow, in my judgment, in the present case that the omission of the word "company" from the indorsement would reasonably give rise to a doubt whether in point of personality the payees and the indorsers were necessarily the same. If so, the bills cannot, as I think, be said to be "complete and regular" on their face.

This view of the matter appears to be in conformity with that of WRIGHT, J., and of SCRUTTON, L.J., in the *Slingsby* case (1) and also with the evidence of banking practice (assuming it to have been admissible) which was called by the defendant in the present case. Accordingly, subject to the point next mentioned, I would be in favour of allowing the appeal. I would add that I have not overlooked the considerations referred to by the learned judge which are special to this particular case and which I have previously mentioned, but they do not

fect the conclusion at which I have arrived. On the assumption that the want of conformity " point was open to the defendant and that the point could be decided in his favour, counsel for the plaintiffs argued that the plaintiffs would, nevertheless, be entitled to succeed on the ground that they were holders for value. A claim on this footing was not pleaded, and my brethren both take the view that, on the principle that the greater includes the less, it was not necessary to plead it inasmuch as the plaintiffs' claim to be holders in due course necessarily involved also the assertion of their rights as holders for value. On this view the defendant must be taken to have pleaded all defences on which he relied as an answer to a claim by the plaintiffs as holders for value, and, as none of the defences which he did plead to the plaintiffs' statement of claim has succeeded, the plaintiffs are entitled to judgment in that capacity. I do not dissent from this view, but I feel that it is very desirable that pleadings should show as plainly as possible what the issues between the parties are, and that it would, at all events, be preferable that a plaintiff who intends to rely on his rights as a holder for value if he fails in his claim to be a holder in due course should say so expressly in his statement of claim. Had the plaintiffs done so in the present case, either in their original statement of claim or by amendment when counsel for the defendant introduced his argument under s. 29 (1) of the Act, it would have been clear beyond doubt what the issues were and the learned judge would not have felt himself precluded as, in his view, he was precluded, from forming or expressing a conclusion on the plaintiffs' position as holders for value. However, as I have indicated, I do not dissent from the views of my brethren on this matter, which is one of procedure in a somewhat specialised field, and, accordingly, I concur in the proposed order dismissing the appeal. With regard to the other matters which were argued before us I am entirely in agreement with the views which SOMERVELL and PENNING, L.J.J., have expressed on them and no useful purpose would be served by my adding any observations of my own.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *John Taylor & Co.*, Manchester (for the defendant); *Coward, Chance & Co.* (for the plaintiffs).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

BEAUCHAMP v. TURRELL.

QUEEN'S BENCH DIVISION (Sellers, J.), October 16, 1951, February 27, 1952.]

Shipping—Limitation of liability—Loss of life—"Actual fault or privity of shipowner"—Negligence of shipowner's servants—Failure to provide safe system of work—Merchant Shipping Act, 1894 (c. 60), s. 503 (1).

While securing the mizzen sail of a steam drifter, a member of the crew stood on the canvas cover of a dinghy which was alongside, in accordance with the method of doing such work which was employed on board the ship with the knowledge of the master. Through the carelessness of a servant of the shipowner on board the ship the rope used for securing the sail was not of sufficient strength for the purpose, and, when the seaman in question pulled it, it gave way and he fell overboard and was drowned. In an action by the widow of the seaman for damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of her husband's death, the shipowner was found to be liable to the plaintiff because of the failure of his servants to exercise reasonable care and/or because of the breach by him of the duty which he owed to the seaman to provide a safe system of work.

Held: the failure of the shipowner's servants to exercise reasonable care and the breach of duty by the shipowner being in respect of matters within the province of the servants responsible, did not make the shipowner

guilty of "actual fault or privity" in connection with the loss of the seaman's life so as to deprive him of his rights under s. 503 (1) of the Merchant Shipping Act, 1894, and he was, therefore, entitled to limit his liability to the damages under that sub-section.

H.M.S. Truculent. Admiralty v. The Divina (Owners) ([1951] 2 All E.R. 968), applied.

Dicta of BUCKLEY, L.J., HAMILTON, L.J., and LORD HALDANE, L.C., in *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* ([1914] 1 K.B. 432, 436; [1915] A.C. 713), cited as applicable by LORD ROCHE in the Judicial Committee of the Privy Council in *Paterson S.S., Ltd. v. Robin Hood Mills, Ltd.* (1937) (58 Lloyd L.R. 39), applied.

AS TO LIMITATION OF SHIPOWNER'S LIABILITY, see HALSBURY, Hailsham Edn., Vol. 30, pp. 940-944, paras. 1303-1308; and FOR CASES, see DIGEST, Vol. 41, pp. 914-920, Nos. 8058-8103.

Cases referred to:

- (1) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463; Digest Supp.
- (2) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (3) *H.M.S. Truculent. Admiralty v. The Divina (Owners)*, [1951] 2 All E.R. 968; [1952] P. 1.
- (4) *The Warkworth*, (1884), 9 P.D. 145; 53 L.J.P. 65; 51 L.T. 558; 41 Digest 918, 8092.
- (5) *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.*, [1924] A.C. 100; 93 L.J.P.C. 49; 130 L.T. 481; 41 Digest 428, 2691.
- (6) *Paterson S.S., Ltd. v. Robin Hood Mills, Ltd.*, (1937), 58 Lloyd L.R. 33; Digest Supp.
- (7) *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, [1914] 1 K.B. 419; *affd.*, H.L., [1915] A.C. 705; 84 L.J.K.B. 1281; 113 L.T. 195; 41 Digest 418, 2616.
- (8) *Winter v. Cardiff Rural District Council*, [1950] 1 All E.R. 819; 114 J.P. 234; 2nd Digest Supp.

ACTION for damages for negligence by the defendant or his servants.

The plaintiff was the widow of a seaman, a member of the crew of the steam drifter Covent Garden which was owned by the defendant. To secure the mizzen sail after it had been lowered on the boom the seaman stood on the canvas covering of a dinghy which was alongside in accordance with the method of doing the work employed on board the ship with the knowledge of the master. He was pulling on a small length of rope used for securing the mizzen sail, when it gave way and he fell overboard and was drowned. The plaintiff claimed damages for her loss under the Fatal Accidents Acts, 1846 to 1908, and for the benefit of the seaman's estate under the Law Reform (Miscellaneous Provisions) Act, 1934. At the hearing at Norwich Assizes counsel for the shipowner was granted leave to amend the defence so as to raise a plea under s. 503 (1) of the Merchant Shipping Act, 1894, which permits a shipowner in appropriate circumstances to limit his liability where any loss of life is caused to a person being carried in his ship. The issue of negligence or breach of duty was tried at the assizes, and SELLERS, J., found that, through the carelessness of some servant of the shipowner on board the ship, the rope must have been worn and of insufficient strength for the purpose, that the employee at the time of the accident was standing in an unsuitable place for securing the mizzen, and that this was an unsatisfactory way of doing the work for which the master of the Covent Garden was responsible. He held, therefore, that the death of the seaman was brought about by a breach of duty owed by the shipowner or his servants to the seaman for which the plaintiff was entitled to recover damages, subject to any right of the shipowner to limit his liability under the Act of 1894. The issue

on this limitation of liability on the amended defence was tried in London, and the decision thereon is the subject of this report.

G. A. Draycott for the plaintiff.

J. F. Donaldson for the shipowner (the defendant).

SELLERS, J.: The plaintiff has established liability against the shipowner who is vicariously liable for the acts of his servants on board the ship, i.e., the master or whoever else was responsible for putting that piece of rope into use. Apart from that it was said that the shipowner was in breach of his common law duty in that at the time of this accident a proper system of work was not being adopted, i.e., the method of standing on the dinghy. It is said that that improper system of work was a breach of duty which the shipowner owed the deceased man—a type of duty which was personal to the shipowner and which he does not escape even if he can establish that he took all reasonable care to delegate to an appropriate and qualified person the task of performing it. If, in fact, it is not carried out in so far as reasonable care could have achieved it, it is said the employer is responsible.

It was that aspect of the case which called for consideration when the shipowner amended the defence so as to rely on the limitation provisions. Section 503 (1) of the Merchant Shipping Act, 1894, which is applicable, so far as is relevant to this case is in these terms:

“ The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,) (a) Where any loss of life or personal injury is caused to any person being carried in the ship; (b) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship; (c) Where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship; (d) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship; be liable to damages beyond the following amounts . . . ”

Then the provisions for assessing those amounts are dealt with in detail. It is said that the breach of duty of the shipowner here is of that type which does not simply arise from vicarious liability for his servant's wrongdoing but is personal to the employer, being either a statutory duty such as arose in *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (1), or a duty at common law within the decision of the House of Lords in *Wilsons & Clyde Coal Co., Ltd. v. English* (2). If it is established that it was a breach of one of those duties, the question is whether that of itself establishes the “ actual fault or privity ” of the shipowner so as to deprive him of the benefit of the limitation provisions of s. 503 (1).

This point was raised before WILLMER, J., in *H.M.S. Truculent. Admiralty v. The Divina (Owners)* (3). In my opinion he deals correctly with it. I propose to follow his decision and that answers this case in favour of the shipowner's claim to limit. H.M.S. Truculent being one of His Majesty's ships, it was contended that there was a breach, on the part of the Admiralty, of a statutory duty with regard to lights, and it was submitted that that breach of statutory duty was sufficient to defeat the claim which was made to limit. WILLMER, J., said ([1951] 2 All E.R. 977):

“ I was invited to say that, just as in *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (1) the breach by colliery owners of their statutory duty under the Coal Mines Act, 1911, was held to amount to ‘ personal negligence or wilful act ’ on their part for the purposes of the Workmen's Compensation Act, 1925, s. 29 (1), so also in this case the breach by the Admiralty of their obligation to obey the collision regulations, so far as these relate to the fitting of lights, should be held to amount to ‘ actual fault or privity ’ within s. 503 (1)

of the Merchant Shipping Act, 1894. In my judgment, this argument fails because the conclusion contended for does not follow from the premise. Let it be assumed that in the matter of the provision of lights the Merchant Shipping Act, 1894, s. 419 (1), imposes on shipowners an absolute obligation, responsibility for the performance of which they cannot evade by delegation. Let it further be assumed that by publishing the King's Regulations and Admiralty Instructions the Admiralty have accepted, on behalf of His Majesty, a similar absolute obligation. It may well be true that in an action for damage caused by defective lights neither the owners of a merchant ship nor the Admiralty could successfully evade liability on the footing that they had delegated their duty to provide lights in accordance with the regulations to some competent person. But this goes only to liability, which is not in issue in the present case. The question of limitation only arises after liability has been determined, and it by no means follows that because liability cannot be evaded the right of limitation is lost. If the proposition contended for by the defendants were well founded, it would never be possible for shipowners to limit their liability where loss or damage has been caused, or contributed to, by defective lights or other defective equipment in their ships. Yet many cases are to be found in the reports in which, in such circumstances, shipowners have been able to satisfy the court of absence of fault or privity on their part and have been held entitled to limit their liability; see, e.g., *The Warkworth* (4), a decision of the Court of Appeal."

It is true that that related to a statutory duty, but there is no difference in principle between that case and the duty imposed absolutely, in the sense that it falls on the employer, although it is only a duty to take reasonable care at common law. In *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (1), Lord Macmillan said ([1934] A.C. 18) :

"It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute,"

and I apprehend that that was the view of the House, both in that case and in *Wilsons & Clyde Coal Co., Ltd. v. English* (2). Therefore, WILLMER, J.'s decision applies to this case, and I follow it. I think it is correct.

I was pressed by counsel for the plaintiff with some observations of VISCOUNT HALDANE in *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.* (5), where it was said, in a passage ([1924] A.C. 113) which I think is more argument than precise finding and is based on supposition of event, that liability (in such circumstances as I have indicated here and as arose there) arising from responsibility for the unseaworthy ship brought about by the master not being informed was a personal obligation of the shipowners, so that there was actual fault or privity. However, that passage in LORD HALDANE's speech stands alone and is not the basis of the decision. Again, I would follow WILLMER, J., in dealing with that case in the judgment to which I have just referred. He said ([1951] 2 All E.R. 978) :

"I do not think, therefore, that it is possible to contend that the mere proof of defective lights on board H.M.S. *Truculent* is sufficient of itself to prevent the Admiralty, on behalf of His Majesty, from establishing absence of fault or privity. I do not see that this conclusion is inconsistent with anything that was said in *Standard Oil Co. of New York v. Clan Line Steamers, Ltd.* (5) to which I was referred by the defendants. In that case, the facts of which were very special, shipowners allowed their ship to put to sea without informing the master of certain peculiarities of the ship in relation to the filling of her tanks. The owners knew of these peculiarities, but the master did not. The master's lack of knowledge rendered the ship unseaworthy, and a loss occurred. In these circumstances it was held that

the owners were not entitled to limit their liability, because they could not discharge the burden of showing that the loss occurred without their actual fault or privity. The fact that they had informed their engineer superintendent of the ship's peculiarities did not help the owners. They had not informed the master, and it was the master's ignorance that was the cause of the ship's unseaworthiness. I do not read this decision as any authority for the proposition that, where shipowners delegate the performance of a duty imposed on themselves, they can in no case limit their liability."

With that observation I respectfully agree.

Another authority which seems to be in point does not appear to have been cited in the case of *The Truculent* (3). Counsel for the defendant relied on it before me, although it arose in different circumstances. That is *Paterson S.S., Ltd. v. Robin Hood Mills, Ltd.* (6) where the shipowners had been held liable for damage to cargo because it had not been shown that due diligence had been exercised to make the vessel seaworthy, and, therefore, s. 6 of the Canadian Water Carriage of Goods Act did not operate to free the owners from responsibility. In *Wilsons & Clyde Coal Co., Ltd. v. English* (2) LORD WRIGHT thus refers to the duty to exercise due diligence as a personal obligation ([1937] 3 All E.R. 641):

"If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a shipowner to exercise due diligence or to take reasonable care to provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know, it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert: the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance."

Notwithstanding that LORD ROCHE in *Paterson S.S., Ltd. v. Robin Hood Mills, Ltd.* (6) dealing, with the effect of the Merchant Shipping Act on a claim for limitation in which liability had been so established, says (58 Lloyd L.R. 39):

"Before dealing with the specific points involved, the general scope and effect of s. 503 of the Merchant Shipping Act, 1894, may be briefly stated. Its scope and effect is not to excuse or except a shipowner from liability for tort or breach of contract, but to limit the amount for which he can be liable for the faults of others than himself. The meaning of fault and privity in s. 502 of the Act, which in that respect is identical with s. 503 has been authoritatively declared by the Court of Appeal and the House of Lords in the case of *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* (7). 'The words "actual fault or privity" in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents' (per BUCKLEY, L.J., [1914] 1 K.B. 432). 'Actual fault negatives that liability which arises solely under the rule of respondeat superior' (per HAMILTON, L.J., *ibid.*, 436). So in the case of a company: 'It must be . . . the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself' (per VISCOUNT HALDANE, L.C. [1915] A.C. 713)."

It was held that the shipowners were entitled to limit their liability.

On those grounds I do not find that the shipowner—by the mere fact that he is liable in law because of the failure of his servants to exercise reasonable care or because of the breach of duty which is owed by him to his servants under the principle of *Wilsons & Clyde Coal Co., Ltd. v. English* (2)—is guilty of "actual fault or privity" so as to deprive him of his rights under the Merchant Shipping Act. On the facts which have been adduced there has been no evidence

which establishes that the shipowner himself knew of anything defective, or failed in any care in appointing competent servants, and so forth. He delegated these matters to other people, and, wherever the fault lay, it was not due to his own personal failure and it did not occur with his knowledge.

That would be sufficient for the purpose of deciding this case in favour of the shipowner, but it is, perhaps, possible to view this case in another way. The obligation is on the employer to have a proper system of work with regard to a vessel at sea. It may well be the province of the shipowner to arrange that the ship shall be properly provided with a crew and with adequate officers so that the watches can be properly fulfilled on the bridge, on the deck, and in the engine room, and, if he so arranges the routine of the ship that the system is faulty and defective, that may indeed be brought home to him. That is a breach of his common law duty. However, I apprehend that, once a vessel is at sea with the master in command he will be the person to decree how many things requiring attention are to be done. If one of the ship's boats had broken loose and the master ordered it to be secured in a way which was dangerous and someone was injured, that might be said to be an unsafe system of work, but it would fall within the province of the master, and the shipowner, on land and not in control of the situation, would not be held responsible for it as a breach of his duty to his servants. The principle of *Winter v. Cardiff Rural District Council* (8) would, I think, apply. That principle is that there may be tasks which properly fall within the sphere of the workman's activities, where he decides how the work shall be done, and, if he decides in a way which is defective and dangerous, the responsibility is his. Other and major matters fall within the sphere of the employer and it is those matters of systems of work, provision of plant, and provision of competent servants which are the duty of the employer. The particular act in this case, of doing this work on the top of the canvas cover of a dinghy, was selected by the skipper of the vessel. He was responsible for it. I would be prepared to find that there was no breach of common law duty by the shipowner. I do not find on any view of the facts that there was any actual fault or privity of the shipowner in this action. I, therefore, find that the shipowner is entitled to limit his liability, in accordance with s. 503 (1) of the Merchant Shipping Act, 1894.

The extent of that limitation has been the subject of agreement. The Act provides, in the case of loss of life, that the rate is £15 a ton, and worked out in accordance with the tonnage that limits the liability to a total of £975, which is the maximum liability of the defendant in the circumstances of this case.

HIS LORDSHIP assessed the damages which it would have been appropriate to award the plaintiff if she had succeeded in the action without any limitation on the amount which she could recover at £250 under the Law Reform (Miscellaneous Provisions) Act, 1934, and at £2,750 under the Fatal Accidents Acts, 1846 to 1908, and he gave judgment for the plaintiff for £975.

Judgment for the plaintiff.

Solicitors: *W. F. Gillham*, agent for *Norton, Peskett & Forward*, Lowestoft (for the plaintiff); *Holman, Fenwick & Willan* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

DIXON v. TOMMIS AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.),
February 20, 1952.]

Rent Restriction—Statutory tenant—Forfeiture of tenancy—"Non-occupying" tenant—Animus revertendi—Tenant leaving with intent to live elsewhere for three years.

The statutory tenant of a dwelling-house within the Rent Restrictions Acts went to live in other premises, leaving his furniture in the house, and his son and the son's family took up residence in the house. On a claim by the landlord for possession on the ground that the tenant had ceased to reside in the house, the tenant gave evidence that he contemplated retiring from his profession in about three years' time and he would then be unable to maintain the other premises and intended to return to the house, of which meanwhile his son was merely a caretaker on his behalf. The county court judge having refused an order for possession,

HELD: the question whether the intention of the tenant to return to the house, although after so long a period as three years, constituted sufficient animus revertendi was one of degree for the county court judge, and it was impossible to say that, in answering that question in the affirmative, he had erred in law.

Brown v. Brash & Ambrose ([1948] 1 All E.R. 922), applied.

Per SIR RAYMOND EVERSHED, M.R.: The court should be somewhat cautious in giving the protection of the Rent Restrictions Acts to what have been called "two-home men", and should look somewhat critically at cases which, if repeatedly extended, would soon go far to defeat one of the main purposes of these Acts, which is to make the best use of the limited housing resources.

AS TO STATUTORY TENANCIES, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401; and FOR CASES, see DIGEST, Replacement, Vol. 31, pp. 692-695, Nos. 7829-7869.

Cases referred to:

- (1) *Brown v. Brash & Ambrose*, [1948] 1 All E.R. 922; [1948] 2 K.B. 247; [1948] L.J.R. 1544; 2nd Digest Supp.
- (2) *Hallwood Estates, Ltd. v. Flack*, (1950), 66 (pt. 2) T.L.R. 368; 2nd Digest Supp.

APPEAL by the landlord from an order of His Honour JUDGE FORBES, Birmingham County Court, dated Nov. 22, 1951, refusing an order for possession against the statutory tenant and an occupant of a dwelling-house.

R. K. Brown for the landlord.

A. W. M. Davies for the tenant and his son, who was in occupation of the dwelling-house.

JENKINS, L.J.: This is an appeal from an order of His Honour JUDGE FORBES refusing the claim of the plaintiff landlord to possession of premises known as No. 75, Abbey Road, Erdington, Birmingham. Those premises were within the protection of the Rent Restrictions Acts and were let weekly, at 12s. 1d. per week, to the first defendant, Mr. Charles Tommis senior, who is the father of the second defendant. It appears that the contractual tenancy ended with the expiration of a notice to quit on Oct. 8, 1951.

The relevant ground on which possession was sought was that the tenant, Mr. Tommis senior, had gone out of possession of the premises and ceased to reside there and so could no longer claim the benefit of the Rent Restrictions Acts. Mr. Tommis senior clearly did remove his own physical presence from No. 75, Abbey Road, but he left behind him his son, Mr. Tommis junior, who

remained on the premises with his wife and child. It seems that Mr. Tommis junior and his family came in at or about the same time as Mr. Tommis senior removed himself. Mr. Tommis senior's absence was thus accounted for by him in his evidence. He said he had been tenant of the premises since 1914; in 1937 he started to build a house single-handed which was not completed at the date when the evidence was given in November, 1951; he had, however, moved into this new house on Aug. 29, 1951, with his wife and daughter; he was a teacher and the retiring age applicable to him was sixty-five, although he could retire at sixty; and when he retired (which he contemplated doing in about three years' time) his pension would be one-third of his then present income and he would not be able to keep the new house. He said he had left his furniture at Abbey Road, and when he retired he would have to sell the new house. His son was at Abbey Road as caretaker. The learned judge accepted that evidence and delivered a short judgment in these terms:

"I find there is an intention on the part of Charles Tommis to return to No. 75 Abbey Road, Erdington, in or about three years' time. In the meantime the second named defendant is residing there as caretaker on his behalf. Charles Tommis has shown an intention not to abandon the tenancy, and I, accordingly, give judgment for the defendants with costs."

So far as that judgment involves a finding of fact, it cannot be challenged in this court except on the ground that there was no evidence to support it. Counsel for the landlord does not dispute that, and he accepts, as he is bound to do, the learned judge's finding that it was Mr. Tommis senior's intention to return in about three years' time, but he says that it follows as a matter of law that for the purposes of the Rent Restrictions Acts Mr. Tommis senior must be taken to have given up any *animus revertendi* except an *animus revertendi* postponed to such a distant future date that it ought not to be taken into account by the court. In my judgment, that contention cannot prevail. The learned judge was clearly entitled to accept the genuineness of Mr. Tommis's evidence about his intention, and, having found the intention, the question whether it amounted to sufficient *animus revertendi*, as it seems to me, must be a question of degree, and, as such, eminently a question for the learned judge. He held that it fell, as it were, on the tenant's side of the line in this case, and, perhaps, the tenant was fortunate in securing that finding. But, the learned judge having taken that view, it does not seem to me to be possible to say that he erred in law in so deciding.

Counsel for the landlord also sought to make a point on the aspect of what I may call constructive possession, that is to say, the *corpus possessionis*, to the effect that there was not sufficient evidence to show that Mr. Tommis junior was really occupying the premises on behalf of his father as his father's licensee. But the evidence of the father to the effect that the son went into the house as caretaker was not challenged in cross-examination, and I think it is impossible for this court now to do anything else but accept the statement of the father in his evidence-in-chief. Therefore, there was on the evidence a caretaker in No. 75, Abbey Road, holding possession of it on behalf of his father. There was also evidence that the father left furniture in the house.

In all these circumstances, I find it impossible to hold that the learned judge committed any error in law in taking the view that the father was still entitled to the protection of the Rent Acts on the principle stated in the judgment of ASQUITH, L.J. in *Brown v. Brash & Ambrose* (1) ([1948] 1 All E.R. 925, 926). In the present case, subject to the question of the length of the projected absence, three years, all the elements which ASQUITH, L.J., specified as necessary in order that the protection of the physically absent tenant should continue seem to me to be present. I think it is significant that the learned lord justice said (*ibid.*, 926):

"To suppose that he can absent himself for five or ten years or more

and retain possession and his protected status simply by proving an inward intention to return after so protracted an absence would be to frustrate the spirit and policy of the Acts . . .”

Observe that the time mentioned as excessive is five or ten years, and that the learned lord justice seems to envisage the possibility that even where an absence of that duration is in question, nevertheless a sufficiency of outward and visible signs of the intention to return—sufficient indicia of the animus revertendi and corpus possessionis—may, even in such a case, oust a prima facie conclusion that the tenant has abandoned his possession of the premises. For these reasons, in my view, this appeal fails.

SIR RAYMOND EVERSLED, M.R.: I agree. I think, with JENKINS, L.J., that the learned county court judge might well have come to a conclusion on the facts adverse to the defendants, particularly in a case such as this where, as counsel for the landlord emphasised, the absence from Abbey Road on the part of the first defendant is a purely voluntary act on his part and has not been occasioned by the necessities or conveniences of his business or other occupation. In saying that I am not, of course, criticising the learned judge, for I have not had the advantage of seeing the witnesses. Still, I agree with counsel for the landlord that the court ought, as I think, and as I said in *Hallwood Estates, Ltd. v. Black* (2), to be somewhat cautious in giving the protection of these Acts to what have been called “two-home men.”

It is, perhaps, worth emphasising that the formula used by ASQUITH, L.J., was animus possidendi and corpus possessionis. In other words, the tenant, though physically absent, must still in the eye of the law retain his possession of the first house. If he gives it up, an intention, however truthfully and sincerely entertained, to return there at some future date will not, as I understand the law, suffice. The learned judge accepted the evidence of the first defendant that his departure to the house over the erection of which he had taken such a very long time was temporary and only intended to last until he had to retire from his profession when he would be unable to afford to continue to live there. In addition, he left in his original home his furniture and his son. I think the learned judge, having treated the matter properly as a matter of degree, had evidence which justified him in concluding as he did that there was no abandonment by the first defendant of his possession of No. 75 Abbey Road, but I venture to repeat that judges ought to look somewhat critically at cases which, if repeatedly extended, would soon go far to defeat one of the main purposes of these Acts, which is to make the best use of the unfortunately limited housing resources. I agree, however, that the appeal fails.

HODSON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Bailey, Cox, Bosworth & Co.*, Birmingham (for the landlord);
C. Lewin Poole & Needham, Birmingham (for the tenant).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

FEYEREISEL v. PARRY AND OTHERS.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), March 3, 4, 1952.]

Rent Restriction—"Dwelling-house let together with land other than the site of the dwelling-house"—*Camping site and bungalow*—*Dominant purpose of lease the carrying on of business of letting out camping sites*—*Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (3)*.

By an agreement dated Nov. 1, 1946, a landlord let to a tenant a camping site and a bungalow situated thereon, the rateable value of the whole being less than £75 a year. The tenant occupied the bungalow and carried on the business of a camping site proprietor. On a claim for possession of the demised premises,

HELD: the camping site was the main object of the letting and the bungalow was merely an adjunct to the business carried on by the tenant on the site, and, therefore, the bungalow was a dwelling-house "let together with land other than the site of the dwelling-house" within the meaning of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, and the Rent Acts did not apply to the premises.

Pender v. Reid (1948 S.C. 381), applied.

FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1078.

Cases referred to:

- (1) *Pender v. Reid*, 1948 S.C. 381; 2nd Digest Supp.
- (2) *Langford Property Co., Ltd. v. Batten*, [1950] 2 All E.R. 1079; [1951] A.C. 223.
- (3) *Thompson v. Simpson*, [1952] 1 All E.R. 431.
- (4) *Vickery v. Martin*, [1944] 2 All E.R. 167; [1944] K.B. 679; 113 L.J.K.B. 552; 171 L.T. 89; 2nd Digest Supp.
- (5) *Cargill v. Phillips*, 1951 S.L.T. 110.
- (6) *Court v. Robinson*, [1951] 1 All E.R. 209; [1951] 2 K.B. 60.
- (7) *Kitchen's Trustee v. Madders*, [1949] 2 All E.R. 1079; [1950] Ch. 134; 2nd Digest Supp.

APPEAL by the tenant from an order of PARKER, J., dated July 25, 1951, on a claim by the landlord for possession of a bungalow and camping site.

In October, 1946, the tenant leased a bungalow from a Mr. Price at a weekly rent of 14s., the tenant having the use of certain articles of furniture the property of Mr. Price. The bungalow was one of a number situated on a site owned by Mr. Price, who let them out to campers. On Nov. 1, 1946, an agreement was drawn up by Mr. Price as follows: "I hereby grant to Mr. J. Feyereisel part of the camping site known as the 'Smugglers Leap' situated on the north and east side of the road running through the ground. This part contains three bus bodies and two trailers on ground rents, and three bus bodies on hire, also shop, shed, garage and bungalow occupied by himself. The tenant is to maintain and keep in fair condition buses and bungalow, replace any broken windows, and provide two coats of good paint in the period of renting. This at a rental of £3 per week, the payment of £13 to be made on the first of each month. The other side of the site contains one bungalow, cabin, greenhouse, orchards and garden occupied by myself, and is kept privately. Option is given to Mr. J. Feyereisel to purchase the whole property freehold including two bungalows, three bus bodies, cabin, shop, garage, etc., for the sum of £2,500 within three years of the signing of this agreement." Under the agreement, which PARKER, J., held to be for a period of three years, the tenant went into possession. In 1948 Mr. Price died and his property passed to the first defendant, Mrs. Parry, as administratrix, who appointed the second defendant, Mr. Turnidge, as manager of the property. Shortly afterwards the first defendant sold the property to the second defendant who, on Dec. 30, 1948, served one month's notice to quit on the tenant. On Apr. 26, 1949, the tenant issued a writ against

the first defendant claiming damages for, inter alia, breach of an implied term of the agreement of Nov. 1, 1946, that the tenant should hold the demised premises without disturbance, and against the other defendants for damages for, inter alia, injuring the tenant in his business as a camping site proprietor. By their defence the defendants denied the allegations contained in the statement of claim and the second defendant counterclaimed for possession, arrears of rent and damages for breach of covenant to repair. By his reply the tenant denied the validity of the notice to quit and in the alternative claimed that the bungalow was protected by the Rent Acts. PARKER, J., held that the primary purpose of the agreement was to enable the tenant to carry on the business of letting camping sites and that the bungalow was an adjunct to that business and, therefore, the bungalow was "let together with land other than the site of the dwelling-house" within the meaning of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, and was not protected.

Thesiger, Q.C., and *J. S. Daniel* for the plaintiff.

Pollock, Q.C., and *M. J. Morris* for the second defendant.

The first, third and fourth defendants were not represented.

SOMERVELL, L.J.: The only question with which we are concerned is whether the tenant is entitled to the protection of the Rent Acts. The learned judge summed up the nature of the agreement of 1946 and its subject-matter as follows:

"It is quite true that the facts here are somewhat different [from *Pender v. Reid* (1)], but I have little doubt here, having heard the [tenant] himself, that what was really let to him was land to enable him to carry on the business of letting out camping sites, and, as it were, as an adjunct to that, he was let the bungalow on that site to enable him to live in it and carry on the business. The [tenant] said: 'I entered into the agreement on Nov. 1, 1946, with the object of sub-letting the land to campers'. If one visualises part of this dis-used chalk pit with various bus bodies and this wooden hut on it, it is really idle to think of a dwelling-house being let with land as an adjunct to that dwelling-house. It is really a case of the letting of land on which somebody can earn money by letting out camping sites, and, as an adjunct to that, letting them live in a wooden shed on that site."

There seems to be ample evidence on which the learned judge could summarise the effect of the letting in those words, and they are consistent, in my opinion, with the terms of the document. The question, therefore, is whether in those circumstances the dwelling-house is within the Rent Acts? In using the word "adjunct" the learned judge had in mind the decision in *Pender v. Reid* (1). In that case a tenant carried on business as a coal merchant in premises which consisted of a dwelling-house (with a small yard behind it) where the tenant and his family lived, and a coal ree, garage and workshop which were used exclusively for the purposes of his business. The area occupied by the house and the yard was less than a third of the whole area. The whole premises had been let in the same form to successive tenants for many years and each tenant had carried on a coal merchant's business. It was held that, since the dominant purpose of the letting was the carrying on of the business of a coal merchant and not the provision of a dwelling-house, the dwelling-house being merely an adjunct to the business part of the premises, the tenancy was not protected by the Rent Restrictions Acts. The LORD JUSTICE-CLERK (LORD THOMSON) and LORD MACKAY examined in detail the relevant provisions of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, and the LORD JUSTICE-CLERK said (1948 S.C. 385):

"... it is not possible to dispose of the case on the broad ground that the mere presence of the dwelling-house in the composite let is enough to bring the whole subjects within the Acts."

Counsel for the tenant argued in the present case that, even where one finds what, on the face of it, can be described as the letting of business premises, by reason of certain words in s. 3 (3) of the Act of 1939 a lessee, if the subject-matter is within the required rateable value, can claim the protection of the Acts if, within those business premises, there is a house or part of a house which can be described as a dwelling-house. LORD MACKAY posed the question in this way (*ibid.*, 392):

"Is one thing [i.e., the business premises or premises other than the dwelling-house] the adjunct of the other, or the other of the one?"

In other words, is the non-dwelling house which is let an adjunct of the dwelling-house, or is the dwelling-house an adjunct of the non-dwelling house? The learned judge accepted that proposition and applied it.

When rent restriction legislation was first introduced, the problem of the scope of the word "dwelling-house" was realised by Parliament. By the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 2 (2), the problem was dealt with in this way.

"This Act shall apply to a house or part of a house let as a separate dwelling where such letting does not include any land other than the site of the dwelling-house and a garden or other premises within the curtilage of the dwelling-house . . ."

That, apparently, was found to be unduly narrow and by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2) (iii) it is provided:

"for the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house."

That provided a rateable value test which may or may not have been easy to apply, but which, at any rate, is simple to understand.

In 1939 the Rent and Mortgage Interest Restrictions Act, 1939, was passed and s. 3 (1) sets out the rateable values on the appropriate day of the properties to which the Act was to apply. It is common ground here that the rateable value of the whole of the subject-matter of the lease is within the applicable limit. Sub-section (2) excepts (a) licensed premises, (b) furnished premises, and (c) certain local authorities' houses. Sub-section (3) provides:

"Subject to the provisions of para. (a) of the last preceding sub-section the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes; and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house; but, save as aforesaid, the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house."

It will be noted that in the latter part of that sub-section there is, first, a reference to land or premises let together with a dwelling-house, and, later, following the words "save as aforesaid", to any dwelling-house let together with land. I think the LORD JUSTICE-CLERK in *Pender v. Reid* (1) based his conclusion as to the construction of the sub-section in part on that difference, and, indeed, particularly on the words following "save as aforesaid."

With respect, I would have come to the conclusion that on the learned judge's finding the tenant fails in limine because he is not the lessee of a dwelling-house

and the Act is dealing with dwelling-houses. There was a time when business premises were protected by the Acts, but it is common ground that the Act of 1939 applies to dwelling-houses. My conclusion is supported by the earlier words of sub-s. (3) which are to be found in earlier Acts, namely, "the application of the principal Acts, by virtue of this section . . . shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes". If all one had to seek was a dwelling-house within the whole subject-matter of the lease, that provision would be quite unnecessary. It implies that it is not enough to find a dwelling-house in what is covered by the lease. If counsel for the tenant is right, what would in ordinary language be described as a lease of business premises, if within the rateable value, would obtain the protection of the Act if one could find a dwelling-house within it. I think the words used at the beginning of this section by necessary implication negative that proposition. Counsel, assuming he could get past that initial difficulty, relied on the very wide words where it is said that any land or premises let together with a dwelling-house shall, unless the land or premises so let consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house. Having regard to the general language of the Acts and their plain purpose to protect dwelling-houses, and having regard to the words, and the implication which, in my opinion, arises from the words, earlier in the section with which I have just dealt, it seems to me impossible to give the words on which counsel relies the meaning which he seeks to put on them. It would mean that, however subordinate and minor the dwelling-house, the whole premises being within the rateable value, the protection of the Act would be obtained. I do not agree, as was submitted on behalf of the tenant here, that the construction placed on this section by the Court of Session in *Pender's* case (1), raises any difficulty. With respect, I agree with it. In considering the words "any land or premises let together with a dwelling-house" one implies the words "as an adjunct to that dwelling-house". If one has three acres of waste land or a shed or other such premises, so long as one can describe them as an adjunct to the dwelling-house, then one has only to consider the rateable value to see whether the Acts apply. The part of the sub-section after the words "save as aforesaid", is not as clearly worded as it might be. That part of the sub-section is negating a construction of the intermediate words which would bring everything in except premises containing more than two acres of agricultural land, and re-affirming, subject to the exceptions in sub-s. (2) (a) (b) and (c), the general principle to be found in the Act of 1915, that the Acts are designed to protect dwelling-houses.

Counsel for the tenant submits that we ought to regard what was said by the House of Lords in *Langford Property Co., Ltd. v. Batten* (2), as negating or throwing doubt on the decision in *Pender's* case (1). The problem in the *Langford Property* case (2) was, to my mind, quite a different one. There the house had originally been let without a garage. It came back into the landlord's hands and was re-let with a garage. The question was whether, for the purpose of fixing the standard rent with the garage, the dwelling-house was the same as that which was previously let without the garage? It was held that the second letting of the house with the garage was a new letting of a new dwelling-house. In the course of the argument reliance was placed by the tenant on *Pender v. Reid* (1), and, according to a report of the argument, it was examined in some little detail. LORD PORTER, LORD OAKSEY and LORD RADCLIFFE referred to s. 3 (3) because the actual words of that section had been regarded as important and as leading to the conclusion that there was not a new letting of a new house. LORD PORTER, in particular, sets out the various sections to which I have referred. In dealing with s. 3 (3) he says ([1950] 2 All E.R. 1083):

" . . . any land (except a certain quantity of agricultural land, which is immaterial to the question at issue) let with the dwelling-house forms part of the dwelling-house and the only question is whether the rateable value

of the combined entity is less than or exceeds the figures prescribed in s. 3 (1) of the Act."

Counsel for the tenant asked us to read those words—which I do not think are intended to be anything more than a statement of the words to be found in the section—as negating the conclusion in *Pender v. Reid* (1). There are other passages on which he relies in the same sense. There is a sentence in LORD RADCLIFFE'S opinion which supports the general view which has led me to the conclusion to which I have come when he says (*ibid.*, 1086):

"The basic thing, therefore, which is protected is the structure forming a house or part of a house and the site that it occupies."

It would be wrong to regard the citing and summarising of those sections for the purpose of the different problem which their Lordships had to consider as indicating any view on the decision in *Pender v. Reid* (1). In fact, I would have said that, reading these speeches, if there was any conclusion to be drawn it was that the noble and learned Lords saw nothing to doubt in that decision. If they had felt a doubt, they would have expressed it. Therefore, so far as one can gather anything from the *Langford Property* case (2), I would have been inclined to think that the noble and learned Lords saw no reason to think that there was anything wrong with *Pender v. Reid* (1).

Reference was made to a decision of HALLETT, J., in *Thompstone v. Simpson* (3) in which *Pender v. Reid* (1) was applied, and we were also referred to *Vickery v. Martin* (4). In *Vickery v. Martin* (4) it was sought to cut down the earlier words of s. 3 (3), namely, that a "dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office . . .", by saying that it must be a non-substantial part which is used as a shop or office. The court negatived that view. There is one sentence in the judgment of LORD GREENE, M.R., which again bears out the general principle which I have tried to apply. In construing s. 3 (3) he says ([1944] 2 All E.R. 170):

"Once a house is a dwelling-house within the meaning of the Act, it is not sufficient to exclude it from the operation of the Act merely to show that part of the premises is used as a shop or office or for business, trade, or professional purposes."

Therefore, it is first necessary to find that the letting is a letting of a dwelling-house within the meaning of the Act. For the reasons which I have tried to give I think that, on the learned judge's findings, there was not here a letting of a dwelling-house within the meaning of the Act and the appeal should be dismissed.

DENNING, L.J.: This is the familiar contest between a literal interpretation of an Act of Parliament and a liberal or reasonable interpretation of it. It is not a very promising case in which to ask the court to give it a literal interpretation. It arises in this way. A landlord let to a tenant a two-roomed bungalow at a rent of 14s. a week. The bungalow contained furniture which the judge found was sufficiently substantial to make the letting of the bungalow a furnished letting not protected by the Rent Acts. Some time later the landlord let to the tenant, not only the furnished bungalow, but also a camping site with several bus bodies, sheds, and so forth, at an inclusive rent of £3 a week. The camping site was a good business proposition, being let in the summer to people for their holidays. The tenant says that, by reason of the addition of the camping site, he is now protected by the Rent Acts, whereas previously he was not.

Counsel for the tenant argues that the case falls precisely within the second part of s. 3 (3) of the Act of 1939. He contends that the bungalow was a dwelling-house and the camping site was "land or premises let together with the dwelling-house". It was not agricultural land, and, therefore, he says, it is to be treated, for the purposes of the Acts, as part of the house. Thence his argument runs thus: The whole is under £75 rateable value, and, therefore, is protected. The furniture in

the bungalow forms so small a proportion of the whole rent that it does not deprive the tenant of the protection of the Act. Thus, the second part of s. 3 (3) is satisfied, and the third part does not apply, because that only applies where the second part does not. I agree that, taking the words of s. 3 (3) in their literal meaning, they do lead to the result contended for by counsel. So do the words used in some of the speeches in *Langford Property Co., Ltd. v. Batten* (2), but it is a mistake to take a few words out of an Act of Parliament and to rely on the letter of them. Every word of the Act must be read in the light of the Act as a whole. The guiding light through the darkness of the Rent Acts is to remember that they confer personal security on a tenant in respect of his home. The Acts apply to dwelling-houses, not to business premises. This is shown by the opening words of s. 12 (2) of the Act of 1920 which applies the Acts to houses "let as a separate dwelling", and s. 3 of the Act of 1939 which applies the Acts to a "dwelling-house". Those are the governing words. The remaining words of those sections are concerned with marginal cases, such as a house where the front rooms are used as a shop and a house let with a field.

We are here concerned with the problem of a house let together with land or premises. The Act of 1920 solved the problem by making protection depend on the relative rateable values. If the house was three times as valuable as the rest, then the whole was protected, but if not, then none of it was protected. The Act of 1939 discarded this test, owing, no doubt, to changes in the rating law. For instance, in between the two Acts, agricultural land had become exempted from rates and had presumably no rateable value. In 1939, therefore, some new test had to be found for a house let with agricultural land. The legislature solved it by saying that, if the agricultural land was less than two acres, the whole was protected, but, if it was more, then none was protected. The position about agricultural land is, therefore, clear enough. But what is the position when other land or premises (not agricultural land) is let together with a dwelling-house? In respect of such land or premises the legislature in 1939 discarded the rateable value test and put nothing in its place. They left the courts to grapple with two contradictory provisions. Under the second part of s. 3 (3) such land or premises is to be treated as part of the dwelling-house, but under the third part the Acts are not to apply to the house or the land. In order to resolve this contradiction we must, I think, read the second part as limited to cases where the land or premises is or are an adjunct to the house. This means that the words "as an adjunct to the dwelling-house" have to be read into that part of the sub-section. I acknowledge that this involves a departure from the literal interpretation, but it does, I think, carry out the intention of Parliament, because it fulfils the fundamental conception that the Acts are intended to protect dwelling-houses, not business premises.

The decisions of the Court of Session in *Pender v. Reid* (1) and *Cargill v. Phillips* (5) are directly in point. English judges have followed those decisions and I think we should do the same. They are fully in line with the recent decisions of this court such as *Court v. Robinson* (6) where it was held that premises let as a social club were not protected by the Acts even though the steward lived there. Cases such as *Vickery v. Martin* (4) and *Kitchen's Trustee v. Madders* (7) are distinguishable because they turned on the first part of s. 3 (3) and not on the second and third parts. In those cases there was one house let and used as a single entity for dwelling purposes. It was not let together with other land or premises.

The effect of s. 3 (3) is, therefore, as follows:—First, a dwelling-house does not cease to be protected simply because a substantial part of it is used for business purposes. Secondly, a dwelling-house does not cease to be protected simply because it is let with something else which is an adjunct to it, such as a garden, a yard, a garage or a paddock. But, thirdly, a dwelling-house is not protected if it is let with more than two acres of agricultural land or if something else such

as a factory or a business is the main object of the letting and the dwelling-house is merely an adjunct to it. The present case comes within the third category. The camping site was the main object of the letting and the bungalow was merely an adjunct to it. The premises are not protected by the Acts. I agree that the appeal should be dismissed.

ROMER, L.J.: I also agree. I agree with counsel for the landlord when he suggests that this case is really one substantially of fact. When one looks at the description of the property in the agreement and at the agreed plan one finds that the subject-matter of this letting was a piece of land applied to commercial purposes and having on it a bungalow or shed for the convenience of the owner or occupier. In those circumstances the judge was well justified in expressing the view that this is really a case of the letting of land on which somebody can earn money by letting out camp sites, and, as an adjunct to that letting, the tenant lives in a bungalow on the site. I agree with my Lord that, taking the facts as they have been established, this bungalow cannot properly be regarded as a dwelling-house for the purposes of the Act. But, assuming that one has to look to the provisions of s. 3 (3) of the Act of 1939, it appears to me that the case is precisely within the last part of that sub-section because here there is a dwelling-house let together with land other than the site of the dwelling-house. I regard that part of the sub-section as being the general law applicable to composite lets. Anybody who wants to get out of that general rule must show that they are brought within the excepting words "save as aforesaid", and when one looks to the words which precede that provision one finds the middle part of the section which deals with "any land or premises let together with a dwelling-house". Both historically and on construction that middle part deals only with cases where the primary subject-matter of the letting is a dwelling-house, and, as is common with dwelling-houses in this country, a small piece of land goes with the dwelling-house and is an adjunct thereto. It is to save cases of that kind that the middle part of this sub-section was introduced. That view of the matter is entirely consistent with what LORD RADCLIFFE said on the subject of this legislation in the *Langford Property* case (2) where he said ([1950] 2 All E.R. 1086):

"The basic thing, therefore, which is protected is the structure forming a house or part of a house and the site that it occupies. If something beyond that is also to come within the protection of the Act [the Act of 1920, s. 12 (2)] it must be brought within it by the operation of some positive enactment to be found between the beginning and the end of sub-s. (2)."

It is wrong to say that the present case is one brought within the purview of the middle part of s. 3 (3) of the Act of 1939 and is, therefore, taken out of the words in the general rule at the end which, as I think, are precisely apt. I would only add that, if any further ground be wanting for rejecting the submission which was put before us by counsel for the tenant, it is to be found in this, that on the construction which he was asking us to adopt, although the final part of sub-s. (3) was plainly intended to be the generally operative provision relating to a composite dwelling, there would be practically no cases to which that general rule would apply having regard to the width of the interpretation which was sought to be put on the excepting provisions to be found in the middle of sub-s. (3). I, accordingly, agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Pattinson & Brewer*, agents for *R. C. Wilson*, Margate (for the plaintiff); *Kingsford, Dorman & Co.*, agents for *Girling, Wilson & Bailey*, Margate (for the second defendant).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

SHOTT v. SHOTT.

[COURT OF APPEAL (Somervell, Jenkins and Hodson, L.J.J.), December 19, 1951.]

Divorce—Maintenance—Application for leave to apply for order eighteen years after decree absolute—No default in payment and deed not impeached—Discretion of court—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 190 (1).

In October, 1932, the wife obtained a decree nisi of divorce and on Apr. 24, 1933, a week before the decree was made absolute, an agreement was entered into under which the husband covenanted to pay certain sums for her maintenance. The wife accepted that covenant in full satisfaction of any claim she had for maintenance or alimony, and she agreed that, so long as the husband performed his covenants, she would not "proceed with any petition or other legal proceedings for maintenance against him." Payments were made under the deed and no action was taken by the wife until 1951 when she applied to the court for leave to apply out of time for an order for maintenance under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1) on the ground that, in consequence of the decisions of *DEVLIN, J.*, in *Bennett v. Bennett* ([1951] 1 All E.R. 1088) and of the Court of Appeal in *Combe v. Combe* ([1951] 1 All E.R. 767), she would no longer be able to enforce the deed or obtain a decision of the court on its construction. The husband contended that the wife's application was groundless, as he had always paid under the deed and would continue to do so.

HELD: the decisions reported on the construction of the words "on any decree for divorce" in s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, showed great latitude, and it was not possible to lay down any general rule that an application eighteen years out of time must be refused; it was entirely a matter of discretion; and in the present case the court had proper material on which to refuse the application.

EDITORIAL NOTE. Section 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, was repealed by the Matrimonial Causes Act, 1950, s. 34 (1) and schedule, and was re-enacted by s. 19 (2) of that Act.

It should also be noted that the decision of *DEVLIN, J.*, in *Bennett v. Bennett* (*supra*) was affirmed by the Court of Appeal (*ante*, p. 413).

AS TO THE PROVISION OF PERMANENT MAINTENANCE, see *HALSBURY*, *Hailsham Edn.*, Vol. 10, pp. 785-787, paras. 1244, 1245; and *FOR CASES*, see *DIGEST*, Vol. 27, p. 510, Nos. 5481-5487 and *Digest Supps.*

Cases referred to:

- (1) *Scott v. Scott*, [1921] P. 107; 90 L.J.P. 171; 124 L.T. 619; 27 Digest, 510, 5486.
- (2) *Fisher v. Fisher*, [1942] 1 All E.R. 438; [1942] P. 101; 111 L.J.P. 28; 166 L.T. 225; 2nd Digest Supp.
- (3) *Bennett v. Bennett*, [1951] 1 All E.R. 1088; [1951] 2 K.B. 572; 115 J.P. 355, *affd.*, C.A., *ante*, p. 413.
- (4) *Combe v. Combe*, [1951] 1 All E.R. 767; [1951] 2 K.B. 215.
- (5) *Hyman v. Hyman*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; Digest Supp.

APPEAL from a decision of *BARNARD, J.*, on Nov. 29, 1951, dismissing the appeal of the wife from the decision of the registrar refusing her application for leave to file out of time an application for maintenance. The decree nisi was made in October, 1932, and in April, 1933, before the decree absolute, the parties entered into a deed under which the husband covenanted to pay and the wife agreed to accept certain sums for maintenance. In view of the decisions given in 1951 in *Bennett v. Bennett* (3) and *Combe v. Combe* (4), the wife was advised to apply for an extension of time in which to ask for maintenance on

the ground that those decisions deprived her of the right to enforce the covenants of the deed in the event of non-payment or to seek the construction by the court of its provisions. The husband replied that he considered the deed binding on him, whatever the legal view might be, and that he had always paid and was prepared to continue his payments.

Picard for the wife.

Gage for the husband.

SOMERVELL, L.J.: This is an appeal from a decision of **BARNARD, J.**, who dismissed a wife's appeal from a decision of the registrar refusing her application to be allowed to file an application for maintenance out of time. The power of the court to make an order for maintenance is contained in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 (1), which provides that "the court may, if it thinks fit, on any decree for divorce or nullity of marriage" make such an order. Cases have come before the courts as to what the word "on" means. In *Scott v. Scott* (1) it was held that the words "on any decree for dissolution of marriage" in s. 1 (1) of the Matrimonial Causes Act, 1907, did not confer on the judge an unfettered discretion as to the time within which he would allow a petition for maintenance to be filed, but that they meant that the petition must be filed "at" or "within a reasonable time after" the decree, having regard to all the circumstances of the case. In *Fisher v. Fisher* (2) a wife who had obtained a decree for dissolution of marriage in 1934, relying on a continuance of alimony paid by her former husband and his undertaking to settle certain property on her, made no application to the court for permanent maintenance until 1941, when all payments to her and negotiations for a settlement had come to an end. It was held that in the circumstances the wife ought to be given leave to apply to the court for an order for permanent maintenance. **LORD GREENE, M.R.**, referred in the course of his judgment to some words that he had used in an earlier case, which, if taken out of their context, might have suggested that he had laid down a hard and fast rule with the result that an application in 1941 with respect to a decree made absolute in 1934 could never in any circumstances be entertained. In *Fisher v. Fisher* (2) **LORD GREENE, M.R.**, used words on which the wife in the present case relies, when he said ([1942] 1 All E.R. 440):

"When the payments have come to an end, and the whole situation has changed in that way, it does seem to me that it would be unfortunate, to say the least of it, if the lady had to be stopped, at the threshold of the court, by failing to obtain an order which would enable her to have the case decided on its merits . . . Although I agree it is a matter upon which different minds might take different views, it seems to me that, in all the circumstances of this case, it is fair to say that an application now made for permanent maintenance could properly be said to be an application made within a reasonable time after the decree nisi, having regard to all the circumstances of the case."

I refer to those cases at the outset to show that there is a considerable latitude in construing the word "on". It might be thought that the fact that this application is made eighteen years after the decree absolute would be a bar in limine, but I think it would be wrong to take that view. One must consider the circumstances and whether there has been a proper exercise of the discretion by the judge. The decree nisi in this case was pronounced on Oct. 14, 1932, and on Apr. 24, 1933, about a week before the decree was made absolute, there was an agreement entered into under which the husband covenanted to pay to the wife not more than £400 and not less than £200 per annum. There was a provision that, if his total income was less than £800 in any year, the sum to be paid to his wife for that year should be half of his income, and there was a further

provision that it would be reduced to £200 when the youngest child became twenty-one years of age. It also contained these words:

"The wife hereby accepts the said covenants by the husband in full satisfaction of all claims by her against the husband whether for maintenance or alimony and hereby covenants with the husband that so long as he shall properly discharge and perform such covenants she will not enter or proceed with any petition or other legal proceedings for maintenance against him."

Payments have been made under that deed ever since, and the ground for asking for leave to apply after this long time is contained in the wife's affidavit where she says:

"I am advised that having regard to the decisions in *Bennett v. Bennett* (3) and *Combe v. Combe* (4) I would not be able to enforce the said deed nor obtain the court's decision as to the construction of its provisions."

There was an answer by the former husband, in which he said that he had no intention of endeavouring to evade his obligations under the deed. He added: "In spite of any legal consideration I consider myself bound by it, and will continue to pay under it. I, therefore, submit that on the facts disclosed the petitioner has no grounds for making this application."

The decision in *Bennett v. Bennett* (3) was one of DEVLIN, J. It concerned a deed which was entered into in anticipation of the dissolution of the marriage, which would itself make it, if not objectionable, at any rate something which would have to be given very careful scrutiny. The husband covenanted to make financial provision for the wife and their younger child in consideration of the wife's not proceeding with her prayers for alimony pending suit, maintenance for herself and her younger child, consenting to those prayers being dismissed, and not presenting any further petition for maintenance. She obtained a decree and was granted custody, and later she brought an action in the King's Bench Division to recover sums alleged to be due under the deed. DEVLIN, J., held that the deed was contrary to public policy, because the consideration moving from her was an undertaking the effect of which would be to exclude the jurisdiction of the court, and he based his judgment on the fact that there were children whose interests clearly made this a matter of public policy. He did not say that he would have decided the other way if there had only been the wife, but he based his decision on public policy in relation to the interests of the children. He referred to the decision of the House of Lords in *Hyman v. Hyman* (5) which he regarded as leading to that conclusion, although the facts there were different.

In *Combe v. Combe* (4) the question was whether there was consideration for a promise by the husband to pay the wife a sum for maintenance and whether his promise could be enforced as a contract. I need not say anything about that, but I want to refer to what was said by ASQUITH, L.J., with regard to *Hyman v. Hyman* (5). In *Combe v. Combe* (4) the husband had promised his wife to allow her £100 a year, but she had not made any express promise in return not to apply to the court, nor had he in any way asked her to forbear from applying. ASQUITH, L.J., having said that he could not regard what had happened as constituting a contract made after decree absolute, said ([1951] 1 All E.R. 774):

"... but, if it were so, I consider on the whole that *Hyman v. Hyman* (5) (a decision of the House of Lords) is not to be construed as applying only to agreements made before decree absolute. I think its application is general. It contains no such limitation in time as has been suggested."

We were referred to *Hyman v. Hyman* (5), but, as the facts are different, I do not propose to say anything about it. There are, however, undoubtedly passages in the judgments of LORD HALLSHAM, L.C., and LORD ATKIN which would apply to a case of this kind and would make the agreement here invalid. Counsel for the husband does not dispute its invalidity before us.

The registrar declined to decide that point, though it appeared that he would still have refused the application on the basis that the agreement was invalid. Its invalidity is the basis of the wife's application, which I will put in this way. She says: "Over all these years I have regarded myself as having enforceable rights against my husband under this deed, and I was content so long as I thought that they were enforceable. It is only since *Bennett v. Bennett* (3) that it has been brought home to me"—meaning, no doubt, through her legal advisers—"that this deed is invalid, and I am, therefore, a wife in receipt only of voluntary payments and at the mercy of my husband if he should choose to stop them, unless I can get an order against him made by the court". She submits that those circumstances entitle her to apply for an order even at this very late hour. Counsel for the wife relied not only on what was said by LORD GREENE, M.R., in the passage which I read from *Fisher v. Fisher* (2), but also on the statement, which was obiter, by BIRKETT, L.J., in *Combe v. Combe* (4), where he said ([1951] 1 All E.R. 773):

"It was said in the course of the argument of counsel for the husband that, if an application was made to the court at this date for maintenance, it would be necessary to explain the long delay in the making of the application. As one of the material circumstances for the court to consider, I cannot conceive of a better ground to be put forward by the wife than that mistakenly she had relied on an agreement which was to fulfil for her all that she could ever hope to acquire by making an application for maintenance, but, much to her surprise, when that agreement came before the court, it was held to be invalid."

That was a case where the wife was claiming a sum which she said was due to her under the agreement.

Those are all the authorities to which I need refer. There is, as the cases show, some latitude, and, perhaps, a greater latitude than one might have anticipated, in construing these words "on any decree for divorce", and I am not seeking to lay down any hard and fast rules or to say that on any matter of principle or law leave might not be given after even eighteen years. It is a matter of discretion, and I think the judge had proper material on which to refuse this application and I agree with the conclusion to which he came. It is important here that the husband is not setting up the invalidity of the deed, and, indeed, he has stated in his affidavit that he has no intention of endeavouring to evade his obligations under the deed.

There is another point of some importance which, we were told, was made before the registrar and the judge, and that is that in the correspondence, and, indeed, before us, the wife was not seeking to validate a document which she had suddenly found to be invalid. She was asking for something more than that. In a letter, written at a time when there had been a mistaken reduction by the husband in the sum payable under the deed, her solicitors said: "If such an application is made there seems no doubt that Mrs. Shott will be entitled to an order for maintenance more than twice as large as the pittance on which she has had to exist and educate and maintain your two boys for nearly twenty years". That is, in substance, repeated in a letter in July which was written after the mistake had been explained. I am also impressed by the fact that, although the facts in *Hyman v. Hyman* (5) were different from those in the present case, and although some people, I gather, did not regard it, as ASQUITH, L.J., regarded it, as of more or less general application to all deeds where it was sought to oust the jurisdiction of the court on this subject, it was, at any rate, a decision which would give a warning to those who deal with these matters that this kind of deed might well be invalid. For all those reasons, I think the appeal should be dismissed.

JENKINS, L.J.: I agree. The wife's case is, in effect, that she refrained from applying to the court for maintenance in proper time in reliance on the

deed of Apr. 24, 1933, and believing that deed imposed enforceable obligations on her husband. She thus claims, in effect, in the words of LORD GREENE, M.R., in *Fisher v. Fisher* (2), to have been "lulled to a sense of security". She says that she received a rude shock when she was advised of the effect of the decision of DEVLIN, J., in *Bennett v. Bennett* (3) as, until that moment, she and her advisers were under the impression that the deed was valid. She claims, accordingly, that, though she is eighteen years out of time, the delay has been due to a misapprehension and, therefore, should not be held against her.

For my part, I am not satisfied that the wife is entitled to rely on her alleged ignorance of the law for the purpose for which she now seeks so to do. I observe that *Bennett v. Bennett* (3) was decided in April, 1951. Her advisers were sufficiently alert and abreast of the current decisions to write their first letter raising the point with the husband on June 26, 1951, and, that being so, I am by no means satisfied that it would have been right to impute to the wife and her advisers to the detriment of the husband ignorance of the law as laid down by the House of Lords in *Hyman v. Hyman* (5) in 1929. Furthermore, it is to be observed that the husband has always faithfully paid the amounts that he covenanted to pay, subject to certain delays and misunderstandings which do not argue any lack of good faith on his part.

The position, therefore, is that the wife comes here after eighteen years, during which time she has received the benefit of the deed, and she now sets up its invalidity and claims that on that account the matter must now be considered as being at large and she must be allowed to apply to the court for maintenance notwithstanding the lapse of time. In my judgment, that contention ought not to be accepted. I think it would be out of all reason, in circumstances such as those of the present case, to treat an application made eighteen years after the decree as an application made "on the decree". The wife is "crying out before she is hurt", and I think there is justification for the comment that she is really using this point about the invalidity of the deed as a pretext to enable her now to make an application to the court in the hope that the court will give her a larger sum than the sum agreed to be paid under the deed. I have only to add that, like SOMERVELL, L.J., I am not seeking to lay down any general principle, and, in particular, I would wish to reserve my view as to what the position might be in a case comparable to this one, but where it was the husband and not the wife who set up the invalidity of the deed and left the wife without any provision. In a case of that kind I think—I am not deciding it now, but I think—that on the principle stated by LORD GREENE, M.R., in *Fisher v. Fisher* (2) it might be proper in some circumstances for an application to be entertained even after a very substantial lapse of time. In the circumstances of the present case I see no reason whatever to interfere with the decision of the registrar or the judge.

HODSON, L.J.: By r. 44 of the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), no application for maintenance can be made later than two months after the final decree, except by leave. That confers a discretion on the court to give leave after two months, but that discretion is subject to the words contained in s. 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which directs that the court "may . . . on any decree for divorce or nullity" make orders for maintenance. The word "on" has been judicially construed in *Scott v. Scott* (1) as meaning "at" or "within a reasonable time after" the decree, having regard to all the circumstances. In the present case the wife now seeks to say that, having recently discovered that this deed is invalid by reason of the decision in *Bennett v. Bennett* (3) she should be entitled to say that her present application for maintenance is, having regard in particular to that circumstance, "on the decree". I think that that contention is wrong. One circumstance which tells against it is that the husband has regularly paid under the agreement and has not sought to maintain that he is entitled to cease payment, but, indeed,

has expressed his intention to continue the payments under the deed. If he had refused to pay, I agree with SOMERVELL, L.J., that it would be necessary to consider the position in the light of his refusal, as, indeed, LORD GREENE, M.R., did in *Fisher v. Fisher* (2), where it was said that a wife who had received voluntary payments over a period of years was "lulled to a sense of security". The payments having been stopped, there was something to be said for holding that that was a circumstance which would entitle the court to regard the application as having been made "on the decree". It is otherwise here. Indeed, it is relevant that the wife made it plain by her solicitors' letter which opened the campaign that she was intending to get, if she could, a much larger amount than the amount provided for her by the deed. In her affidavit in support of the application she says that her husband's income has very much increased, and, therefore, the circumstances of this case are much the same as those of *Scott v. Scott* (1), where LORD STERNDAL, M.R., said ([1921] P. 121):

"The present application . . . is really in substance an application for an order to increase the amount of the payment, because the husband's means have increased, for if that were not the object, I do not suppose an application for an order would ever have been made."

For those reasons, as well as those which have been given by my Lords, I think that it cannot truly be said that this application has been made "on the decree". If it could be said that it was made "on the decree" this court would be in the position of hearing an appeal from a judge who had exercised against the wife a discretion which he had under the rules, he having all the circumstances before him and it not being shown that he had taken into account any circumstance which he ought not to have taken into account or left out of consideration any circumstance which he ought to have considered or acted on any wrong principle. For that reason, I think, this is not a case in which this court should interfere. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Attwater & Liell* (for the wife); *Ranger, Burton & Frost* (for the husband).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

Re WOOD'S WILL TRUSTS. WOOD AND ANOTHER v. DONNELLY AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), March 4, 1952.]

Will—Condition—Condition subsequent—Certainty—Name and arms clause—
"Discontinue to bear and use".

By his will the testator provided that those persons, with certain exceptions specified therein, who became entitled under the sub-clauses preceding should "assume and use the surname and arms of Wood either alone or together with his or her own surname and arms and . . . in case any such person shall refuse or neglect within [a certain period] (unless prevented by death absence or unavoidable cause) to assume and use such surname and arms or shall at any time afterwards discontinue to bear and use such surname and arms" then his or her beneficial interest should be determined.

Held: the meaning of the phrase "discontinue to bear and use" in its context was indistinguishable from that of the word "disuse" in its context in *Re Bouverie* (ante, p. 408), and, therefore, the phrase rendered the clause in which it appeared incapable of sufficiently precise construction by the court, and, consequently, void for uncertainty.

Re Bouverie (ante, p. 408), applied.

AS TO NAME AND ARMS CLAUSE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 789-792, paras. 1097, 1098; and FOR CASES, see DIGEST, Vol. 35, pp. 705-709, 711, 712, Nos. 55-80, 95-98.

Cases referred to:

- (1) *Re Bouverie*, [1952] 1 All E.R. 408.
- (2) *Re Lewis' Will Trusts*, [1951] W.N. 591.
- (3) *Bromley v. Tryon*, [1951] 2 All E.R. 1058; *affg. sub nom. Re Wilson's Will Trusts*, [1950] 2 All E.R. 955.

ADJOURNED SUMMONS to determine, inter alia, whether the condition contained in cl. 11 (3) of the will of Sir John Wood, Bart., deceased, was (a) wholly void and inoperative, or (b) effectual and operative to some, and, if so, what, extent. Clause 11 (3) of the said will provided:

"Every person not being a peer or peeress or eldest son of a peer or peeress who under the trusts herein contained shall become entitled in possession as tenant for life or tenant in tail by purchase to the net proceeds of sale of my real and leasehold estates or the income thereof or the net rents and profits thereof until sale or to any part thereof and who shall not then bear and use the surname and arms of Wood shall within one year after he or she shall become so entitled or (being an infant) within one year after he or she shall attain the age of twenty-one years (unless prevented by death absence or unavoidable cause) and also . . . every man (not being a peer or eldest son of a peer) with whom any women (sic) so becoming entitled as aforesaid shall intermarry shall within one year after such woman shall so become entitled as aforesaid or after such marriage whichever event shall last happen (unless prevented by death absence or unavoidable cause) assume and use the surname and arms of Wood either alone or together with his or her own surname and arms and . . . in case any such person shall refuse or neglect within such period as aforesaid (unless prevented by death absence or unavoidable cause) to assume and use such surname and arms or shall at any time afterwards discontinue to bear and use such surname and arms . . ."

then his or her beneficial interest should be determined.

Harold Lightman for the plaintiffs, the trustees of the will.

E. B. Stamp for the first defendant, who argued against the validity of the clause.

Peter Foster for the second and third defendants, who argued against the validity of the clause.

Wilfrid Hunt for the fourth, fifth and tenth defendants, who argued in support of the clause.

Parbury for the sixth to ninth defendants, who argued in support of the clause.

WYNN-PARRY, J.: This question concerns the validity of the name and arms provisions contained in cl. 11 (3) of the testator's will, by which he seeks to provide that every person, with the exceptions there specified, who becomes entitled under the preceding provisions of the clause in question shall

"assume and use the surname and arms of Wood either alone or together with his or her own surname and arms And . . . in case any such person shall refuse or neglect within such period as aforesaid (unless prevented by death absence or unavoidable cause) to assume and use such surname and arms or shall at any time afterwards discontinue to bear and use such surname and arms . . ."

Then follow the defeasance provisions which are to take effect on that discontinuance to bear and use.

The nearest authority to the present case is the recent decision of VAISEY, J., in *Re Bouverie* (1). In that case, the name and arms clause was, except in one

respect, for all material purposes similar to the one which I have to consider, the difference being that instead of the phrase "discontinue to bear and use", the verb "disuse" was employed. The relevant part of the clause read:

"And if the person so entitled as aforesaid or in the case of a married woman her husband shall refuse or neglect within such year to assume such surname or to apply for such authority as aforesaid or shall at any time afterwards disuse such surname from any cause . . ."

other than those specified, and then follow the provisions for defeasance. In the course of his judgment, VAISEY, J., considered certain prior authorities. VAISEY, J., as I am informed by Mr. Foster who appeared for the second defendant in that case, had his attention drawn to the various editions of the books of precedents in which the name and arms clauses appear, and he made this statement ([1952] 1 All E.R. 410):

"I am fully aware of the fact that these name and arms clauses have been used in accordance with well known precedents for a very great number of years, but, in my judgment, the cases to which I have alluded have put a very different complexion on the manner in which these conditions subsequent are approached. I am not, and I cannot, indeed, be, moved by the fact that my decision may affect a large number of other cases in which this point has not been taken."

In the result, the learned judge held that the clause in question was void for uncertainty.

It has been urged on me that I am not bound by that decision because, in the first instance, the words which I have to construe are "discontinue to bear and use", whereas the word which VAISEY, J., had to construe was "disuse", and that, in the second place, the learned judge approached the problem from the wrong point of view. So far as the first point is concerned, the learned judge said (*ibid.*, 411):

"Although, as counsel for the infant defendant pointed out, the word 'discontinue' is probably in not much better case, I thought at one time that it was more descriptive of a single act than the word 'disuse'."

The learned judge was referring to an earlier decision of his in *Re Lewis' Will Trusts* (2).

"I am, however, not at all certain that the word 'discontinue' is not open to the same objection as the word 'disuse', but I am not going to say anything further about that because that is not the word which is in question here. I think that 'disuse' is a word which signifies in a vague manner the slipping of a custom or a tendency and is not referable to a definite act which would enable anybody, either prospectively or retrospectively, to say on what day and at what moment this estate was forfeited."

It has been very properly emphasised by counsel on behalf of those supporting the clause that the words used in the clause in *Re Bouverie* (1) differed from the phrase with which I am concerned. But I have heard no argument which persuades me that, in the context in which I find the phrase "discontinue to bear and use", I could give it any different meaning from that which VAISEY, J., attributed to the word "disuse" in the context in which, in *Re Bouverie* (1), the learned judge had to consider that word.

I pass next to the criticism that the learned judge approached the case before him from the wrong point of view. It is perfectly true, as emerges so clearly from the judgment of SIR RAYMOND EVERSHED, M.R., in *Re Wilson's Will Trusts* (3), that the mere fact that ([1950] 2 All E.R. 964)

"... a document is difficult of construction is not the same thing as saying that it is so vague and obscure as to be unintelligible, and, therefore, unenforceable."

SIR RAYMOND EVERSHED, M.R., goes on to say (*ibid.*):

"It is a common event for these courts to have to construe provisions in wills and settlements, and it could not surely be said that a clause such as this failed in effect if it raised a point of construction such that it was thought desirable to take on it the opinion of the court . . . Suffice it for me to say that I am not satisfied that those points are of such obscurity that a court would be forced to say that the clause is so uncertain in expression as to be ineffective. I am strongly moved to that conclusion for the reasons which [JENKINS, L.J.] has already mentioned, namely, the long and respectable ancestry which this particular clause has, deriving its origin from the early precedent of MR. DAVIDSON."

In the House of Lords, to which that case was taken sub nomine *Bromley v. Tryon* (3), LORD SIMONDS, L.C., in the course of his speech, said ([1951] 2 All E.R. 1064):

"I come then to the point which was not argued before HARMAN, J., but was chiefly relied on in the Court of Appeal and in this House, viz., that the clause is altogether void for uncertainty. It is a question which I must approach with this familiar principle in the foreground of my mind: ' . . . that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.'"

I accept the view that the guidance to be found in those passages is that the proper approach to a question such as this is not what questions must the party ask himself or herself or what difficulties may face that party on the reading of the will, but whether or not the court can, on consideration of the clause, attribute to it a sufficiently precise meaning. It is said that VAISEY, J., failed to apply that test. The relevant passage in his judgment is ([1952] 1 All E.R. 410):

"Applying the test to the present case, I ask myself: Can Mrs. Marshall and her husband say precisely and exactly what they have to do or refrain from doing in order to prevent any transfer of the lady's estate under the gift over?"

If the passage stopped there, then, indeed, there would be force in the criticism that the learned judge was looking at the problem through the eyes of the persons concerned and not through his own eyes, but he goes on (*ibid.*):

"It does not require very much ingenuity to imagine a large number of borderline cases. Of course, if the lady ceased to use the name Bouverie altogether, and never used it again, never mentioned it, and never allowed it to be used in conjunction with her own name, then that would be an obvious case. But to what extent and for what period of time has the 'disuse' referred to in the clause to take effect? Would it be a breach of it if from time to time the lady, having adopted the name of Bouverie for general purposes, occasionally referred to herself by her former name of Mrs. Marshall, and occasionally used that name when giving an order in a shop in London? How often would she have to omit the use of the word 'Bouverie' to bring about the forfeiture for which the clause provides? What percentage short of one hundred per cent. of the disuser of the name would amount to a disuser of it within the meaning of the clause? Those questions, in my judgment, are incapable of being answered, and, that being so, it seems to me that this condition is not so framed as to satisfy the exacting requirements of the law as laid down in the highest tribunals in the cases to which I have referred."

I have read that passage in extenso in view of the invitation extended to me to inquire whether the learned judge had applied the right test, because it seems to me that only if I could be satisfied that the learned judge had applied the wrong test could I properly do otherwise than follow his decision. It seems to me to be plain, when the whole passage is read, that, although the learned judge started off postulating the question asked by Mrs. Marshall and her husband, he was dealing with this clause from the point of view of the court. That, I think, is demonstrated by the sentence at the end of the passage which I read: "Those questions, in my judgment, are incapable of being answered".

Taking the view, as I do, with all respect, that the learned judge has applied the correct test—the test indicated in *Re Wilson* (3)—and, bearing in mind that, as I am informed, the old precedents were cited to him and the passage earlier in his judgment which I have quoted, which makes it clear that he had taken into consideration fully that these name and arms clauses had been used in accordance with well known precedents for a great number of years, and, finally, taking into consideration that I can find in its context no difference in effect between the phrase which I have to construe, "discontinue to bear and use", from the word "disuse" which VAISEY, J., had to consider, I think there are left no grounds on which it is open to me, sitting as a judge of first instance, to differ from the decision of VAISEY, J., and, therefore, I follow it. In my view, so far as this court is concerned, this question is concluded by the authority of *Re Bouverie* (1), and I propose to declare accordingly.

Order accordingly.

Solicitors: *Hugh V. Harraway & Son* (for the plaintiffs); *Slaughter & May* (for the first, second and third defendants); *Druces & Attlee* (for the fourth, fifth and tenth defendants); *Savory, Pryor & Blagden* (for the sixth, seventh, eighth and ninth defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

MINISTRY OF HEALTH v. STAFFORD CO *Reversed.* C.A. [1952] 2 All E.R. 386 AND ANOTHER.

[CHANCERY DIVISION (Danckwerts, J.), March 4, 1952.]

National Health Service—Hospital—Transfer of property—Property held by local authority—Two local authorities respectively owning freehold and leasehold interests in hospital premises—National Health Service Act, 1946 (c. 81), s. 6 (2).

From 1907 onwards the S. corporation used certain premises which it owned in fee simple as an isolation hospital. On May 27, 1943, the M.S. joint hospital board, constituted under the Public Health Act, 1936, s. 6 (1), by agreement with the corporation acquired a tenancy of the premises for ten years from Oct. 1, 1941, with an option to extend the tenancy for a further period of ten years. Immediately before July 5, 1948, the "appointed day" under the National Health Service Act, 1946, the premises were being used by the joint hospital board as an isolation hospital. Both the corporation and the joint hospital board fell within the definition of "local authority" in s. 79 (1) of the Act of 1946. On the question what interests in the said premises vested in the Minister of Health under s. 6 (2) of the said Act,

HELD: the effect of s. 6 (2) was to transfer to the Minister all the interests in the hospital which immediately before the appointed day were vested in a local authority, and, therefore, both the fee simple and the term of years held respectively by the corporation and the joint hospital board were thereby transferred to and vested in the Minister.

But, semble, aliter so far as the fee simple was concerned if it had been owned by a private person and not by a local authority.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 6 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 15, p. 339.

ADJOURNED SUMMONS to determine whether, on the true construction of the National Health Service Act, 1946, certain premises, used as an isolation hospital, comprised in an agreement dated May 27, 1943, and made between Stafford Corporation (the owner of the fee simple) and the Mid-Staffordshire Joint Hospital Board, whereby the latter was granted a tenancy of the said premises for a term of ten years from Oct. 1, 1941, were, on July 5, 1948, transferred to and vested in the Minister of Health both as to the leasehold interest and the fee simple reversion or only as to the leasehold interest.

Denys B. Buckley for the plaintiff, the Ministry of Health.

Russell, Q.C., and *J. V. Nesbitt* for the defendants, Stafford Corporation and the Mid-Staffordshire Joint Hospital Board.

DANCKWERTS, J.: In or about 1880 some land was acquired by the corporation of Stafford which, from 1907 onwards, was used by the corporation for the purposes of what I will call an isolation hospital, i.e., for the accommodation of persons suffering from infectious diseases other than smallpox. It was so used by the corporation down to the formation of a joint hospital board and an agreement of tenancy which was made between the corporation and that board, the Mid-Staffordshire Joint Hospital Board, on May 27, 1943. The origin of that agreement is to be found in the provisions of the Public Health Act, 1936, s. 6 (1) of which provided for the union, by order made by the Minister of Health, of districts for purposes which included the provision of hospitals. The governing body of a united district was a joint board: see s. 6 (2); and it was provided by s. 7 (1) that:

"A local authority having jurisdiction in any part of a united district shall cease to discharge in relation thereto any functions which are functions of the joint board . . ."

That was subject to two provisos the operation of which depended on authorisation by or the approval of the Minister of Health. A provision in s. 6 (4) of the Act compelled a provisional order made by the Minister, if it was opposed, to be confirmed by Parliament. In pursuance of those provisions the Minister made an order which was opposed by the Stafford Corporation and which, therefore, had to be approved by Parliament, it being eventually brought into effect by the Minister under the title of the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938. Pursuant to that, the Mid-Staffordshire Joint Hospital Board came into being, and, after some attempts by the corporation to secure the continuance of their operations notwithstanding the order, finally, on the footing that it would take ten years for the joint board to provide the isolation hospital which was to be built, the agreement of May 27, 1943, was entered into by which the joint board acquired a tenancy for ten years from Oct. 1, 1941, of the property in question, with an option for a further period of ten years after the expiration of that primary term. The result was that immediately before the appointed day operative under the provisions of the National Health Service Act, 1946, this property was being used by the joint board for the purposes of an isolation hospital, the joint board holding the tenancy for the term of ten years from Oct. 1, 1941, with a possible extension for a further ten years, subject to which the fee simple in the property was vested in the corporation.

The question which I have to decide is whether, in addition to the leasehold term which indisputably vested in the Minister under the provisions of the National Health Service Act, 1946, there also vested in the Minister under the

Act the fee simple reversion which was retained by the corporation. It is claimed by the Minister that under s. 6 (2) of the National Health Service Act, 1946, the fee simple is vested in him as well as the term of years. Section 6 (1) provides:

"Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section."

Referring to the definition section, s. 79 (1), I find that the word "voluntary" is defined as meaning "not carried on for profit and not provided by a local or public authority". I also find that "local authority" means

"the council of a county or county borough, the Common Council of the City of London, the council of a metropolitan borough and the council of a county district",

which last would apply to Stafford Corporation. The same definition also includes: "(a) any joint board constituted under the Public Health Act, 1936 . . ." or under the other Acts which are mentioned in the definition, so not only Stafford Corporation, but also the Mid-Staffordshire Joint Board, would be included in the definition of a local authority.

With those provisions in mind I turn to s. 6 (2), which is in these terms:

"Subject to the provisions of this Act, there shall also, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all hospitals vested in a local authority immediately before the appointed day, and all property and liabilities held by a local authority, or to which a local authority were subject, immediately before the appointed day, being property and liabilities held or incurred solely for the purposes of those hospitals or any of them or for the purpose of securing accommodation for persons in the area at any hospital not vested in the authority".

The first thing which strikes one on reading that sub-section after having also read sub-s. (1) is that, whereas sub-s. (1) refers to "interests in or attaching to premises", which suggests that the quality of ownership was evidently before the mind of the draftsman when he was dealing with voluntary hospitals, when one comes to sub-s. (2) one finds no reference to interests at all, but a reference to "all hospitals vested in a local authority". It would appear that the draftsman of the Act, when he dealt with hospitals belonging to a local authority, if I may use that term, had in mind simply the corporeal existence of the hospital as a building or an activity which was conducted by or on behalf of the local authority, and it does not appear to have occurred to him that the hospital might not be vested solely in the local authority so far as all interests in land were concerned otherwise than for all time in fee simple. It does not appear to have occurred to him that a local authority might be carrying on a hospital on land in which it had only a very limited interest, such as a short term of years. It appears to have been assumed that nobody other than the local authority would be interested in the land on which the hospital stood, and so, if a certain construction were put on the sub-section, it might result in the appropriation of a

citizen's property entirely without compensation. If I look at a hospital merely as a building or activity carried on by a local authority immediately before the appointed day, I might find that there was a short leasehold interest vested in the local authority and that, subject to that, the site of the hospital belonged in fee simple to some private person. If I then construe the sub-section as simply vesting the hospital without further consideration in the Minister without regard to the interests of other persons in the land concerned, it would appear that the sub-section would have the effect of depriving a private person of his fee simple without any provision for compensation.

I cannot believe that that was the intention of the sub-section, and I conclude, therefore, that some limitation must be put on the apparently all-embracing words "all hospitals vested in a local authority". I think what must be vested in the Minister of Health must be a hospital, meaning the site and activities to the extent to which the site or the interests in the site are vested in a local authority. Accordingly, I find that there is a further question to be considered before I can reach the conclusion in the present case. Two local authorities were concerned. First, there was the Mid-Staffordshire Joint Hospital Board, which had a leasehold term and was actually carrying on the activities of an isolation hospital on the site in question. Secondly, there was Stafford Corporation, which, subject to the rights conferred by the agreement of May 27, 1943, owned the land in fee simple, and was by no means tied to the use of that land for the purposes of a hospital because the land was owned by the corporation as corporate property and, under the provisions of s. 163 of the Local Government Act, 1933, it could be applied by the corporation, subject to the approval of the Minister, to any other purpose for which the local authority were authorised to acquire land. Consequently, it is urged that, if I hold that the fee simple is vested by this sub-section in the Minister of Health, the result is also to deprive without compensation the Stafford Corporation of its property applicable for other purposes than a hospital.

It is a matter which appears to me to be of considerable difficulty. I have taken one step, which is to limit the interests transferred by this sub-section to interests in the land vested in a local authority, and the question is whether I ought to impose a further limitation on the construction of this sub-section. It seems to me that I must apply the sub-section according to the words which are used, and that, if there is any interest in land which is used for the purposes of a hospital immediately before the appointed day, I must regard this sub-section as transferring to the Minister the interests in that land which are vested in any local authority. Therefore, while in some respects the result is rather surprising, I come to the conclusion, invoking the Interpretation Act, that the provisions of this sub-section may apply to two or more local authorities as well as to one. Consequently, it seems to me that, this being land on which the activities of a hospital were carried on immediately before the appointed day, whatever interests in that land were vested in a local authority are transferred by this sub-section to the Minister of Health, and that not only the leasehold term, which was held by the Mid-Staffordshire Joint Board, but also the fee simple interest, which was owned by Stafford Corporation, were vested in the Minister by the provisions of s. 6 (2) of the Act of 1946.

Order accordingly.

Solicitors: *Solicitor, Ministry of Health; Sharpe, Pritchard & Co., agents for T. B. Nowell, town clerk, Stafford (for the defendants).*

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

LAWES v. CAULCUTT.

[QUEEN'S BENCH DIVISION (Gorman, J.), February 25, 28, 1952.]

Agriculture—Agricultural holding—Notice to quit—Resumption of occupation by landlord—Occupation by landlord for twelve months immediately before tenancy—Need of personal occupation—Agricultural Holdings Act, 1948 (c. 63), s. 24 (3) (a).

After being in occupation of an agricultural holding for seven years the owner died on Feb. 7, 1946, leaving his wife (hereinafter called "the landlord") as sole executrix and sole beneficiary. She continued to occupy the holding, and on Sept. 21, 1946, she let the holding to a tenant from Oct. 11, 1946, "on a yearly tenancy until twelve months' notice to quit in writing is given by either party to the other of them upon the express terms that if the landlord desires to resume occupation before the expiration of seven years from Oct. 11, 1946, the landlord shall be entitled to give notice to quit without becoming liable to pay the tenant any compensation for disturbance in accordance with s. 12 (7) (g) of the Agricultural Holdings Act" (the Act in force at that time being the Agricultural Holdings Act, 1923). By a notice dated Oct. 10, 1950, and purporting to be a notice within s. 24 (3) of the Agricultural Holdings Act, 1948, the landlord gave the tenant notice to quit on Oct. 11, 1951, on the following grounds: "(i) The holding was let upon the express terms that if the landlord desired to resume occupation before the expiration of seven years from Oct. 11, 1946, the landlord should be entitled to give notice to quit without becoming liable to pay to the tenant any compensation for disturbance in accordance with s. 12 (7) (g) of the Agricultural Holdings Act, 1923, and (ii) The notice is given pursuant to s. 24 (3) of the Agricultural Holdings Act, 1948, so as to enable the landlord to resume occupation of the holding within the specified period." On Oct. 28, 1950, the tenant gave the landlord a counter-notice under s. 24 (1) of the Act of 1948 requiring that that sub-section should apply to the notice. The landlord did not seek the consent to the notice of the Minister of Agriculture under s. 24 (1), and, therefore, the Minister had not consented to the operation thereof.

HELD: the landlord entitled by reason of s. 24 (3) (a) of the Act of 1948 to serve a valid notice to quit without obtaining the consent of the Minister was a landlord who had himself been in occupation of the agricultural holding for not less than twelve months immediately before the creation of the tenancy; occupation during part of that period by the landlord giving the notice to quit and during part of it by a preceding landlord did not constitute "occupation" within s. 24 (3) (a); and, therefore, as the landlord in the present case had not personally been in occupation for the necessary period, she was not entitled to take advantage of s. 24 (3), and, the consent of the Minister to the notice not having been obtained, the notice was invalid.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 24 (3) (a), see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 47.

ACTION for a declaration that a notice to quit, dated Oct. 10, 1950, served by the landlord, Mrs. Gladys Marguerite Lawes (formerly Mullett), on the tenant requiring him to quit Thorley Manor Farm, Yarmouth, Isle of Wight, was a valid, effective and operative notice to quit, and that, by virtue of it, the tenant was bound to quit and yield up possession of the farm on Oct. 11, 1951. The tenant counterclaimed that there was no valid, effective, or operative notice requiring him to quit the farm, and that he was entitled to remain in occupation after Oct. 11, 1951, by virtue of a memorandum of agreement dated Sept. 21, 1946.

Thorley Manor Farm was an agricultural holding comprising a farm house, five cottages, land, and buildings of an area of 398 acres, which was acquired by a Mr. R. S. B. Mullett on the death of his father in 1939, and until 1946 was occupied and worked by him, his wife (the present landlord and the plaintiff in the action), and one son. On Feb. 7, 1946, Mr. Mullett died, leaving the landlord his sole executrix and beneficiary. She continued to occupy and work the farm. By a memorandum of agreement dated Sept. 21, 1946, less than twelve months after the landlord became owner of the farm, she agreed to let the farm to the tenant

“from Oct. 11, 1946, on a yearly tenancy until twelve months’ notice to quit in writing is given by either party to the other of them upon the express terms that if the landlord desires to resume occupation before the expiration of seven years from Oct. 11, 1946, the landlord shall be entitled to give notice to quit without becoming liable to pay the tenant any compensation for disturbance in accordance with s. 12 (7) (g) of the Agricultural Holdings Act [1923].” *

In pursuance of the agreement in October, 1946, the landlord left the farm and the tenant went into occupation and worked it. By a notice dated Oct. 10, 1950, the landlord, through her solicitors, gave the tenant notice to quit the farm in the following terms:

“As solicitors and agents for Gladys Marguerite Lawes (formerly Mullett) your landlord, we hereby give you notice to quit and deliver up to her possession of all that holding and premises known as Thorley Manor, and situate at Yarmouth in the Isle of Wight, which you hold of her as tenant thereof, on Oct. 11, 1951, or at the expiration of the year of your tenancy which shall expire next after the end of twelve months from the date of service of this notice. This notice is given on and for the following grounds and reasons: (i) The holding was let upon the express terms that if the landlord desired to resume occupation before the expiration of seven years from Oct. 11, 1946, the landlord should be entitled to give notice to quit without becoming liable to pay to the tenant any compensation for disturbance in accordance with s. 12 (7) (g) of the Agricultural Holdings Act, 1923. (ii) The notice is given pursuant to s. 24 (3) of the Agricultural Holdings Act, 1948, so as to enable the landlord to resume occupation of the holding within the specified period.”

The tenant gave the landlord a counter-notice, dated Oct. 28, 1950, in the following terms:

“I hereby give you a counter-notice that I require s. 24 (1) of the Agricultural Holdings Act, 1948, to apply to the notice to quit all that holding of premises known as Thorley Manor and situate at Yarmouth in the Isle of Wight which I hold as tenant thereof and which notice to quit is dated Oct. 10, 1950, it being maintained by me that s. 24 (3) of the Agricultural Holdings Act, 1948, pursuant to which the said notice to quit was given to me has no application to the said holding for the reason that the landlord had not for a period of not less than twelve months immediately before the creation of the said tenancy been in occupation of the said holding.”

The Minister of Agriculture and Fisheries was not asked to consent to the operation of the notice to quit.

The landlord contended that the farm had been occupied by the landlord of the farm for the twelve months immediately before the creation of the tenancy, i.e., by herself as landlord for seven and a half months immediately before the tenancy and by her husband as landlord for the preceding four and a half months, the need to obtain the consent of the Minister to the operation of the notice to quit under s. 24 (1) of the Act of 1948 was dispensed with by virtue of s. 24 (3). The

* See now Agricultural Holdings Act, 1948, s. 24 (3).

tenant submitted that the twelve months' occupation by the landlord immediately before the creation of the tenancy meant continuous occupation for the twelve months by the landlord who actually created the tenancy, and that, as the plaintiff had been landlord for only seven and a half months before the tenancy, s. 24 (3) of the Act did not apply and the notice to quit was bad.

Molony for the landlord.

Heathcote-Williams, Q.C., and *Aggs* for the tenant.

Cur. adv. vult.

Feb. 28. **GORMAN, J.**, stated the facts and continued: At the time of the agreement of tenancy the Agricultural Holdings Act, 1923, was in force. The Agriculture Act, 1947, and the Agricultural Holdings Act, 1948, were subsequently passed, and the Act of 1948 was in operation when the notice to quit was given by the landlord to the tenant. Section 12 (7) (g) of the Act of 1923, referred to in the memorandum of agreement, although the date is not mentioned, provides that compensation shall not be payable under s. 12

"where a written contract of tenancy has been entered into (whether before or after the commencement of this Act) for the letting by the landlord to the tenant of a holding, which at the time of the creation of the tenancy had then been for a period of not less than twelve months in the occupation of the landlord, upon the express terms that if the landlord desires to resume that occupation before the expiration of a specified term not exceeding seven years the landlord should be entitled to give notice to quit without becoming liable to pay to the tenant any compensation for disturbance, and the landlord desires to resume occupation within the specified period, and such notice to quit has been given accordingly."

It is said that the present tenancy agreement had in contemplation that section of the Act. By s. 57 (1) of the same Act:

"In this Act, unless the context otherwise requires . . . 'Landlord' means any person for the time being entitled to receive the rents and profits of any land."

There was, therefore, in the Act a protection given in respect of compensation, but not in respect of a notice to quit.

Section 30 of the Agriculture Act, 1947, dealt with compensation for disturbance, replacing most of the provisions of ss. 12 to 14 of the Act of 1923. Section 30 (8) provided:

"Nothing in this section shall apply to a notice to terminate a tenancy of a holding subsisting under a written contract entered into before Mar. 25, 1947—(a) where immediately before the creation of the tenancy the holding had been for a period of not less than twelve months in the occupation of the landlord; (b) the holding is let upon the express terms that if the landlord desires to resume that occupation before the expiration of a specified period not exceeding seven years the landlord shall be entitled to give notice to quit without becoming liable to pay to the tenant any compensation for disturbance; and (c) the notice to terminate the tenancy is given so as to enable the landlord to resume occupation of the holding within the specified period."

That sub-section excluded the landlord's liability to pay compensation for disturbance where before Mar. 25, 1947, he entered into an agreement with the tenant that he should have the right to resume possession of the holding within a specified period not exceeding seven years, provided the landlord had been in occupation of the holding for a period of not less than twelve months immediately before the creation of the tenancy and provided the notice to determine the tenancy was given so as to enable him to resume occupation of the holding within the specified period. It will be seen that, by virtue of s. 31 (10), where

ability for compensation was so excluded by s. 30 (8) of the Act, the protection given to the tenant by the requirement in s. 31 (1) that the Minister must consent to the operation of the notice was also excluded. Section 31 (1) of the Act of 1947 (which had no counterpart in the Act of 1923) gave to the tenant an additional form of security. It provided:

"Where notice to quit a holding or part of a holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord notice in writing requiring that this sub-section shall apply to the notice to quit, then subject to the provisions of the next following sub-section the notice to quit shall not have effect unless the Minister consents to the operation thereof."

Under that section, if a counter-notice was given to a notice to quit, the consent of the Minister was necessary to the operation of the notice. By s. 31 (10):

"Nothing in this section shall apply to any such notice as is specified in "

s. 30 (8), which I have just read. The requirement of the consent of the Minister under s. 31 (1), therefore, did not apply to a notice given under s. 30 (8).

The Agricultural Holdings Act, 1948, repealed s. 30 and s. 31 of the Act of 1947, s. 24 replacing the sections relevant in this case. The marginal note of s. 24 of the Act is: "Restrictions on operation of notices to quit." By sub-s. (1):

"Where notice to quit an agricultural holding or part of an agricultural holding is given to the tenant thereof, and not later than one month from the giving of the notice to quit the tenant serves on the landlord a counter-notice in writing requiring that this sub-section shall apply to the notice to quit then, subject to the provisions of the next following sub-section, the notice to quit shall not have effect unless the Minister consents to the operation thereof."

The provisions of that sub-section have been complied with here. A notice to quit was given, and also a counter-notice in writing requiring that the sub-section should apply. No consent of the Minister has been given or sought. By sub-s. (3):

"Nothing in this section shall apply to a notice to terminate a tenancy of an agricultural holding subsisting under a written contract entered into before Mar. 25, 1947—(a) where, immediately before the creation of the tenancy, the holding had been for a period of not less than twelve months in the occupation of the landlord; (b) the holding is let upon the express terms that, if the landlord desires to resume that occupation before the expiration of a specified period not exceeding seven years, the landlord shall be entitled to give notice to quit without becoming liable to pay to the tenant any compensation for disturbance; (c) the notice to terminate the tenancy is given so as to enable the landlord to resume occupation of the holding within the specified period."

This sub-section creates an exception to the operation of sub-s. (1), removing, if it is complied with, the protection given to the tenant by the requirement that the consent of the Minister shall be obtained to the operation of a notice to quit under that sub-section. This lessens the protection given to the tenant vis-à-vis the landlord and gives the landlord more freedom to determine the tenancy. I have also been referred to s. 34, relating to compensation for disturbance. By s. 94 (1) (the interpretation section):

"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say . . . 'landlord' means any person for the time being entitled to receive the rents and profits of any land."

This definition of "landlord" is as in the Act of 1923, but (and this is of crucial importance here) it must now be read with the opening words of s. 94 (1).

The landlord contended that the case comes under s. 24 (3) of the Act of 1948, and that the notice to quit does not require the consent of the Minister to its operation because these terms of s. 24 (3) (a)—

“where, immediately before the creation of the tenancy, the holding had been for a period of not less than twelve months in the occupation of the landlord”—

had been complied with. She said that for a period of not less than twelve months before the tenancy the farm was occupied by her as landlord or her husband as landlord. The present landlord succeeded to the farm on Feb. 7, 1946, and the tenancy agreement was made on Sept. 21, 1946, but for seven years before that the present landlord's husband had been in occupation as landlord. The present landlord, therefore, had been in occupation as landlord some seven and a half months before the date of the agreement and her husband for the balance of the twelve months before that. Counsel contended that, although there was a break in the identity of the landlord, there was no time in the previous twelve months when a tenant was in occupation, and that the break in the continuity of the personality of the landlord was immaterial. It was submitted that the test under the Act was: Was there a landlord in occupation? If there was, the fact that there was a change in the personality of the landlord within the continuity of the occupation by a landlord, by death, by a voluntary assignment, by an involuntary act, by a mortgagee going into possession, or otherwise, was immaterial. If that contention is right, it followed that, however many times the landlord changed in the course of the twelve months before the creation of the tenancy, provided each landlord was in occupation, each landlord got the protection of the Act and the tenancy could be terminated without the consent of the Minister. A landlord, it was urged could even sell the holding with the benefit of this protection, and it was claimed that the fact that the landlord in this case succeeded, not as a result of a sale, but as the beneficiary under her husband's will, would not affect the position.

In support of his contention counsel referred to s. 92 (5) and s. 25 (1) (d) of the Act of 1948, and submitted that the landlord was a legal conception who might be a different person at different times. He said that the word “landlord” in s. 24 (1) obviously might apply to different persons since, whoever created the tenancy, the person entitled to give the notice to quit under that sub-section must be the landlord at the time of the giving of the notice and not a former landlord who might then be dead. He said that “landlord” in s. 24 (1) meant the person entitled for the time being to receive the rents and profits of the land, that the provision in s. 24 (3) (c) was simply specifying that the notice must be given within a certain time, and that the word “landlord” must have the same meaning in sub-s. (1) and in sub-s. (3) (a), (b) and (c) of that section since there was nothing in the context which required the word to have different meanings in different provisions of the Act. Section 24 (3), however, was an exception to s. 24 (1).

Counsel for the tenant, basing his argument on s. 24 (3) (a), contends that the notice was bad because the landlord who in fact gave it was not in occupation of the farm for a period of not less than twelve months before the creation of the tenancy. He says that one cannot add together the period of occupancy of different landlords to make the total period of occupation up to the requisite twelve months, and he called my attention to the opening words of s. 94 (1) of the Act:

“In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say . . . ‘landlord’ means any person for the time being entitled to receive the rents and profits of any land.”

He contended that the context here required that the person whose occupancy for twelve months was to be considered was the actual person creating the tenancy and this limited the meaning of “landlord” in the definition. He said that the

words "immediately before the creation of the tenancy" were only applicable to the person who created the tenancy and were not of general application to all landlords in occupation during the vital twelve months. Sub-section (3), it was argued, was an exception to sub-s. (1) conferring special privileges on a special landlord, and "landlord" did not mean the landlord and his predecessors in title. He said that what was envisaged here was that, if for some reason a landlord in occupation had to give up his occupation and subsequently desired to come back into occupation within the specified period not exceeding seven years, he could do so without suffering the disability of having to obtain the consent of the Minister. The wording of s. 24 (3) (b) was important:

"the holding is let upon the express terms that, if the landlord desires to resume that occupation before the expiration of a specified period not exceeding seven years, the landlord shall be entitled . . ."

In the phrase "to resume that occupation" what was the meaning of "that occupation" except the occupation in which the landlord was before the creation of the tenancy agreement? Could it be said that a man could resume something which he had never previously had? If the contention of the landlord was right and, so long as a landlord was in occupation during the necessary twelve months, it mattered not how many landlords there were, or who of those numerous landlords was the person who could resume occupation? If there was a sale of the land during that period and each of the persons becoming landlord was in occupation, who could demand to go back? Was it the first, second, third, or the one who was in occupation "immediately before the creation of the tenancy"? The contention of the tenant in sum was that the landlord was, not a mere legal conception, but the person who had enjoyed occupation for a continuous period of twelve months, and it was only to such a person that the legislature gave the right to resume his occupation without getting the consent of the Minister. Counsel dealt also with the point raised by counsel for the landlord in respect of s. 92 (5) and s. 25 (1) (d), saying that there was no possible ambiguity in s. 24 of the Act as there might well be in the other two sections, that the scheme of the Act was to prevent eviction, and that s. 24 (3) was by way of an exception to the landlord's general obligation under s. 24 (1) to get the Minister's consent to the operation of the notice to quit before it could be deemed to be a good one.

In my view, s. 24 (3) is clearly an exception to s. 24 (1). It may well be contemplated that in s. 24 (1) the landlord is the person for the time being entitled to receive the rents and profits of the land, but, if the landlord's contention is right, any person being a landlord in occupation during the twelve months is protected by s. 24 (3), and that however he became landlord, whether as an executor, a mortgagee in possession, or a purchaser with a saleable right, for it was not contended that the act of devolution by which a person became the landlord affected the position. I have considered also the possible effects on s. 24 (3) (b) of the landlord's contention that the landlord under s. 24 (3) (a) is any landlord in occupation irrespective of person. Looking at the whole position and interpreting s. 24 (3) as I think it should be interpreted, I am of the opinion that the tenant's contention is right and that the obligation under s. 24 (3) (a) that the landlord shall have been in occupation for a period of not less than twelve months is not covered by the submissions made to me on behalf of the landlord. The present landlord was not in occupation of the farm during the period of twelve months before the creation of the tenancy. In my opinion, the context of the enactment connotes a particular landlord—the landlord who granted the tenancy and was himself in occupation not less than twelve months immediately before the granting of the tenancy. The present landlord does not fulfil those requirements, and, therefore, the notice to quit was not valid and the landlord's claim fails.

Judgment for tenant.

Solicitors: *Lake & Son*, agents for *Roach, Pittis & Co.*, Newport, Isle of Wight (for the landlord); *Holloway, Blount & Duke* (for the tenant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

ALFORD *v.* NATIONAL COAL BOARD.

[HOUSE OF LORDS (Lord Normand, Lord Reid, Lord Tucker and Lord Cohen),
January 16, 17, March 6, 1952.]

Mine—Coal mine—Shot-firing—Shot fired by unqualified miner—Apparatus operated by pair of pliers—Cable left in wrong position by authorised shot-firer—General Regulations, 1913 (S.R. & O., 1913, No. 748), reg. 28, made under Coal Mines Act, 1911 (c. 50), s. 86—Explosives in Coal Mines Order, 1934 (S.R. & O., 1934, No. 6), cl. 2 (h), cl. 2 (i).

On Nov. 11, 1948, the appellant, a miner employed by the respondents, prepared shot holes in the face of his working place, No. 5 room, and was on the way to take shelter while the shots were fired. The authorised shot-firer, having to fire shots both in that room and in the adjoining room (No. 6), coupled up the holes in the two rooms to different cables, but left both outbye cable ends near the same shot-firing apparatus. In breach of the Explosives in Coal Mines Order, 1934, cl. 2 (h) and cl. 2 (i), another miner, M., who had prepared the shot-holes in No. 6 room and who was not an authorised shot-firer, connected the cable from No. 5 room to the firing apparatus, in the mistaken belief that he was connecting the cable from No. 6 room. He then operated the apparatus by inserting a pair of pliers, or similar instrument, into the socket meant for the handle, and fired the shots before the appellant had reached shelter, with the result that the appellant was injured. In a claim against the respondents for damages for breach of statutory duty, the appellant alleged breaches of cl. 2 (h) and cl. 2 (i) of the Explosives in Coal Mines Order, 1934. He further alleged a breach of reg. 28 of the General Regulations, 1913, in that the authorised shot-firer had contravened proper and normal mining practice by failing to lead the outbye end of the cable from No. 5 room to a point between No. 4 and No. 5 rooms in the heading with the result that M. was misled into firing the shots in No. 5 instead of No. 6 room.

HELD: (i) as M. was not acting within the scope of his employment in operating the firing apparatus, the respondents were not liable for his breach of cl. 2 (h) and cl. 2 (i) of the order of 1934.

M'Aulay v. James Dunlop & Co., ([1926] A.C. 377), followed.

(ii) the words "handle or plug" in cl. 2 (i) (i) of the order of 1934 suggested simple tools and not something of an intricate pattern for which no substitute could be found, and the obligation in the sub-clause that the shot-firer should keep the handle or plug in his possession, did not imply any specialty of design; the obligation that the handle should be kept in the custody of the shot-firer could be regarded as a precaution against the act of an unauthorised person who might find the handle lying beside the battery, and as an indication that such an act should be kept in view by a shot-firer as a likely cause of danger, but there was no obligation on the respondents to provide a "fool-proof" handle; and, therefore, there was no breach of cl. 2 (i) (i).

(iii) there was no breach of reg. 28 of the General Regulations, 1913, unless it was proved that the act or omission complained of was negligent or wilful, and, where (as in this case) the act was alleged to be negligent, negligence in the common law sense had to be proved; (per LORD NORMAND, LORD TUCKER and LORD COHEN) to establish that the respondents, by their servant, the authorised shot-firer, were in breach of reg. 28, in that the shot-firer had contravened proper and normal mining practice by failing to lead the outbye end of the cable from No. 5 room to a point between No. 5 and No. 4 rooms in the heading, it would be necessary to show that such a practice existed, and, if it did, what its purpose was; and, therefore, the case should be remitted for evidence on these points.

Per LORD REID: even if the practice of leading the outbye end of the cable from No. 5 room to a point between No. 4 and No. 5 rooms in the heading was proved to have existed, it was not open to the appellant on his averments to lead evidence to show why it existed.

AS TO REGULATIONS GOVERNING THE USE OF EXPLOSIVES IN MINES, see HALSBURY, Hailsham Edn., Vol. 22, p. 803, para. 1656; and FOR CASES, see DIGEST, Vol. 34, pp. 301-303, Nos. 2498-2506, and pp. 744, 745, Nos. 1190-1195.

Case referred to:

(1) *M'Aulay v. Dunlop (James) & Co.*, [1926] A.C. 377; 95 L.J.P.C. 130; 135 L.T. 164; 19 B.W.C.C. 1; 34 Digest 301, 2499.

APPEAL from an interlocutor of the First Division of the Court of Session (LORD COOPER (Lord President), LORD CARMONT and LORD KEITH), dated Dec. 12, 1950, adhering to the interlocutor of LORD BLADES (Lord Ordinary), dated June 22, 1950, dismissing an action by the appellant, a miner, in respect of injuries sustained by him on Nov. 11, 1948, in the course of his employment by the respondents, the National Coal Board. The accident occurred as the result of a shot being fired by another miner, who was not an authorised shot-firer and who had operated the shot-firing apparatus by inserting a pair of pliers, or similar instrument, in the apparatus. The appellant contended that the respondents were guilty of breaches of statutory duty (i) under the General Regulations, 1913, reg. 28, made under the Coal Mines Act, 1911, s. 86, (ii) under the Explosives in Coal Mines Order, 1934, cl. 2 (*h*) and cl. 2 (*i*), and (iii) under cl. 2 (*i*) (i) of the order of 1934. LORD BLADES (Lord Ordinary) held that there had been no breach of statutory duty on the part of the respondents and his decision was upheld by the First Division of the Court of Session.

Pritt, Q.C., *Graham-Guest, Q.C.* (of the Scottish Bar), and *Grieve* (of the Scottish Bar) for the appellant.

Morison, Q.C. (of the Scottish Bar), *W. I. R. Fraser* (of the Scottish Bar) and *J. C. B. W. Leonard* for the respondents.

The House took time for consideration.

Mar. 6. The following opinions were delivered.

LORD NORMAND: My Lords, in this appeal the question has to be decided whether the appellant has relevantly averred breach of statutory duty on the part of his employers, the respondents. The facts averred are as follows. The appellant and another man, employed as ordinary miners, having prepared shot holes in the face of their working place, No. 5 room off No. 2 heading in Thornton Mine, were about to leave their working place to take shelter while the shots were fired. The electric cable for firing the shots had been coupled up to these holes by the authorised shot-firer, Moir, but had not been connected to the firing battery. In the adjoining working place, No. 6 room, in the same heading, shot holes had been bored and stemmed by another miner, named Morgan, Moir had coupled up these also to another electric cable and he had left the outbye end of this cable close to the outbye end of the cable connected to the holes in No. 5 room. Both outbye cable ends were left by Moir near the same firing battery in the heading. Morgan connected the cable from No. 5 room to the firing battery in the mistaken belief that he was connecting the cable from No. 6 room. He then operated the battery by inserting into the socket meant for the handle a pair of pliers, or a similar instrument, and so fired the shots in No. 5 room injuring the appellant, who had not reached shelter. It is agreed that Morgan was not an authorised shot-firer.

Three grounds of action are alleged. The first is a breach of reg. 28 of the General Regulations, 1913, made under the Coal Mines Act, 1911, s. 86. Regulation 28 provides:

"No person employed in or about the mine shall negligently or wilfully do anything likely to endanger life or limb in the mine, or negligently or

wilfully omit to do anything necessary for the safety of the mine or of the persons employed therein."

The averments of breach of this regulation will have to be closely examined, but in the meantime it is enough to say briefly that Moir is charged with contravening proper and normal mining practice by failing to lead the outbye end of the cable from No. 5 room to a point between No. 4 and No. 5 rooms in the heading with the result that Morgan was misled into firing the shots in No. 5 instead of in No. 6 room. The second ground of action is that Morgan infringed cl. 2 (h) and cl. 2 (i) of the Explosives in Coal Mines Order, 1934, made under the Coal Mines Act, 1911, s. 61. Clause 2 (h) provides:

"Where shots are fired electrically they shall only be fired by a person authorised in writing by the manager for the purpose. The authorised person . . . shall . . . himself couple the cable to the firing apparatus."

Clause 2 (i) provides:

"No unauthorised person shall open or interfere with any electrical shot-firing apparatus."

The third ground of action is that the respondents were in breach of other provisions of cl. 2 (i) which follow immediately after those already quoted. These provisions are:

"Every electrical shot-firing apparatus shall be so constructed and used (i) that it can only be operated by a removable handle or plug. This handle or plug shall not be placed in position until a shot is about to be fired and shall be removed as soon as a shot has been fired, and it shall at all times whilst the authorised person is on duty be kept in his personal custody."

LORD BLADES, Lord Ordinary, held that the averments in support of each one of these grounds of action were irrelevant and his judgment was affirmed by the First Division. The Lord President (LORD COOPER) delivered the only judgment, LORD CARMONT and LORD KEITH concurred.

My Lords, I have felt no difficulty about the second and third grounds of action, and I shall dispose of them first. The second ground of action is clearly excluded by the decision of this House in *M'Aulay v. James Dunlop & Co.* (1). That was a workmen's compensation case in which a miner, not being an authorised shot-firer, coupled a cable to the detonator while the shot-firer was moving the battery handle, which had jammed. The result was an explosion in which a miner was killed. It was necessary to determine whether the miner who coupled the cable to the detonator, and who was not an authorised shot-firer, was acting within the scope of his employment. It was held that he had overstepped the limits of his employment and, therefore, that his employers were not answerable for his breach of the regulations, which were in the same terms as those in the instant case. There are in the present case averments that the motive in infringing the regulations was to speed up production. But motive is irrelevant to the question whether Morgan was doing what he was employed to do. I entirely agree with the opinions of the Lord Ordinary and the Lord President on this branch of the case and need say no more.

On the third ground of action the Lord Ordinary held that, esto there was a breach of the regulations, that breach did not cause the injury suffered by the appellant. The Lord President held that there was no provision whereby a coal owner is guilty of negligence if he provides shot-firing batteries which are not incapable of being operated by a person who makes an attack on them with a pair of pliers, and, further, that the fundamental and sole operative cause of the injury suffered by the appellant was the act of interference by Morgan. My Lords, I think that it is first necessary to construe cl. 2 (i) (i) of the order of 1934 and to determine whether there has been a breach. The appellant's submission was that the regulation requires that the handle should be of special design, like that, for example, of the key of a Yale lock, and that the socket into which it

fitted should be designed so that only its special key would fit it. He also submitted that, if that were so, the inference would inevitably arise that the purpose and intention of the regulation was to make the apparatus "fool-proof" against the interference of an ordinary miner disposed to trespass beyond the sphere of his employment and to fire the shot by using an instrument like a pair of pliers. On that view of the meaning of the regulation, there could be much to be said for the averment that the breach of the regulation caused the accident. But, if it was intended to prescribe a key of peculiar design, it would be difficult to choose words less apt for that purpose than the words "handle or plug". "Handle" does not suggest any specialty of design, and "plug" suggests a plain blunt piece of wood or other material. The obligation that the shot-firer shall keep the handle or plug in his possession does not imply any specialty of design. All that is prescribed about the form of the handle is that it shall be removable and the purpose so far may only be to provide against the firing of a shot through an accidental or negligent contact with a fixed handle. The further obligation that the handle shall be kept in the custody of the shot-firer may go further than that and it may be possible to regard it as a precaution against the act of an unauthorised person who might find the handle lying beside the battery, and an indication that such an act should be kept in view by a shot-firer as a likely cause of danger. But there is no obligation to provide a "fool-proof" handle, and there has been no breach of the regulation. The battery could not be operated except by a movable handle or plug. The handle was kept in Moir's custody, but unfortunately Morgan operated the battery by what was in his hands a movable plug. I think, therefore, that the averments on this branch of the case are irrelevant, though not altogether for the reasons given in the courts below.

On the first ground of liability alleged, the Lord Ordinary and the First Division held that the shot-firer had no duty to provide against the acts of unauthorised persons acting contrary to statutory prohibition and that the alleged fault of the shot-firer could not in any event be held to have caused or contributed to the accident. Again, the first question is: What is the meaning of reg. 28 of the General Regulations, 1913? Counsel for the appellant argued that it was more than a formulation of a common law duty. His argument was subtle and refined, and I am not sure that I followed it completely. But it led to the conclusion that anyone who did anything likely to endanger life or limb in the mine, or omitted to do anything necessary for the safety of the persons employed therein, must be deemed to have acted, or omitted to act, negligently or wilfully. The argument was supported by the submission that the regulation must be supposed to have done more than enact the common law of negligence unless it was to be held superfluous. These arguments are, in my opinion, fallacious. The words "negligently" and "wilfully" have a well recognised significance in law and it will not do to treat them as having a meaning so artificial and recondite that they really cease to have any effect. And the formulation of a common law duty as a statutory regulation has the formidable effect of subjecting those who infringe it to penal consequences. It also has the effect in a civil action of depriving the infringer of the benefit of the plea of *volenti non fit injuria*. To give statutory sanction to the common law obligation is by no means an otiose procedure. In my opinion, therefore, there is no breach of the regulation unless it is proved that the act or omission was negligent or wilful. Then it was said that there could be no negligence unless there was, at least, a duty to foresee a likelihood of some danger arising from the act or omission, and that there was no averment that the shot-firer ought to have foreseen that anyone would act in the way in which Morgan acted. Similarly, it was said that Morgan's unforeseeable action in disobedience to the statutory prohibition "broke the chain of causation". It was conceded, on the other hand, that if there had been an averment that accidents had recently occurred in the mine through the breach of cl. 2 (h) and cl. 2 (i) of the Explosives in Coal

Mines Order, 1934, the case might have been different and that there might then have been a sufficiently relevant case to go to proof. In view of some of the contentions advanced by counsel for the appellant, I wish to make it clear beyond all cavil that it would be incompetent to allow evidence that there had previously been other infringements of cl. 2 (*h*) and cl. 2 (*i*) either in this mine or in any other. There is no notice on record that such a case will be made and it is a fundamental rule that without notice on record a fact material for the pursuer's case or for the defence shall not be proved. But that does not end the question. What is averred is that it was the duty of the shot-firer to obey the terms of the regulation and that it was his duty and in accordance with proper and normal mining practice to lead the outbye end of the cable from No. 5 room to a point between No. 5 and No. 4 rooms in the same heading, that he failed to do this, and that but for this failure there would have been no risk of anyone confusing the cable with the cable to No. 6 room. These averments, construed without straining them seem to mean that the alleged practice was a precaution against the confusion by the shot-firer or others of one cable with another and the firing of shots in the wrong room, and that conformity with the practice was part of the duty flowing from the general duty not negligently to do anything likely to endanger life or limb in the mine and not negligently to omit to do anything necessary for the safety of those employed in the mine. If that is the meaning of the averments, I think that there is a sufficient averment of negligence and a sufficient averment that the negligence caused or contributed to the injury. It will, in my opinion, be competent to ask witnesses whether the practice averred exists, and, if it does, what its purpose is. But it will not be competent to carry the matter much further in view of the fact that neither party has averred any facts and circumstances to explain the origin of the practice.

The case is certainly narrow and difficult, and it would not be right to anticipate the questions which may arise. I wish not to hamper or embarrass the lord ordinary who may have to decide the case after the proof and I hope I have made it clear that I decide nothing except (i) that, on a sound construction of reg. 28, negligence in the common law sense must be proved, (ii) that there are averments which, reasonably construed, may infer a duty on the part of the shot-firer to have regard to the risk of confusion about the cables and of the consequent firing of shots in the wrong room, and (iii) that even the unlawful interference of a miner who is not an authorised shot-firer will not necessarily lead to absolvitor of the respondents on the ground that their breach of duty did not cause or contribute to the injury. All else is left for further decision after proof, which will technically be a proof before answer. In my opinion, this ground of action cannot be disposed of without proof, and I would allow the appeal to the extent of reversing the interlocutor so far as it sustains the respondents' first plea in law quoad the averments of breach of reg. 28. The case will be remitted to the Court of Session.

LORD REID stated the facts and said that, in regard to the second ground of action, he was in complete agreement with LORD NORMAND. Dealing with the third ground of action (*viz.*, the alleged breach of cl. 2 (*i*) (i) of the Explosives in Coal Mines Order, 1934), HIS LORDSHIP read the sub-clause and continued: Was it a breach of cl. 2 (*i*) (i) for the respondents to provide an apparatus which could be operated by the use of a pair of pliers? There appear to me to be two possible meanings of the regulation. One is that the apparatus must be so constructed that it cannot be operated by hand, but can only be operated by using some instrument or tool as a handle or plug. The other is that it must be impossible to operate the apparatus without using a handle or plug of a particular pattern: it must be like a well made lock which requires its own key. I do not think that the regulation can mean that anything which can properly be called a handle or plug may be usable, but that, if anything else can be used, there is an infringement. If a variety of handles or tools could be used, I do not see how

the apparatus could be designed to make it impossible to use a makeshift handle or tool. In this case, Morgan appears to have used his pliers as a makeshift handle. To my mind, the words "handle or plug" suggest simple tools and not something of an intricate pattern for which an effective substitute cannot readily be found. I think that, if the Board of Trade had intended that it was to be an offence to provide an apparatus which could be operated by a makeshift handle or plug, this should have been made clear. But it was argued that the purpose of cl. 2 (i) is to ensure safety, that safety is not ensured if the apparatus can be operated by something other than its own handle or key, and that, therefore, the regulation should be so construed as to require that the apparatus cannot be so operated. I cannot accept this argument. An apparatus which could be operated by hand without the use of any tool might be most unsafe. An unauthorised person might operate it by mistake or carelessly or acting on the spur of the moment. All these possibilities would seem to be excluded merely by ensuring that some tool is necessary and that it shall be taken away by the shot-firer when he is not using the apparatus. The only purpose of making it necessary to use a tool of a particular pattern would be to provide against serious and deliberate breaches of the law (for it is a serious offence for an unauthorised person to operate a shot-firing apparatus) and I see nothing in these regulations to indicate that this was the object of cl. 2 (i). I am, therefore, of opinion that, if the appellant's averments were proved, no infringement of this regulation would be established and, therefore, his averments on this matter are irrelevant.

The other alleged breach of a regulation involves much more difficult questions. It is alleged that Moir, the shot-firer, was in breach of reg. 28 of the General Regulations of July 10, 1913, made by the Home Secretary under the Coal Mines Act, 1911, s. 86. [LORD REID read the regulation, stated the relevant facts, and continued:] The fault alleged against Moir is that he had left the outbye ends of both cables at the same place in the heading. It is averred that proper and normal mining practice required him to lead the cable from Morgan's room to a different point in the heading and that, if that had been done, there would have been no risk of anyone mistaking the cable leading to the appellant's room for the cable leading to Morgan's room. Before considering the relevancy of these averments, I think it is necessary to determine the meaning of reg. 28. That regulation has no application unless the act or omission is negligent or wilful. It was argued that the word "negligently" in this regulation has a wider or different meaning from that which it has at common law. I can see nothing to support this argument. The principal purpose of the regulation appears to me to be subject to penalties conduct which, if it caused injury, would be a civil wrong giving rise to a right to reparation. In the present case, I do not think that the appellant's rights under the regulation are in any way different from his common law rights. If he could not recover damages at common law, he cannot do so under the regulation.

The question, then, is whether on his averments the appellant is entitled to prove enough to establish common law liability against Moir and, therefore, against his employers. This appeal must be decided on the assumption that the appellant will prove all that he has averred but nothing else, because he will not be entitled to lead evidence to prove any essential fact which he has not averred. So regarding the case, I have the greatest difficulty in seeing how the appellant can succeed, but, as your Lordships are, I understand, of a different opinion and the case must go back for proof on this matter, I think it better not to express my views at length. I shall, therefore, only state my views in a brief and tentative way and I shall not formally dissent.

In general, I do not think that a person is liable in damages because he has created an opportunity for another to break the law and thereby cause injury to a third person, but he may be liable if he ought to have known that it was likely that advantage would be taken of this opportunity. If facts had been averred to show that Moir knew or ought to have known that someone was likely to try

to fire a shot if he left a cable near the shot-firing apparatus, I would have had no difficulty. But that is not averred, all that is said is that Moir failed to act in accordance with proper and normal mining practice. No doubt, if the practice is proved to have existed, Moir knew or ought to have known of it, and, if the mere fact that the practice existed was enough to show that breaches of the law might be expected, and that the practice was intended to lessen the risk of an accident if such a breach occurred, then I would agree that the appellant's averment is sufficient. But it is not clear to me that the practice may not have existed for other reasons and I do not think that it is open to the appellant on his averments to lead evidence to show why it existed. I agree with my noble and learned friend, LORD NORMAND, that it is not open to the appellant, on his averments, to prove that there have been previous breaches of the law and I think it will be equally incompetent to prove any other facts to show that Moir had reason to suppose that a breach of the law might occur, and it seems to me that evidence that the practice existed because such breaches had occurred in the past, or because there had been reason to anticipate such breaches, would be open to the same objection. If the appellant intends to prove something beyond the mere existence of the practice, then he ought to have averred it. If he does not, then I am far from being convinced that he can succeed.

LORD TUCKER and **LORD COHEN** concurred in the opinion delivered by **LORD NORMAND**.

Appeal allowed to the extent of reversing the interlocutor so far as it sustained the respondents' plea in law in regard to the alleged breach of the General Regulations, 1913, reg. 28.

Solicitors : *Kenneth Brown, Baker, Baker*, agents for *J. and A. Hastie*, Edinburgh, and *Macbeth, Currie & Co.*, Dunfermline (for the appellant) ; *R. S. S. Allen*, agent for *James Allan*, Edinburgh (for the respondents).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

BOON v. BOON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), February 25, March 7, 1952.]

Execution—Exemption from civil process—Airman—Debt exceeding £30—Costs of legal proceedings—Air Force Act, s. 144 (1).

The wife obtained a decree nisi against the husband and an order for costs. which were taxed at £59 5s. The husband made no payment under the order and the wife issued a judgment summons. The husband was an airman in the regular air force, and, by the Air Force Act, s. 144 (1): "An airman of the regular air force shall not be liable to be taken out of His Majesty's service by any process, execution, or order of any court of law or otherwise, or to be compelled to appear in person before any court of law, except . . . (b) On account of any debt . . . when the amount exceeds £30 over and above all costs of suit."

HELD: costs were not to be taken into account in computing the amount of the "debt", and, therefore, costs alone could not be a debt within the meaning of the exception, the husband was entitled to the protection of the section, and the wife's remedy was barred.

Flanders v. Nicholls (1737) (Barnes 433), applied.

FOR THE AIR FORCE ACT, s. 144 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 22, p. 586.

Case referred to:

(1) *Flanders v. Nicholls*, (1737), Barnes 433; 94 E.R. 990.

JUDGMENT SUMMONS issued by the wife against the husband in respect of his failure to pay the costs, taxed at £59 5s., of divorce proceedings brought by her against him.

The husband was an airman in the regular air force. It was contended for the wife that the costs were a debt within the meaning of the exception contained in s. 144 (1) (b) of the Air Force Act, that a judgment summons was a suit separate and distinct from the divorce suit, and that it was the latter suit and not the former which was referred to in s. 144 (1) (b). It was contended for the husband that a judgment summons was the successor of such part of the old remedy of "*capias ad satisfaciendum*" as was preserved by s. 5 of the Debtors Act, 1869, and was, therefore, a form of execution within the meaning of s. 144 (1), and that "costs of the suit" must mean the costs of the suit in which the execution was had.

Baskerville for the wife.

P. E. Lewis for the husband.

Cur. adv. vult.

Mar. 7. COLLINGWOOD, J., read the following judgment. On July 26, 1951, the wife obtained a decree nisi on the ground of the husband's adultery. The decree was made absolute on Sept. 11, 1951, and on Sept. 21, 1951, the wife obtained an order for payment of £59 5s. being the amount of her taxed costs. Nothing having been paid under this order, the wife obtained the issue of this judgment summons.

The husband is an aircraftman 1st class, an airman of the regular air force, and, in accordance with the Air Force Act, s. 144 (5), complaint has been made by the commanding officer of the Royal Air Force Station, Felixstowe, under whose command the husband is serving, that the judgment summons has been issued in contravention of s. 144 (1) of the Act.

Section 144 (1) of the Air Force Act provides:

"An airman of the regular air force shall not be liable to be taken out of His Majesty's service by any process, execution, or order of any court of law or otherwise, or to be compelled to appear in person before any court of law, except in respect of the following matters, or one of them; that is to say, (a) On account of a charge of or conviction for crime; or (b) On account of any debt, damages, or sum of money, when the amount exceeds £30 over and above all costs of suit."

It was contended on behalf of the wife that, though the husband's liability had its origin in costs, it had, by reason of the judgment, become a debt, and, it being above the statutory limit of £30 (irrespective of the costs of the judgment summons proceedings), the section had no application.

The exemption of members of the forces of the Crown from civil process was first granted under the Conscription Act, 1705 (4 & 5 Anne, c. 21)—a temporary measure, the object of which was to secure the personal service of volunteers, not to protect their goods from seizure. By 9 Anne, c. 4, in order, as the preamble states, to remedy the "evil practices" which had ensued, the privilege was limited, in case of arrest for debt under £20, to soldiers sent abroad beyond the seas. The Mutiny Act (1 Geo. I, st. 2, c. 3) granted exemption to volunteers in the same words as those in 4 & 5 Anne, c. 21. By an Act of 1718 (4 Geo. 1, c. 4) the exemption was limited to debts under £10. In 1780 (20 Geo. 3, c. 12) the amount was raised to £20, and in 1830 (11 Geo. 4 & 1 Will. 4, c. 7) to £30, where it now stands. By the Act of 1718 the exemption was expressed to be:

"unless for a real debt, or other just cause of action, and unless before the taking out of such process or execution the plaintiff shall make affidavit: that to his knowledge the sum justly owing to the plaintiff from the defendant in the action on which such process shall issue, or the debt or damages and costs for which such execution shall be issued out, amounts to the value of £10 at least."

In the Mutiny Act, 1739 (13 Geo. 2, c. 10), the wording is changed, and the affidavit must be to the effect:

"that to his knowledge the original sum, justly due and owing to the plaintiff from the defendant in the action or cause of action, on which such process shall issue, or the original debt for which such execution shall be issued out, amounts to the value of £10 at least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded."

This new provision was considered as follows by the Court of Common Pleas in *Flanders v. Nicholls* (1) (Barnes 433):

"Defendant, a soldier in His Majesty's service, was sued by plaintiff in the Marshal's Court for a debt of £3 17s. 4d., and after a writ of inquiry executed in that court, the costs were taxed at £7 14s., and plaintiff signed final judgment for the sum total, being £11 11s. 4d. Defendant moved the judge of the Marshal's Court, that no execution might be issued against his person, which upon hearing both sides was ordered, and the judge directed defendant to apply for costs, in case his person should be taken in execution. Plaintiff brought an action in this court upon the judgment, and defendant moved that the bail-bond might be delivered up, on entering a common appearance, and obtained a rule to show cause, and for costs. The court on showing cause were of opinion, that though the clauses in the former Acts of Parliament to prevent soldiers being taken out of the King's service have hitherto been defective, yet the clause in the last Act, 13 Geo. 2, is sufficient, the original debt being under £10, and plaintiff having proceeded to hold defendant to bail after he knew the opinion of the judge of the Marshal's Court, the rule was made absolute in omnibus."

From this account it would appear that the court held the view that, if the original debt was below the figure in the Act (then £10), but with costs it amounted to more than that sum, and then debt were brought on the judgment, the soldier was entitled to the benefit of the Act.

If, in computing the amount of the debt in order to ascertain whether it exceeds the statutory minimum, costs of the suit must be excluded, then, in my opinion, it follows that in the present case, where there is no debt apart from the costs of the suit, the airman is protected by the section. It would, I think, be a strange result if, while a judgment for an amount under the statutory minimum but amounted with costs over than sum, was within the Act, an order for the latter alone was not. The unfortunate result of such protection may well be to deprive a wife (or where, as here, she is a legally assisted person, the taxpayer) of all effective remedy for the recovery of the costs of the suit—a result, I suggest, clearly not envisaged by the Act and quite outside the mischief at which the provision was originally aimed.

Summons dismissed.

Solicitors: *Good, Good & Co.* (for the wife); *Clement G. Lawrence* (for the husband).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

McINTOSH (INSPECTOR OF TAXES) v. MANCHESTER CORPORATION.

[CHANCERY DIVISION (Vaisey, J.), March 4, 5, 1952.]

Income Tax—Industrial building allowances—“Cutting”—Excavation of land by water undertaking—Income Tax Act, 1945 (c. 32), s. 14 (1) (b), and proviso.

A corporation incurred capital expenditure on the construction of buildings or structures in use for the purposes of its water undertaking, which were admittedly industrial buildings or structures within Part I of the Income Tax Act, 1945. Part of the expenditure, relating to the excavation of land for extending reservoirs, deepening channels, making chutes, settling pools, etc., was disallowed for the purpose of claiming industrial building allowances on the ground that the work was “cutting” within the meaning of s. 14 (1) (b) of the Income Tax Act, 1945, and the proviso to the sub-section.

HELD: the word “cutting”, both in s. 14 (1) (b) of the Income Tax Act, 1945, and in the proviso, meant any incision of the earth which severed the continuity of the soil, and was not limited to the making of an open way through land which rose above the level of the way, and, therefore, the corporation’s expenditure on excavation was properly disallowed in computing its claim to industrial building allowances.

FOR THE INCOME TAX ACT, 1945, s. 14 (1) (b), see HALSBURY’S STATUTES, Second Edn., Vol. 12, p. 626.

CASE STATED by the Special Commissioners of Income Tax.

The corporation claimed income tax annual allowances under s. 2 of the Income Tax Act, 1945, on capital expenditure incurred by it on the construction of industrial buildings or structures which formed part of its waterworks undertaking, but that part of the expenditure which related to excavation work was disallowed on the ground that the work was “cutting” within the meaning of s. 14 (1) (b) of the Income Tax Act, 1945, and the proviso thereto. On an appeal by the corporation to the Special Commissioners the corporation contended that the excavating was not cutting, since the word “cutting” was to be construed as relating to operations which resulted in “cuttings” in the sense of open ways through land, such as railway cuttings. The Crown contended that the word was to be construed in the unrestricted sense of any incision which severed the continuity of the soil. The Special Commissioners accepted the corporation’s contention, and allowed the appeal. The Crown appealed.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), and Sir Reginald Hills for the Crown.

Grant, Q.C., and Tribe for the corporation.

VAISEY, J.: This is a short point arising on the construction of the Income Tax Act, 1945, Part I, which consists of fourteen sections grouped together under the heading of “Industrial Buildings and Structures, etc.”. Section 1 provides that where a person incurs capital expenditure on the construction of a building or structure which is to be an industrial building or structure occupied for the purposes of a trade, he shall be entitled to an allowance, referred to as an “initial allowance”, equal to one-tenth thereof. Section 2 provides that where a person is entitled to an interest in a building or structure which is an industrial building or structure and that interest is the relevant interest in relation to the capital expenditure incurred on the construction of that building or structure, an allowance, referred to as an “annual allowance”, equal to one-fiftieth of that expenditure shall be made to him. Section 8 (1) of the Act defines an industrial building or structure as including a building or structure in use for, among other purposes, the purpose of a water undertaking. Section 14 (1) reads as follows:

“References in this Part of this Act to expenditure incurred on the

construction of a building or structure do not include—(a) any expenditure incurred on the acquisition of, or of rights in or over, any land; or (b) any expenditure incurred on preparing, cutting, tunnelling or levelling any land.”

To that sub-section there is a proviso which reads as follows:

“ Provided that para. (b) of this sub-section shall not apply to expenditure on work done on the land to be covered by a building or structure for the purposes of preparing the land to receive the foundations of the building or structure, being work which may be expected to be valueless when the building or structure is demolished and not being work which consists of cutting or tunnelling.”

The word “cutting”, on which the present question turns, is used once in the body of s. 14 (1) and once in the proviso. The question is: What does it mean?

The building or structure, so called, regarding which the question arises is the totality of the extensive works of the taxpayers, Manchester Corporation, as water undertakers in the city of Manchester, such works including their reservoirs at Longdendale, Thirlmere and Haweswater, and the many miles of conduits, aqueducts, pipes, culverts and other apparatus through and by which the water is, or is intended to be, brought to that city. It is admitted that the works of the corporation constitute an industrial building or structure, though one of an unusual type. The only point I have to consider is the meaning of the one word “cutting”. Counsel both for the Crown and for the corporation are agreed that the word must have one and the same meaning in the body of the sub-section and in the proviso, but they are, of course, not agreed in their submissions as to what that meaning is.

Counsel for the Crown contends that the cutting meant is a participle of a verb, which means breaking the surface of the land quite generally. Counsel for the corporation submits that “cutting”, although he agrees it is a participle of a verb, means making a cutting in the sense in which “cutting” (a noun) is used, somewhat colloquially as I think, in reference to railway cuttings in contrast with tunnels. The Special Commissioners adopted the latter view. They did not accept what is called in the Case the unrestricted definition of “cutting”, that is to say, any incision of the earth which severs the continuity of the soil. They accepted the definition of it as making an open way through land which rises above the level of the way to be made through it—a definition which is eminently unsatisfactory in that it raises without attempting to solve the questions how far must the banks of a cutting be before it becomes a cutting?, and when is a trench not a trench but a cutting? I ask these questions, but I think neither I nor anyone else can answer them.

In my judgment, the words “preparing”, “cutting”, “tunnelling” and “levelling” land are all descriptive of processes applied to land, and do not describe the results or consequences of operating those processes. It is on this short ground that I prefer the unrestricted definition which the commissioners have rejected. The words describe things which are being done and not things which would be produced. Thus “tunnelling” is not, as described there, making a tunnel, and “cutting” is not the same as making a cutting. “Cutting” and “tunnelling” are really, I think, only an extended way of describing excavating, the former being an operation more or less in a downward direction and the latter an operation more or less horizontal. I do not find any inconsistency between the body of s. 14 (1) and the proviso, when it is observed that the proviso deals with what I may call foundation works for which allowances may be made on a special basis and on special terms. I, therefore, come to the conclusion that this appeal succeeds and that the items of expenditure sought to be disallowed by the tax authorities were properly disallowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Sharpe, Pritchard & Co.*, agents for *Philip B. Dingle*, town clerk, Manchester (for the corporation).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

HUNWICK v. ESSEX RIVERS CATCHMENT BOARD.

[CHELMSFORD ASSIZES (Croom-Johnson, J.), February 28, 1952.]

Negligence—Sea wall—Duty of catchment board to repair—Footpath on wall—Collapse of wall—Injury to person on path.

Under the Land Drainage Act, 1930, s. 4 (1) (a), and the Essex Rivers Catchment Board Transfer Order, 1932, the defendant catchment board were the authority responsible for the repair of an ancient sea wall on the coast of Essex. As a result of people walking along the top of the wall, a footpath had come into existence over forty-three years ago and was used by the public. In July, 1948, part of the wall collapsed while the plaintiff was standing on it and she was injured. In an action against the board for damages for negligence,

HELD: (i) the duty of the board, as the successors in title of the commissioners of sewers, was to keep the sea wall in repair, but they were not in occupation of the wall as a result of that duty and they were not empowered to maintain, construct or dedicate a highway on the wall, and, therefore, assuming that there was an ancient highway along the top of the wall on which the public had the right to pass, there was no duty on the board to keep it in repair and they were not liable to the plaintiff for failure to do so.

(ii) the duty of the board was to repair the sea wall so as to restrain the sea water and they were under no duty to repair it so as to prevent persons going on it from being injured; the plaintiff was not on the sea wall at the invitation of the board; and, therefore, they owed no duty to protect her from, or warn her of, a hidden danger and were not liable to her in damages.

FOR THE SEWERS ACT, 1833, s. 47, see HALSBURY'S STATUTES, Vol. 17, p. 1026.

FOR THE LAND DRAINAGE ACT, 1930, s. 4, see *ibid.*, Second Edn., Vol. 13, p. 556.

Cases referred to:

- (1) *Symes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board*, [1936] 3 All E.R. 908; [1937] 1 K.B. 548; 106 L.J.K.B. 279; 156 L.T. 116; 101 J.P. 179; Digest Supp.
- (2) *A.-G. of Southern Nigeria v. Holt (John) & Co. (Liverpool), Ltd.*, [1915] A.C. 599; 84 L.J.P.C. 98; 112 L.T. 955; 19 Digest 19, 56.
- (3) *R. v. Leake (Inhabitants)*, (1833), 5 B. & Ad. 469; 110 E.R. 863; 26 Digest 290, 225.
- (4) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.*, (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.

ACTION for damages for personal injuries.

In July, 1948, the plaintiff was walking along the top of a sea wall on the coast of Essex, and, while she was standing to let some other people pass, part of the wall collapsed and she was injured. In an action against the Essex Rivers Catchment Board, who were the authority responsible for the repair of the wall, she contended *inter alia* (a) that there was a public footpath along the sea wall, that the board were the owners or occupiers of the wall, and, alternatively, that, under the Land Drainage Act, 1930, s. 4, and the Essex Rivers Catchment Board Transfer Order, 1932, the rights, obligations and liabilities over and in connection with the sea wall and the footpath were vested in and to be discharged by the board, and, therefore, they were under a duty to keep the footpath and the sea wall in a proper state of repair, and were liable to her in damages for breach of that duty, and (b) that the board had failed to protect her from or warn her of a hidden danger on the sea wall.

J. M. Shaw for the plaintiff.

Jukes and *P. M. O'Connor* for the catchment board.

CROOM-JOHNSON, J.: On the coast of Essex, in the neighbourhood of St. Osyth, an ancient sea wall (the age of which was not proved by either party) was erected either by the Crown direct or by the Commissioners of Sewers in whom for a long time were vested the powers of the Crown to create and keep in order sea walls so as to prevent the incursion of the sea into the land behind the wall. On the top of this sea wall, which is constructed of clay with a slope towards the sea, is a pathway, which has been there for over forty-three years. It is in no sense made a pathway; it came into existence as a result of people climbing up the sea side of the wall and walking on the top of it. [His LORDSHIP stated the facts in regard to the plaintiff's accident, and continued:] The question that arises is: Is the plaintiff, in the circumstances of the case, entitled to maintain an action against the particular defendants against whom she has elected to proceed? That has given rise to a number of problems posed for me by counsel for the plaintiff with a view to suggesting various pegs on which this claim can be hung, and, accordingly, it is necessary that I should examine what the position is and has been in regard to the sea wall.

The circumstances in regard to the wall, so far as is known, have already been examined by the Court of Appeal in *Symes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board* (1). To save expense, counsel has directed my attention to certain statements made in the judgments in that case, and no objection has been taken to that method of procedure. This sea wall is part of a length of sea wall which is under the care of the defendants. It forms three sides of a parallelogram. In the space between it and the top of the beach, as it now exists at the material point, a number of dwellings have been erected in a series of straight paths or roads, and the district has now become a populous one. To protect the dwellings, those responsible for them made a path or roadway, known as "Brooklands", on the top of the shingle or beach. But, apparently, Brooklands is not likely to be an efficient substitute for the sea wall except in a temporary way. No one knows when the wall was constructed, but it must be very old. There is no doubt that at common law it was the duty and the prerogative of the Crown to protect the realm against the incursion of sea water, just as a wall of a fort is erected to prevent the attack of an enemy: see per GREER, L.J. ([1936] 3 All E.R. 913), in *Symes'* case (1). The Commissioners of Sewers began to exercise jurisdiction in respect of land drainage under the Statute of Sewers, 1531 (23 Hen. 8, c. 5), but I do not think I need examine whether they took over the protection of the sea walls so constructed. It is quite plain that what was done was done to protect the land, to guard against the invasion of the sea as a destructive force, and to conserve the use of the properties inland. In *A.-G. of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.* (2) LORD SHAW OF DUNFERMLINE, delivering the judgment of the Privy Council, said ([1915] A.C. 620):

"... it is recognised by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject but with this duty of the Crown."

It seems to me, therefore, that the true position is that anything which interferes with the duty of the Crown or of the commissioners who took over the duty of protection, can and must be prevented. It is established in other cases that there cannot be permitted to exist a state of affairs where persons have the right to keep a sea wall in repair, but no precise obligation to do so.

This principle becomes important in view of one of the claims made in this action. It is said that a path was constructed at the top of the wall with the inten-

tion of dedicating it as a highway, and that thereby the path has become a highway. There is no question that a footpath may be a highway, and no difficulty, therefore, arises from that point of view. But, on the other hand, if people who have a duty to maintain drainage or other works for public utility proceed to do something which makes the carrying out of their duties impossible, then the ordinary results do not follow. The whole question on this point was examined in *R. v. Inhabitants of Leake* (3). The question in that case was whether trustees, in whom land was vested, by statute, for certain public purposes, were supposed to have dedicated the surface of some part of the land for use as a highway. DENMAN, C.J., and PARKE, J., held that, if the land were vested by the Act in the trustees so that they were thereby bound to use it for some special purpose incompatible with its public use as a highway, the trustees would have been incapable, in point of law, of making a dedication of it, but that, if the use by the public was not incompatible with the objects prescribed by the Act, they would have had the power. PARKE, J., said (5 B. & Ad. 478):

"The mere circumstance of their not being beneficial owners, cannot preclude them from giving the public this right."

In the case now before me, I think it is quite plain that the footpath on the top of the sea wall has been used by the public for generations, and, if so, the circumstance that that user has continued, apparently without objection or any inconvenience or interference with the duty to maintain the sea wall, makes me think that the use by the public of the footpath is not incompatible with what was prescribed by the law on whomever the duty was to maintain the sea wall. Therefore, I have come to the conclusion that it was possible for someone to dedicate the pathway as a highway. Whether the Crown could do it, I doubt very much, as that might have involved the question how far mere user can affect the property of the Crown and interfere with the prerogative. For the purpose of this judgment, however, I propose to assume that the path on the top of the sea wall is an ancient highway which was, at some time or another, dedicated for use of the public, and, accordingly, that the public had a right to pass along the path in the way that the plaintiff was doing on the day when she met with her accident. The trouble about that branch of the case is that, if the path is an ancient highway, it is repairable by the inhabitants at large, and, unless that duty has been specifically cast on some other person by legislation or by the proper construction of such legislation as there may be, the duty still persists in the inhabitants at large or in the inhabitants of the parish where the highway is situate. Therefore, unless the plaintiff can establish that the duty of maintaining this ancient highway was cast on the defendant board or their predecessors in title, they are not liable to maintain it. Moreover, even if they were liable, they would be liable only for acts of misfeasance, and not for acts of non-feasance. In *R. v. Inhabitants of Leake* (3) it was laid down that the inhabitants of a parish are bound by law to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish. If that is the right approach to this part of the argument, the only question which could then arise would be: Has the duty of maintaining this highway been cast on the defendants? There is no evidence that there was ever a dedication either by the defendants or by any of their predecessors in title within modern times—I do not think I need go further back than the Sewers Act, 1833—and I do not think that it is the fact.

By the Sewers Act, 1833, s. 47:

"The property of and in all lands . . . erections, works, and other things which shall have been or shall hereafter be . . . obtained, erected, constructed, and made by or by the order of, or which are or shall be within or under the view, cognisance, or management of any commissioners of sewers . . . shall be and the same are hereby vested in . . ."

the Commissioners of Sewers. Under the Land Drainage Act, 1930, s. 4, and

the Essex Rivers Catchment Board Transfer Order, 1932 (S.R. & O., 1932, No. 875), made under s. 4 (1) (a) of the Act of 1930, the powers and duties of the commissioners for the area in question were transferred to the defendant board, and it is contended that, in consequence, s. 47 of the Act of 1833 imposes on the board a liability to maintain the highway on the sea wall. It must be borne in mind, however, that the duty cast on the commissioners [by the Statute of Sewers, 1531, s. 1,] was to keep the sea walls in repair, and I can find no reference in any of the statutes to which I have been referred to any liability or power on their part to maintain, construct or dedicate a highway. I do not think that they were at any time in the position of being proprietors of land which they could dedicate, other than land which they had purchased. I am not satisfied that, for the purpose of this action, the catchment board, or any of their predecessors in title, were ever in occupation of the sea wall, and it is not one of those classes of cases in which a duty is cast on the individual or on a board in such a manner that, if the duty is discharged negligently, an action might lie for breach of that duty.

The argument of counsel for the plaintiff that with the duty to look after the bank arose the vesting of the bank itself as a right of property in the commissioners would, if correct, have some rather extraordinary results, as not only would the property be vested in the defendant board or their predecessors, but the real owner would be divested of it. It seems to me that the answer to this contention is that, if this is a highway, the people who are responsible for its repair, and the only people against whom an action could, in any event, be brought with regard to this particular part of the highway, are the persons or the authority in whom the duty of maintaining the highways in this particular locality is now vested. I think I have said enough to show that, unless there is some statutory provision in the Act of 1930 or in the order of 1932 which imposes that particular duty on the defendant board, not with regard to the bank but with regard to the highway, the plaintiff cannot succeed on this point.

Her claim is then put in a slightly different way. It is said, in effect, that she had a right, as against the catchment board, to have care taken so that she was not subjected to any hidden danger of which she had not been warned, and that there was a duty on the board either to protect her from the danger or to warn her of it. There seems to be a variety of answers to that. The plaintiff was not there at the invitation of the catchment board. The board never accepted responsibility for this footpath worn by the feet of passengers during the years—that is the only way in which it came to be a footpath—and they neither invited people there, nor did they wish people to be there. They did not endeavour to keep people off the sea wall, but, in the circumstances, it would have been impossible for them to attempt to do so. They were not in occupation, they were not the owners, and, furthermore, there is no evidence that anybody on behalf of the board knew, or should have known, of this particular danger. I am quite satisfied that the board do what they can to keep the sea wall in repair, not for the purpose of seeing that foot passengers, who happen to clamber on it, are not injured, but for the purpose of keeping out the sea water. It is their duty to protect the sea wall and to keep it in repair, and I have heard nothing in the course of this case which suggests that they are failing to do it. I can see no ground, therefore, for saying that they ought to have known that this place was likely to collapse. I am quite satisfied that, whatever caused the plaintiff's accident, it was due to no negligence on the part of the board or of their servants. I think that the attempt to suggest that this is a case of a hidden trap or danger, based on *Indermaur v. Dames* (4) and similar authorities, is quite hopeless on the facts. I have come to the conclusion that the action fails, and must be dismissed with costs.

Judgment for the defendant board.

Solicitors: *Leonard Tubbs & Co.* (for the plaintiff); *Hair & Co.* (for the catchment board).

[Reported by MRS. R. V. GUPTA, Barrister-at-Law.]

Re HODGSON (deceased). HODGSON AND ANOTHER v.
GILLET AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), March 6, 11, 1952.]

Will—"Survive"—Gift to such of children of son as shall survive testator—Son unmarried at date of will and date of death of testator.

By his will, dated Apr. 7, 1920, a testator, who died on Apr. 25, 1920, provided inter alia for the sale and conversion of his residuary estate and directed his trustees to stand possessed of his residuary trust funds and the income thereof "upon trust to pay and divide the said income equally between my said wife and my said son [Captain Hodgson] during their joint lives . . . and subject thereto my trustees shall hold the residuary trust funds in trust on the decease of my said wife [to make a certain payment] and subject thereto to pay the whole of the income of the remaining part of the residuary trust funds to the said [Captain Hodgson] if living at the death of my wife for his life and after his death my trustees shall hold the residuary trust funds (subject nevertheless as aforesaid) and the income thereof in trust for such of the child or children of the said [Captain Hodgson] who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age and so that as between his sons and daughters the share of each daughter shall be equal to one equal third part of the share of each son of my said son [Captain Hodgson] but if my said son . . . shall die in my lifetime without leaving issue as aforesaid or if any child of his being a son or sons shall die before attaining the age of twenty-one years or being a daughter or daughters shall not attain that age or previously marry my trustees shall subject as aforesaid hold the residuary trust funds in trust for such sons of my said daughter Noel . . . as shall attain the age of twenty-one years and if more than one in equal shares absolutely . . ." A condition relating to the adoption of the testator's surname was attached to the latter trust, and finally the testator provided that his residuary trust funds should be held "subject as aforesaid, in trust for that son of my said nephew Archibald . . . who shall survive me and first attain the age of twenty-one years". When the testator signed his will Captain Hodgson was unmarried and was not contemplating marriage with any particular person. At that time the nephew, Archibald, had three sons. The testator was survived by his wife, Captain Hodgson, and his daughter, Noel, but by no other child of his and by no issue of any child of his who predeceased him. Captain Hodgson was first married in 1923, and there were two children of that marriage.

HELD: the ordinary meaning of "survive" was that the propositus should be living at and after the relevant date, and, there being nothing in the will or the surrounding circumstances to displace that meaning, the phrase "such of the child or children of the said [Captain Hodgson] who shall survive me" did not include any child or children born after the date of the death of the testator.

Elliot v. Joicey ([1935] A.C. 209), applied.

Re Clark's Estate (1864) (3 De G.J. & Sm. 111), considered.

AS TO SURVIVORSHIP, see HALSBURY, Hailsham Edn., Vol. 34, pp. 279-283, paras. 330-333; and FOR CASES, see DIGEST, Vol. 44, pp. 1183-1215, Nos. 10234-10506.

Cases referred to:

- (1) *Elliot v. Joicey*, [1935] A.C. 209; 104 L.J.Ch. 111; *sub nom. Re Joicey*, 152 L.T. 398; Digest Supp.
- (2) *Re Clark's Estate*, (1864), 3 De G.J. & Sm. 111; 46 E.R. 579; 44 Digest 1184, 10243.

(3) *Re Delany*, (1895), 39 Sol. Jo. 468; 44 Digest 1185, 10253.

(4) *Re Heath*, (1904), 48 Sol. Jo. 416; 44 Digest 1185, 10254.

(5) *Re Sing*, [1914] W.N. 90; 44 Digest 1185, 10249.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Charles Durant Hodgson, deceased, the residuary estate of the testator after the death of the defendant, Harold Edward Austen Hodgson, would be held on trust for such of the children of the said Harold Edward Austen Hodgson who being a son or sons had attained or should attain the age of twenty-one years or being a daughter or daughters should attain that age or marry under that age and so that the share of any such daughter should be equal to one third of the share of any such son.

Denys B. Buckley for the plaintiffs, interested in the residuary estate of the testator.

Rink for the first, second and third defendants, the trustees of the will.

Gray, Q.C., and *Wigglesworth* for the fourth, fifth and eighth defendants, interested in the residuary estate of the testator.

P. W. E. Taylor for the sixth defendant, one of the legal personal representatives of Emily Hodgson, deceased, the widow of the testator.

The seventh defendant was not represented.

ROXBURGH, J.: The very difficult question in this case arises on the will, dated Apr. 7, 1920, of Charles Durant Hodgson who died on Apr. 25, 1920. The testator was survived by his widow, by his son, Harold Edward Austen Hodgson, and by his daughter, Noel Emily Beatrice Charteris, but by no other child of his and by no issue of any child of his who predeceased him.

The testator's son, Captain Hodgson, was first married to Catherine Phyllis Champneys, who died on Sept. 30, 1942. That marriage took place on Oct. 25, 1923, i.e., after the date of the testator's death. Captain Hodgson had by her two children only, viz., Charles Arthur Champneys Hodgson and Robert Basil Champneys Hodgson. Captain Hodgson was secondly married to Eileen Mary Drew who is still living, but he has had no children by her. Captain Hodgson has sworn two affidavits. Paragraph 2 of the first, sworn on Nov. 15, 1951, says:

"For a considerable time before my father's death I was living at his residence, The Hallams, Shamley Green, in the county of Surrey. In the latter part of 1919 my father was in poor health and was suffering from nervous trouble and blood pressure. From approximately Christmas, 1919, onwards a nurse was constantly in attendance upon him. In the early part of 1920 my father's health deteriorated and from approximately the beginning of March, 1920, until the time of his death he was bed-ridden and was in this condition when he signed his will on Apr. 7, 1920."

His second affidavit, sworn on Mar. 7, 1952, says in para. 2:

"When my father signed his will on Apr. 7, 1920, I was unmarried and was not contemplating marriage with any particular person. I was not at that date engaged to be married or about to become engaged to be married and had never previously been engaged to be married. To the best of my knowledge and belief when my father signed his said will there were no circumstances which might have led him to believe that I was about to become engaged to be married."

The testator also had a nephew, Archibald Sanford Hodgson, who had at least three sons. There is no evidence what their ages were when he made his will or when he died, and there is only indefinite and vague evidence of the testator's own age which appears to have been about sixty. The will is clearly drawn by a professional hand, and no part of the difficulties to which I refer can be attributed to the testator's bed-ridden condition.

It will be apparent from what I have read that at the date of the will the testator's son was a bachelor with no present intention to become married. Obviously, therefore, he had no children. It is that circumstance which gives rise to the difficult question which I have to attempt to decide. By the relevant trusts of the will the trustees are directed to stand possessed of the residuary trust funds and the income thereof

"upon trust to pay and divide the said income equally between my said wife and my said son [Captain Hodgson] during their joint lives . . . and subject thereto my trustees shall hold the residuary trust funds in trust on the decease of my said wife [to make a certain payment] And subject thereto to pay the whole of the income of the remaining part of the residuary trust funds to the said [Captain Hodgson] if living at the death of my wife for his life and after his death my trustees shall hold the residuary trust funds (subject nevertheless as aforesaid) and the income thereof in trust for such of the child or children of the said [Captain Hodgson] who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age and so that as between his sons and daughters the share of each daughter shall be equal to one equal third part of the share of each son of my said son [Captain Hodgson] but if my said son . . . shall die in my lifetime without leaving issue as aforesaid or if any child of his being a son or sons shall die before attaining the age of twenty-one years or being a daughter or daughters shall not attain that age or previously marry my trustees shall subject as aforesaid hold the residuary trust funds in trust for such sons of my said daughter Noel Emily Beatrice Charteris as shall attain the age of twenty-one years and if more than one in equal shares absolutely . . ."

on condition that they adopt the surname of Hodgson. The clause continues:

"but if any such grandson shall neglect or refuse to take and use the said surname within the said period or if none of such grandsons shall attain the age of twenty-one years then my trustees shall hold the residuary trust funds or the share or shares therein of any such grandson or grandsons so neglecting or refusing to take and use the said surname as aforesaid as the case may be and the income thereof and subject as aforesaid in trust for that son of my said nephew Archibald Sanford Hodgson who shall survive me and first attain the age of twenty-one years absolutely."

The question is whether the bequest in favour of "such of the child or children" of Captain Hodgson "who shall survive me" is limited to those who were living at and after the death of the testator (in which case there was none), or does it comprehend a child or children of Captain Hodgson who, though not living at the date of the testator's death, was or were living after the testator, having been born after the date of the testator's death? The question is complex, not only because the will on any view is extremely difficult to construe, but also because the state of the authorities is in flux.

I start with *Elliot v. Joicey* (1). What is quite certain is that "survive", when used in relation to an event or point of time, predicates prima-facie that the propositus is alive at and after the point of time or the event in question. I must confess that I should have thought that that was so on the ordinary meaning of language, but, at any rate, whatever I may have thought, that much is now finally settled by the House of Lords. On the other hand, there is a decision of the Court of Appeal which bears a considerable resemblance to the present case, viz., *Re Clark's Estate* (2). In that case the gift was to M.C. for life and after her death to "all and every the children of the said M.C. who shall survive me". The only relevant surrounding circumstance which appeared to have existed in *Re Clark's Estate* (2) was that M.C. was only twelve years of age

at the date of the testator's will. I cannot myself find any other surrounding circumstance. The report does not state how old the testator himself was. I think (and this is not unimportant to the decision of this case) the only surrounding circumstance really was that a disposition which differentiates between the children of a named person born before the death of the testator and the children of the same person born after the death of the testator would appear to be wholly capricious. I think I might adopt the argument of counsel in *Re Clark's Estate* (2). KINDERSLEY, V.-C., had decided that the prima facie meaning had to be applied to the gift and counsel submitted

"The Vice-Chancellor's construction gives a most unnatural effect to the will, and ought not to be adopted without necessity. It is most unlikely that in making a disposition in favour of the children of a girl twelve years old, he should intend none to take, except those who were born in his own lifetime."

Counsel added—and this has been a bone of contention ever since—

"The word 'survive' strictly means to live after; JOHNSON'S DICTIONARY: 'Survive'."

The reasons for the decision of the Court of Appeal reversing the decision of the Vice-Chancellor are very shortly stated. KNIGHT BRUCE, L.J., says (3 De G.J. & Sm. 115):

"I am of opinion that we may without impropriety hold the words 'who shall survive me' to mean 'who shall be living after me'; and I am not sure that this is not their strictly correct meaning."

TURNER, L.J., concurred. That short judgment stirred up a long history of controversy. Few, if any, of the judges who have subsequently considered this question were prepared to agree with the lords justices that "who shall be living after me" was the strictly correct meaning of the words.

In *Re Delany* (3), which again, unfortunately, is very shortly reported, CHITTY, J., who was dealing with a similar question, said that (39 Sol. Jo. 468):

"... the common meaning of 'survivor' implied two lives running together. It would be a very forced use of the expression to say that Queen Victoria survived William the Conqueror. In one case—viz., *Re Clark* (2)—it was held that 'survive' meant 'live after'. With great respect ... that decision was right on the particular will."

So, there is CHITTY, J., disapproving of that part of the judgment of KNIGHT BRUCE, L.J., where he said: "I am not sure that this is not their strictly correct meaning", but none the less approving of the decision. He does not say what in the will seems to him to justify the decision. In fact, there was nothing in the will that had any bearing on the question, but, undoubtedly, CHITTY, J., meant the surrounding circumstances affecting that will.

That is the view which BUCKLEY, J., took of the problem in *Re Heath* (4). He said (48 Sol. Jo. 416):

"I have been pressed in argument with *Re Clark* (2), where it was held that the words 'who shall survive me', meant 'who shall live after me', and included all children of the tenant for life whether they were living concurrently with the testator or not. In commenting on that case in *Re Delany* (3) ... CHITTY, J., said ...",

and then he quotes the passage which I have read, and adds (*ibid.*):

"I think the decision of *Re Clark* (2) must have been arrived at on the particular facts of that case. The court was struggling to get away from the ordinary meaning of the expression, and did not intend to lay down any general rule that 'survive' means 'live after'."

So, up to this point subsequent judges had disapproved of the proposition that "live after" was strictly the correct meaning of "survive", but had approved of the decision in *Re Clark's Estate* (2) which, indeed, they could not have overruled. Then came the decision of EVE, J., in *Re Sing* (5), in which he reached the same conclusion as was reached in *Re Clark's Estate* (2), but there was in that case a context which the learned judge said largely assisted him. There followed *Elliot v. Joicey* (1).

A The problem which I have to decide is a very nice one because it is beyond doubt that the approach which the Court of Appeal adopted in *Re Clark's Estate* (2) is no longer permissible, having regard to the decision of the House of Lords in *Elliot v. Joicey* (1). On the other hand, *Re Clark's Estate* (2) stands as a decision of the Court of Appeal. One question is whether it is possible to say that, if the Court of Appeal had adopted what has now been held by the House of Lords to be the right approach, they could have reached the conclusion they reached. A second question is whether, if they had adopted what is now held to be the right approach, they would have reached the conclusion which they did reach. Counsel for the fourth, fifth and eighth defendants propounded a proposition which may well be right, but which does not in the end find favour with me, viz., that once you have got it decided that there is a prima facie meaning for the words "survive me", you have to find a context in the will itself to displace that particular meaning. You must not look for it in the surrounding circumstances alone, and, therefore, *Re Clark's Estate* (2) is no longer good law. I am not prepared to go so far as that. I am not prepared to say that it is impossible as a matter of law to find enough in the surrounding circumstances to displace the prima facie meaning of the words. On the other hand, I am of the view that, now the prima facie meaning of the words has been so authoritatively determined, more care is required in drawing inferences from the surrounding circumstances than would have been necessary if the words had been held not to have a prima facie meaning. It is that consideration which is going to lead me to my conclusion.

E I have now to examine, first, the context of the will and then the surrounding circumstances to see if there is enough to justify me in departing from the prima facie meaning of the words. The first thing that is plain is that one half of the gift over is, as it stands, nonsense. The words "or if any child of his being a son or sons shall die before attaining the age of twenty-one years" must be erroneous in some respect. That is common ground between the parties. Counsel for the plaintiffs says that, if you read in the word "every" instead of "any", that very much supports his submission. Of course it does, but I am not prepared to do that. It seems to me to be plain that something has gone wrong, but equally it seems to me to be plain that what I have to add depends on the view which I take of the question which I have to decide. If I accepted the contention of counsel for the plaintiffs as to the gift to the children of Captain Hodgson, then I should write in "every", but, if I accept the submission of counsel for the fourth, fifth and eighth defendants, then I should not write in "every", but I should introduce some qualification into the clause. It seems to me that it would be most dangerous in this setting to apply the doctrine of falsa demonstratio to the gift over and then to construe the original gift by reference to the gift over as thus amended. I am not able, therefore, to find any corroboration for the submission of counsel for the plaintiffs in this inept gift over. On the other hand, at the end of this clause there is a gift in which the words "survive me" are certainly used in their ordinary and natural sense. I think counsel for the plaintiffs was disposed to agree that where the reference in the language is to

"that son of my said nephew Archibald Sanford Hodgson who shall survive me and first attain the age of twenty-one years absolutely"

only those sons (and there were already three of them) who were born before the death of the testator could have participated. I think that must be so.

Therefore, if I am going to construe the words "who shall survive me" in connection with Captain Hodgson's children in the way in which counsel for the plaintiffs invites me to construe them, I shall undoubtedly be giving a different meaning to the phrase "survive me" in the two places in which it occurs in this same clause. I agree with counsel that that is not conclusive, but it seems to me a strong thing to give a different meaning to the same phrase in two different parts of the same clause. To my mind, that is all that can be extracted from the context in the will, but, such as it is, it is against the plaintiffs.

When I turn to the surrounding circumstances, I come at once to that circumstance which dominates the whole scene and is, indeed, so powerful that I really do not know how I ought to decide this case. Unless I construe these words in an unnatural way, the disposition is extraordinarily capricious, and that, as I see it, is a dominant consideration on the side of the plaintiffs. I can think of no conceivable reason why the testator should have wished to limit his beneficence to the children of a person then a bachelor who happened to be born during his own lifetime. Unfortunately, *prima facie* at any rate, that is what he has said. So far as the rest of the surrounding circumstances are concerned, they do not seem to me to throw much light on the problem. Counsel for the plaintiffs naturally emphasised the bed-ridden condition of the testator, but there are passages in this will which clearly show, to my mind, that the testator contemplated that he might live for many years after the date of this will. He knew that Captain Hodgson was a bachelor, and yet he talks about his son Harold (Captain Hodgson) dying in his lifetime "without leaving issue". That does seem to me to contemplate that he (the testator) might still be living when Captain Hodgson had married and had had an opportunity of having issue, but, in fact, had had no issue. That, perhaps, is not very strong, but in the last trust for the nephew it seems to me that the testator clearly does visualise that there might be one of the children of his nephew who should attain the age of twenty-one years and yet fail to qualify by reason of predeceasing the testator. That seems to me certainly to contemplate the possibility of a fairly long period ahead before the death of the testator.

I think that in the last resort the question is simply this: Am I entitled to give an unnatural meaning to the words "who shall survive me", because, if I do not do so, the will operates in a most capricious manner. I am not sure what is the right answer to that question, but, on the whole, I think that in a matter of this sort it is the duty of a judge of first instance to tread the conservative path, hoping, perhaps, that a higher court will be able to deal more radically with the situation. Therefore, by a narrow margin I must decide that I have not found anything in the context and not found enough in the surrounding circumstances to enable me to depart from the natural meaning of the words.

Declaration that the phrase "such of the child or children of the said Harold Edward Austen Hodgson who shall survive me" does not include any child or children born after the date of the death of the testator.

Solicitors: *Foyer, White & Prescott* (for the plaintiffs); *Baileys, Shaw & Gillett* (for the first, second, third and sixth defendants); *A. M. Longhurst & Butler* (for the fifth and eighth defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

COMMISSIONERS OF CUSTOMS AND EXCISE v. POOLS FINANCE (1937) LTD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), February 25, 26, March 7, 1952.]

Gaming—Pool betting—Duty—Collector appointed by promoters of pool to receive stake money from bettor and pay it to promoters less commission—Duty chargeable on gross amount of stake money received by collector—Finance (No. 2) Act, 1947 (c. 9), s. 6 (1).

The defendants were promoters of football and racing betting pools and had appointed W. as one of their collectors. By the terms of his appointment it was agreed that W. should place with the defendants bets for himself and his "clients" in accordance with the defendants' rules and conditions. It was the duty of W. to supply members of the public wishing to bet with coupons obtained by W. from the defendants. The bettor filled up the coupon and returned it to W. who forwarded it to the defendants. If the bettor won money, the defendants would inform W. who would pay the bettor out of money supplied by the defendants. W. guaranteed to pay the defendants 14s. 6d. in the £ in respect of all bets made with him by bettors without any deduction if a bettor or bettors defaulted in his or their payments. By r. 11: "Coupons issued through a collector will only be accepted if received by us [the defendants] from the collector. It is understood the collector acts solely for the investor, and that winnings will be paid only to him, and that he alone shall be responsible to the investor therefor." The Commissioners of Customs and Excise claimed a declaration that duty under s. 6 (1) of the Finance (No. 2) Act, 1947, was chargeable on the full amount of the stake money collected by W. and not on the amount remitted by W. to the defendants, i.e., the stake money less his commission of 5s. 6d. in the £.

HELD: the rules could not be read to contradict the position as between the defendants and W. proved by the evidence which showed that W. was the defendants' agent for the receipt of the bettors' stake money; even if W. was not an agent, the stake money was paid to him as a collector nominated by the defendants to receive it; and, therefore, duty was chargeable on the amount of the stake money paid by the bettors to W. and not on the amount paid by W. to the defendants after the deduction of his commission.

FOR THE FINANCE (No. 2) ACT, 1947, s. 6 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 813.

Cases referred to:

- (1) *Jones v. Vernons Pools, Ltd.*, [1938] 2 All E.R. 626; Digest Supp.
- (2) *Appleson v. Littlewood (H.), Ltd.*, [1939] 1 All E.R. 464; Digest Supp.
- (3) *Matthews v. Smallwood*, [1910] 1 Ch. 777; 79 L.J.Ch. 322; 102 L.T. 228; 30 Digest, Replacement, 467, 1088.
- (4) *Harling v. Eddy*, [1951] 2 All E.R. 212; [1951] 2 K.B. 739.
- (5) *Hydarnes S.S. Co. v. Indemnity Mutual Marine Assurance Co.*, [1895] 1 Q.B. 500; 64 L.J.Q.B. 353; 72 L.T. 103; 29 Digest 69, 265.

APPEAL by the defendants from an order of McNAIR, J., dated Oct. 24, 1951, whereby he held that the defendants were chargeable under s. 6 (1) of the Finance (No. 2) Act, 1947, with pool betting duty on bets made through one, S. Wood, during the week ending May 8, 1948, calculated on the sum of £43 16s. 11d.

The defendants were at all material times promoters of betting pools, and Wood was employed by them to act as their collector on commission. In the week ending May 8, 1948, members of the public made bets amounting to £53 9s. 9d. on 404 coupons which were remitted by Wood to the defendants.

Wood collected from the bettors in respect of lost bets stake money amounting to £44 13s. 9d., the balance of £8 16s. constituting bad debts. The amount remitted by Wood to the defendants was £39 12s. 4d., i.e., the gross amount of the bets less commission at $17\frac{1}{2}$ per cent., plus 16s. 10d. representing the cost of the coupons. The Commissioners of Customs and Excise claimed that the defendants were chargeable with duty calculated on £43 16s. 11d. (£44 13s. 9d., less 16s. 10d.). The defendants contended that they were only chargeable with duty calculated on the amount remitted to them by Wood, £39 12s. 4d. or, alternatively, that sum less the cost of coupons. McNAIR, J., held that duty was chargeable on the amount of stake money paid to Wood by the unsuccessful bettors and not on the amount remitted by him to the defendants.

Beufus, Q.C., and *F. D. L. McIntyre* for the defendants.
J. P. Ashworth for the commissioners.

Cur. adv. vult.

Mar. 7. The following judgments were read.

SOMERVELL, L.J.: The broad issue in this appeal is set out concisely in the first paragraph of the learned judge's judgment, which I will read:

"In this case the Commissioners of Customs and Excise claim against the defendants, Pools Finance (1937) Ltd., a declaration as to their liability for pool betting duty in respect of stake money staked by a number of persons who entered one of the defendants' pools through a collector, one S. Wood. In outline the contest between the parties is whether, as the commissioners contend, the pool betting duty is chargeable on the full amount of the stake money collected by Wood, or whether, as the defendants contend, on the amount remitted by Wood to the defendants."

The defendants are promoters of football and racing pools. As part of the machinery of their business they appointed collectors, of whom a Mr. Wood was one. It will be convenient to state in the first instance the admitted course of business. Bets are made, by those who wish to bet, on coupons. Mr. Wood, as collector, obtained a number of coupons from the defendants. A member of the public who intended to bet could obtain a coupon from Mr. Wood. The latter, under the Paper (Use in Betting Schemes) Order, 1947 (S.R. & O., 1947, No. 2247), art. 2, had to make a charge, which he did. The charge was a half-penny. The members of the public who betted were called "clients" by the learned judge and I will adopt this word. The client filled up the coupon and returned it to Mr. Wood. The betting was on credit, so no money was enclosed with the coupon. The stake, the amount of which depended on how the coupon was filled up, was to be remitted later within a week and normally would be enclosed by a regular client with the coupon of the following week. Mr. Wood would forward the coupons to the defendants. If any of the clients won money, the defendants would inform Mr. Wood of the clients' names and addresses and forward the amount of their winnings which would be paid to them by Mr. Wood. With regard to the stakes, the procedure can be made clear by the following figures. Assume in one week that clients had staked £100, Mr. Wood had undertaken with the defendants to pay the defendants the following week 14s. 6d. in the £, that is, $72\frac{1}{2}$ per cent. of the amount staked. If £100 had been staked, he would pay £72 10s. It would appear that in this business there are a number of bad debts. Mr. Wood might receive more or less than £72 10s. He had still to pay £72 10s. This case is concerned with a week's transaction in respect of which Mr. Wood received more than 14s. 6d. in the £. Though the actual figures were different, I will assume for the argument that on the above figures he received £85. The plaintiffs contend that the tax is exigible on £85, the defendants on £72 10s. The learned judge accepted the plaintiffs' contention.

The issue turns on the application of s. 6 of the Finance (No. 2) Act, 1947, which provides:

A " (1) There shall be charged on all bets made by way of pool betting, other
 than bets made by means of a totalisator set up on an approved horse race-
 course by or under the authority of the Racecourse Betting Control Board,
 a duty of excise, to be known as the pool betting duty, equal to ten per cent.
 of the amount of the stake money paid. (2) The pool betting duty shall be
 paid, in the case of bets made by means of a totalisator, by the operator,
 that is to say, the person who (as principal) operates the totalisator, and, in
 the case of other bets, by the promoter. . . . (4) The supplemental
 provisions set out in sched. V to this Act shall have effect with respect to the
 pool betting duty. (5) Bets shall be deemed for the purposes of this section
 and the said sched. V to be made by way of pool betting whenever a number
 of persons make bets on terms that the winnings of such of those persons
 B as are winners shall be, or be a share of, or be determined by reference to,
 the stake money paid or agreed to be paid by those persons, whether the bets
 are made by means of a totalisator, or by filling up and returning coupons
 or other printed or written forms, or otherwise howsoever. (6) In this
 section and the said sched. V, the following expressions have the meanings
 hereby respectively assigned to them, that is to say— . . . ' promoter '
 C means, in relation to any pool betting, the person to whom the persons
 making the bets look for the payment of their winnings, if any."

Various documents were put in, and Mr. Wood gave evidence. The position,
 as will appear, is not as clear as it might have been. One of the defendants'
 documents put in, applicable to the pools in question—" National Pools "—
 was described as " Collectors' Conditions and Instructions." It was a document
 D drawn up for signature by collectors. Mr. Wood did not sign one of these. He
 had acted as collector previously for the defendants for a different pool scheme
 and his appointment for National Pools was oral. It is headed: " Commission
 including all expenses—Five shillings in the £." Five shillings should admittedly,
 so far as Mr. Wood is concerned, be 5s. 6d. In so far as the description of the
 5s. 6d. as commission may be relevant, it appears in the account kept by the
 E defendants in respect of Mr. Wood's transactions. The amount bet by the clients
 is described as " stakes " and the 27½ per cent. as commission. The account
 then shows the halfpenny per coupon and with that adjustment the amount to
 be paid, and the amount paid, based on the 72½ per cent. The document further
 provides that the collector is to send in coupons received by him in any week to
 reach the defendants not later than 5 p.m. Saturday. A weekly account slip is
 F to be rendered by the defendants which is to be returned with any further coupons
 at the week-end with the amount indicated as due for the previous week, that is,
 the 72½ per cent. with adjustment for the halfpenny per coupon. At the foot is
 a statement to be signed by the collector of his willingness to act as a collector
 according to the conditions set out in the document, with a request for a number
 of coupons to be specified. That document sets out the relation of a collector to
 G the defendants and, though not signed by Mr. Wood, indicates his position as
 shown by the course of dealing.

In their defence, and particulars delivered under it, the defendants alleged
 the terms of their oral agreement with Mr. Wood as follows:

" The said bets were placed in pursuance of an oral agreement made
 between the said Wood and the defendants' manager acting on behalf of the
 H defendants at an interview at the defendants' office at the end of April, 1948.
 It was agreed that Wood should as from May 8, 1948, place bets for himself
 and his clients with the defendants in accordance with their rules and
 conditions for pools on horse races, that the defendants would supply him
 with copies of their said rules and conditions and the necessary coupons and
 would accept his bets, that he should be charged the gross amount of his bets
 less 5s. 6d. in the £, and that any winnings due to him should be paid to him
 in due course."

Counsel for the defendants in cross-examination obtained from Mr. Wood an admission that this was correct. This, counsel submitted, brings in rules which we have on a small printed card and which we were told were reproduced on all the coupons. I will read r. 1 and r. 2.

"1. The coupon (which is available to subscribers only) is an entry form governed by these rules in compliance with which it may be completed and submitted to us and on which alone we are prepared to receive it and, if we think fit, to accept it as an entry. 2. It is a basic condition of the sending in and acceptance of the coupon that it is intended and agreed that the conduct of the pools and everything done in connection therewith and all arrangements relating thereto (whether mentioned in these rules or to be implied) and the coupon and any agreement or transaction entered into or payment made by or under it shall not be attended by or give rise to any legal relationship, rights or duties or consequences whatsoever or be legally enforceable or the subject of litigation, but all such arrangements, agreements or transactions are binding in honour only."

Rule 3 deals with clients' remittances. There follow paragraphs of instructions to clients, a paragraph as to division of the pool, and then r. 11 on which counsel for the defendants relies:

"Coupons issued through a collector will only be accepted if received by us from the collector. It is understood the collector acts solely for the investor, and that winnings will be paid only to him, and that he alone shall be responsible to the investor therefor."

The evidence that Mr. Wood accepted these rules as part of his contract with the defendants was not, to my mind, very satisfactory, but I will assume that they are to be looked at in considering the defendants' position in relation to the words of the Act.

The learned judge had no hesitation in deciding that apart from r. 11, Mr. Wood was the defendants' agent. I agree. An agent is a person authorised to act on behalf of another who agrees so to act. Mr. Wood was authorised to distribute the defendants' coupons to clients who wished to make bets with the defendants. The coupons received were to be forwarded to the defendants, who accepted them as bets made with them, on which, if successful, they would pay through Mr. Wood. Mr. Wood was to account for and pay an agreed percentage of the amount staked. His commission was 5s. 6d. in the £, he taking the risk of bad debts. On this basis he was their agent. Does r. 11 affect the position? The learned judge decided that it did not, having regard to r. 2. He held that by reason of that rule the rules could not be read as affecting "the undoubted legal relationship established between the promoters and the collectors by the course of dealing". There is, if I may say so with respect, force in this. In any event, the position as between defendants and collectors is not set out in the rules. There is nothing there about 5s. 6d. in the £, the consideration for which collectors, including Mr. Wood, agreed to act. The rules assume the collector is entitled to issue the defendants' coupons. The rules provide, in effect, that, so far as clients are concerned, the defendants will not consider themselves bound in honour if the collector whom they have appointed fails in his manifest duty to them to pass on the coupons and the stake money. The expression "clients' collector" and the words "the collector acts solely for his clients" may be regarded, perhaps, as merely descriptive of the effect vis-à-vis the clients as I have stated it. They cannot be read as contradicting the position as between the defendants and Mr. Wood as evidenced by the oral agreement and course of dealing. Counsel suggested that the learned judge was proceeding on the basis that an "in honour" document could never be relevant to the application of the taxing section. I do not so read what the learned judge said. It seems to me he was expressing in one sentence what I have, having regard to the argument,

expanded into two or three. Reference was made in the course of the argument to a sentence in the "Collectors' Conditions." that the collector was not to be regarded as an employee. These words do not assist the defendants' argument. An agent is not necessarily or usually an employee. I, therefore, agree with the learned judge that Mr. Wood was the defendants' agent. On this finding counsel for the defendants agreed that he must fail.

A We were, however, asked to consider the matter on the basis that this was wrong. The basis then would be that Mr. Wood, though nominated by the defendants and authorised to issue their coupons, and receive them if filled up for transmission, was not their agent quoad, at any rate, the receipt of stake money. I would still myself think that the stake money paid by the clients was stake money paid within s. 6 (1) of the Act of 1947. The stake money was in respect of a bet made by way of pool betting within the definition. The defendants were the promoters of the pool. The stake money was paid to a collector. B nominated by the defendants to receive it. The defendants seek to say that the 72½ per cent. which they receive is the stake money paid on which the duty is exigible, but, as the learned judge said, that is not the amount of the stake money paid, but a sum which the collector has guaranteed to pay whether the stake C money is paid or not. In the week with which we are concerned the stake money paid was in excess of the 72½ per cent. It was suggested on behalf of the plaintiffs that, if it was less, the duty could be exacted on the 72½ per cent. actually paid. This, in my view, cannot be right. The duty falls on the stake money paid and the 72½ per cent. is an irrelevant figure. This conclusion seems to me to carry out the intention of the Act. That intention clearly is (i) that the duty shall not D be paid on bad debts, (ii) that expenses are not deductible. The collector's lot is not a happy one if the stake money paid is less than the 72½ per cent. This happened in a number of weeks to Mr. Wood, who tendered his resignation, be it noted, to the defendants. The arrangement plainly contemplates that the stake money paid will on the average exceed the 72½ per cent. so as to provide, inter alia, for the collector's expenses and remuneration. If the defendants were E right, this excess would, in effect, be deducted, and this seems to me contrary to the intention of the Act. I, therefore, think the appeal should be dismissed.

DENNING, L.J.: If we could disregard the rules set out in the printed form, it would be quite clear that the collector, Mr. Wood, was the agent of the promoters. What, then, is the effect of the rules? The promoters did every- F thing which is usually considered sufficient to make the rules binding on those concerned. They printed them on the coupons which were signed by the investors. They got Mr. Wood to agree to act in accordance with them. But the strange thing is that, if these rules are held to be literally binding, they will produce results which are quite contrary to the law and to the facts. Take r. 2, for instance. It purports to deny legal effect to any of these arrangements, and to deprive the transactions of any legal consequences. I venture to suggest that G this rule cannot be given so wide a scope. It cannot, for instance, stop the operation of the criminal law. Fraudulent conversion of stake money or the forgery of coupons will not go unpunished, despite the statement in the rule that nothing done is to have any legal consequences. Nor can the rule stop the operation of much of the civil law. If a collector has received winnings to pay over to an investor, he must account to the investor for them in an action for H money had and received, notwithstanding the statement in the rule that all transactions are binding in honour only. Likewise, the rule cannot stop the operation of the revenue law. If a collector is, in truth, the agent of the promoters, he remains their agent, despite the statement in the rule that the arrangements do not give rise to any legal relationship. The rule is, no doubt, effective to prevent an investor from suing the promoters at law for his winnings: *Jones v. Vernons Pools, Ltd.* (1), *Appleson v. Littlewood (H.), Ltd.* (2). To that extent it does not contradict the law on the facts. It merely puts the transaction on the

same footing as a wager. But whenever the rule does contradict the facts or the law, then the truth must prevail over it.

Take now r. 11. It purports to make the collector the agent of the investors and not the agent of the promoters. It says that "the collector acts solely for his clients." This rule, again, goes too far. The true relationship of the parties is to be discovered from the facts, not from this clause. What, in fact, happens is that the promoters appoint a collector to canvass for business. He finds a member of the public whom he persuades to "invest" in the pool. The investor pays his stake money, let us say it is £1, to the collector. The collector then pays the money over to the promoters less 5s. 6d. for his commission. The total receipts form the pool which is distributed to the investors. The promoters reckon the pool as including the full £1 paid by the investor, but they deduct the 5s. 6d. as being part of their own expenses. The 5s. 6d. is the remuneration which they allow the collector for his services in issuing the coupons and obtaining the investments and for his guarantee in respect of bad debts. On those facts I cannot see how the promoters can say that the collector is not their agent. They cannot truthfully say the collector "acts solely for the investors" when they themselves appoint him and pay him. The rule contradicts the facts and is, to that extent, invalid.

This is no new doctrine. In life actions speak louder than words. So they do in law. If a landlord, who is entitled to forfeit a lease, knowingly accepts the rent, then by law he waives the forfeiture, and nothing which he can say by way of protest against the law will avail him anything: *Matthews v. Smallwood* (3) ([1910] 1 Ch. 786). If a seller of goods by auction warrants by word of mouth that they are sound, he cannot get rid of his liability by setting up an exempting condition which is in the catalogue: *Harling v. Eddy* (4). If a policy of insurance contains a printed clause which is inconsistent with the objects of the insurance, it is disregarded: *Hydarnes S.S. Co. v. Indemnity Mutual Marine Assurance Co.* (5). So, here, these conditions cannot, under the cloak of contract, be allowed to speak that which is false. They cannot assert that black is white and expect the courts to believe it. The courts do not willingly go behind the conditions of a contract in this way. They would far rather reconcile the conditions with the transaction as a whole than reject them altogether. But there does sometimes come a point when they must be overridden. We live in days when standardised conditions cover large fields of human activity. They have become a means whereby powerful interests seek to dictate to the public the conditions on which they will do business. The public cannot amend the conditions. They are offered the contract on the terms: "Take it or leave it. Accept my conditions or go without." The conditions thus come to resemble a legislative code applicable to all who take part in the business. They presume to define the relationship of the parties and to prescribe their rights and liabilities. This is, no doubt, to a large extent, permitted by law, but it is subject to important safeguards. The conditions cannot alter the true relationship of the parties, and they are subordinate to any terms expressly agreed between them. There are other safeguards shown in the books, but I do not stay to consider them now. Suffice it to say that r. 2 and r. 11 cannot alter the fact that the collector was the agent of the promoters and not of the investor. The "stake money paid" was the money which was paid by the investors to the collector. It was not the money paid by the collector to the promoters. The appeal must, therefore, be dismissed.

ROMER, L.J.: The defendants' argument that the collector, Wood, was not their agent, but the agent of the investors, was almost entirely founded on the view that r. 11 of the rules which appear on the coupons constituted a term of the legal relationship which existed between Wood and themselves. I am clearly of opinion (and apart altogether from the effect of r. 2) that this view is quite unjustified. In his evidence Wood said that in May, 1948, he decided to distribute National racing coupons and went to the defendants' office to make

arrangements with the manager, Mr. Edwards, for a supply of coupons. He arranged with Mr. Edwards that his position would be a collector for racing coupons as he had been for Empire football coupons and that he should be responsible for all investments incurred and should remit to the defendants 14s. 6d. out of each pound of investments sent in. Counsel then handed to Mr. Wood a print of the defendants' "Collectors' Conditions and Instructions" and said:

"You told us you had been acting for National Pools for football before the racing season? A.—Yes. Q.—For Empire, was it? A.—Empire. Q.—Had you seen a document like the one you have got now? A.—Yes, I have seen one before."

In fact, the form of Collectors' Conditions and Instructions which had been used for the football season by Empire Pools was somewhat different from the form which was handed up to Wood, but for the purposes relevant to this appeal the two forms were substantially the same, and there can, in my judgment, be no reasonable doubt (although the contrary was argued before us) that any collector who—whether or not he signed it—acted on the footing of either of those forms stood in a relationship of agency towards the promoters. In the particulars which the defendants delivered of the oral agreement alleged to have been made between Wood and the defendants' manager, reference was made to the defendants' "rules and conditions for pools on horse races." A copy of these particulars was shown to Wood in cross-examination and he was asked whether they accurately set out the facts and he said they did. After a good many questions on another topic a small document was handed up to him on which were printed twelve paragraphs in very small print. He was told that No. 11 dealt with collectors and was asked whether he was fully acquainted with that document at the time he was acting as a collector in respect of National Pools. He said he remembered the rules and that they were printed both on the coupons and on the small documents (of which he had been shown a print) and on being asked whether he had a great number of documents like that in that form he said:

"I had these to distribute to our clients . . . to the clients we distributed them."

The learned judge found that, although it was not proved affirmatively that Wood signed the "Collectors' Conditions and Instructions" form in connection with the racing pools, it was quite clear that he acted on the basis of it, and that basis was, as I have already indicated, one of agency as between himself and the defendants. It is, to my mind, as obvious that the "Collectors' Conditions and Instructions" form was brought into being by the defendants to regulate the position as between themselves and the collectors as it is that the rules which appear on the coupons and the small document were evolved to order matters as between the defendants and the investors. It would, accordingly, as I think, require fairly clear and unequivocal evidence to show that a collector who was acting on the footing of the former—and appropriate—document must also be taken to have acted on the footing of one condition extracted from the latter—and inappropriate—document. There was, in my judgment, no such evidence in the present case. If the particulars are relied on, the "Rules and Conditions" therein mentioned might well be a reference to the "Collectors' Conditions and Instructions" and the learned judge said in his judgment that he was satisfied that Wood did not fully appreciate the full import of the particulars. As to the little card, Wood was not asked whether he regarded r. 11 as incorporated in his agreement with the defendants, nor did he say that it was. All he said was that he knew the rules and distributed the cards to the persons for whose edification they were obviously printed, namely, the clients. Apart from the questions and answers about the particulars and the cards there is no evidence

whatever to suggest that r. 11 played any part in the relationship which existed between the defendants and Wood. I am clearly of the opinion that it did not, and there was nothing in the course of dealing between the promoters, Wood, and the clients to suggest the contrary.

In my judgment, the learned judge was quite right in holding that Wood acted as the defendants' agent in connection with the pool betting transactions in question and, on that view, the appeal accordingly fails. The question of the construction of s. 6 of the Finance (No. 2) Act, 1947, which was argued before us, therefore, does not arise. I desire, however, to express my complete concurrence in the conclusions on that question which my Lord has stated in his judgment.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Harold Yates*, Blackpool (for the defendants); *Mr. M. G. Whittome* (for the commissioners).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

CONWAY v. WINGATE AND ANOTHER.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.J.J.), March 5, 1952.]

Surtax—Inclusion in "income tax"—Covenant by partners to discharge outgoing partner's liability for "income tax".

An outgoing partner in a firm agreed to sell his share in the partnership to an incoming partner. A continuing partner and the incoming partner agreed to discharge "... all liability (including that of the vendor personally) for income tax excess profits tax and property tax of and relating to the said partnership down to the date of these presents ...". In an action by the outgoing partner against the two new partners for a declaration that they were liable to discharge his liability for surtax in respect of his share of the partnership profits,

HELD: although by the Finance (1909-10) Act, 1910, s. 66 (1), supertax was imposed as an "additional duty of income tax" and, therefore, surtax could rightly be described as "additional income tax", it was not income tax "of and relating to the partnership", since it was a liability of the individual partner and not of the firm, and, accordingly, the defendants were not liable to discharge the plaintiff's liability for surtax.

Re Reckitt ([1932] 2 Ch. 144), distinguished.

Observations as to the form of indemnity claimed.

AS TO SUPER-TAX AND SUR-TAX, see HALSBURY, Hailsham Edn., Vol. 17, p. 262, para. 529; and FOR CASES, see DIGEST, Vol. 28, pp. 104-113, Nos. 643-707.

Cases referred to:

- (1) *Re Reckitt*, [1932] 2 Ch. 144; 101 L.J.Ch. 333; 147 L.T. 275; Digest Supp.
- (2) *Re Bowring*, [1918] W.N. 265; 34 T.L.R. 575; 39 Digest 168, 593.

APPEAL by the plaintiff from an order of PARKER, J., dated Nov. 7, 1951, dismissing the plaintiff's claim for a declaration that the defendants were liable to discharge the plaintiff's surtax liability under a covenant to discharge liability for income tax. The plaintiff appealed.

Lloyd-Jones, Q.C., and *N. C. Bridge* for the plaintiff.

Lincoln, Q.C., and *E. K. I. Hurst* for the defendants.

SINGLETON, L.J.: For some years from 1936 onwards the plaintiff and the second defendant were in partnership in a business. In 1949 there were differences of opinion between them which were solved by a deed described as "Assignment of share in partnership" and dated Oct. 21, 1949. It was made between the plaintiff, described as the vendor, of the first part, the second

defendant, of the second part, and the first defendant, described as the purchaser, of the third part, and it was said to be supplemental to the partnership agreement of Aug. 20, 1936. After certain recitals, cl. 1 of the deed provides for the assignment of the plaintiff's half share of the partnership business to the first defendant. Thus the plaintiff was to go out of the partnership, and in future the partners would be the first and second defendants. Clause 4 of the deed, on which the argument has been based, reads:

A "The purchaser and Mrs. Wingate [the first and second defendants] hereby further jointly and severally covenant with the vendor [the plaintiff] to pay and discharge all the debts and liabilities of the said partnership business subsisting or accruing at the date of these presents and all liability (including that of the vendor personally) for income tax excess profits tax and property tax of and relating to the said partnership down to the date of these presents and shall in respect of all such matters keep the vendor indemnified from all actions proceedings claims demands and liability in respect thereof."

B Under that clause it is claimed by the plaintiff that the defendants are bound to pay to the plaintiff not only the income tax, but also the surtax, payable by him in respect of the amounts derived from his share of the partnership at the relevant times. The statement of claim, having referred to cl. 4 of the deed, sets out:

C " (4) On the said Oct. 21, 1949, the income tax payable by the said partnership for all years of assessment beginning with the year 1945-46 and the surtax payable by the plaintiff for each of those years was unpaid. (5) By virtue of the said clause the defendants are liable to discharge and to indemnify the plaintiff against such proportion of the plaintiff's liability to surtax in respect of the years of assessment 1945-46 to 1950-51 inclusive as his share in the profits of the said business bore to his total income for each of the said years."

D Thus it is said that for six years of assessment the income tax and the surtax of the plaintiff in respect of that income was unpaid, and it is claimed that the defendants are responsible to the plaintiff, not only in respect of the income tax, but also in respect of the surtax. The plaintiff claims:

E "A declaration that the defendants are jointly and severally liable under the deed of Oct. 21, 1949, to discharge and to indemnify the plaintiff against such proportion of his liability to surtax for the years of assessment 1945-46 to 1950-51 inclusive as his share in the profits of the said partnership bore to his total income for each of the said years."

F The plaintiff's claim is based on certain decisions of the courts as to tax on annuities. The one to which our attention was directed mainly is in *Re Reckitt* (1), in which this court upheld a decision of EVE, J., that an annuity given by the will of a testator "free of tax" was payable free of surtax. LORD HANWORTH, M.R., in the course of his judgment in that case, said ([1932] 2 Ch. 148):

G "Now what is super-tax? It was originally imposed by the Finance (1909-10) Act, 1910, s. 66. By sub-s. 1 it is declared that: 'In addition to the income tax charged at the rate of . . . under this Act, there shall be charged, levied, and paid for the year . . . in respect of the income of any individual, the total of which from all sources exceeds' a certain standard, 'an additional duty of income tax (in this Act referred to as a super-tax).'"

H On that decision and those words counsel for the plaintiff submits that the words "income tax" in cl. 4 of the deed which we have to consider include surtax. It is true that in *Re Reckitt* (1) LORD HANWORTH, M.R., said (*ibid.*, 149):

"I feel myself, therefore, unable to recognise any distinction between income tax and super-tax when construing the words 'income tax', as used in cl. 12 of the testator's will";

but towards the end of his judgment he said (*ibid.*, 151):

"As I have already pointed out, it is not prescribed in what instalments that sum is to be paid. No reference is made to the system of, or the power of the trustees to make, deductions; there is simply a direction that a total sum in each year is to be paid free of income tax. As I have pointed out, super-tax or sur-tax is in essence an additional income tax, and, as there is no indication to restrict the words to income tax as known for so many years, it must follow that freedom is given to the widow in respect of both income tax, as we know it, and the additional income tax which has now been given the name of sur-tax."

ROMER, L.J., said (*ibid.*, 153):

"For the reasons given by the Master of the Rolls it is, in my opinion, clear that, *prima facie*, the words 'income-tax' include super-tax."

Counsel for the plaintiff draws our attention also to the words of cl. 4, and, in particular, to the words in brackets, "(including that of the vendor personally)".

I will come back to the clause. By the deed:

"The purchaser and Mrs. Wingate hereby further jointly and severally covenant with the vendor to pay and discharge all the debts and liabilities of the said partnership business subsisting or accruing at the date of these presents . . ."

Pausing there, that which the parties are considering is the liability of the partnership—a liability which might fall on the vendor in part unless provision was made for it. The clause continues:

". . . and all liability (including that of the vendor personally) for income tax excess profits tax and property tax of and relating to the said partnership down to the date of these presents and shall in respect of all such matters keep the vendor indemnified from all actions proceedings claims demands and liability in respect thereof."

As counsel for the defendants pointed out, the clause not only contains an undertaking to pay and discharge debts, but gives to the vendor an indemnity from all actions, proceedings, claims, demands and liability in respect thereof.

In the ordinary course a trading partnership is assessed for the purpose of income tax, the assessment is normally made on the firm, and each member of the firm becomes liable to pay the amount of tax due on that assessment according to his share in the firm. The assessment, in the first instance, is on the firm. It is said that, that being so, the words in brackets "(including that of the vendor personally)" can mean nothing but surtax. That was the mainspring of the argument adopted by junior counsel for the plaintiff. It seems to me, however, that these words may have been introduced for more than one reason. It may have been thought it would make the matter clearer, if there was a liability, even though in a sense it was a partnership liability, on the plaintiff and he paid it, that under the indemnity he could recover any amount paid by him, or, if he were sued, he could, perhaps, bring in the other parties to the deed as third parties. I should think that the words probably were introduced from an abundance of caution. With regard to the argument on behalf of the plaintiff that those words can only mean surtax, I find it impossible to believe that that can have been the reason for their introduction in cl. 4. Solicitors were discussing the proposal to assign a half share in the partnership. This deed, we are told, was put forward by the plaintiff's

solicitors. If they intended those words to cover surtax, they would have put in the word "surtax". If the words "(including that of the vendor personally)" were put in to cover surtax, I should regard it as a very peculiar proceeding, and I cannot believe that they were.

Let us consider the position of the parties to this contract for a moment. We do not know whether the plaintiff had been paid any share of profits for the last few years or not. We do know that he did not want to pay tax on them if there were any. He may have known what the accounts showed—I expect he did—but the accounts had not been settled with the inspector of taxes. I think it can be taken that the parties, certainly the first defendant (who was manager of the business at the time), would know what the assessment put on the firm by the inspector of taxes was for each relevant year, so he and the second defendant would know the highest liability to income tax that there could be in any year. But if it is said that the deed was intended to cover questions relating to surtax, it is obvious that they could not know the extent of their liability. Each party would know the highest claim which could be made for income tax. The defendants could not know anything as to any claim which might be made for surtax in respect of the plaintiff's income. Whether they knew that the plaintiff was a surtax payer I do not know, but, if he was liable to surtax, they could not have any idea of the amount of his liability thereto. For that reason it is too much to expect one to think that any solicitor would introduce those words "(including that of the vendor personally)" with the idea of covering surtax. The question, however, is one of construction. Does this clause in fact, or in law, cover surtax? The covenant is to pay and discharge the debts and liabilities of the partnership business and all liabilities for income tax, excess profits tax, and property tax of and relating to the said partnership. Income tax, excess profits tax, and property tax arise from the business: surtax has nothing to do with it. True, surtax is, in one sense, an additional income tax, but it is levied on the individual and not on the partnership. Surtax is in no sense a liability of the partnership, nor is it anything that can be said to be covered by the words "of and relating to the said partnership". That by itself leads me to think that surtax was not intended to be covered by a clause which dealt with liability arising out of or related to the partnership business. I accept, I need not say, the reasoning of this court in *Re Reith* (1). I have drawn attention to the words of LORD HANWORTH, M.R., in which he pointed out that there was in that case no indication to restrict the words to income tax, and to the words of ROMER, L.J., that, *prima facie*, the words "income tax" include supertax, but in the present clause there is, in my view, something to show that surtax was not intended to be covered. First, the clause deals with partnership matters; secondly, it provides for the discharge of all liability for income tax, excess profits tax and property tax. In respect of income tax there is a liability on the partnership and on the partners. In respect of excess profits tax the liability is on the firm or partnership, and in default of payment by the firm the partners may become liable individually. The same applies to property tax. But I cannot conceive that, if these parties intended to cover surtax, they would not have included surtax in this clause, when they do, in fact, mention three separate heads—income tax, excess profits tax and property tax. The setting out of those three items appears to me to be an indication that only those items were covered, and that surtax was not intended to be included. I cannot think that in circumstances such as these an unknown liability would have been undertaken by the defendants—not, at least, without some inquiry, and there is nothing to show that there ever was any.

My view on this case is formed on the clause itself. PARKER, J., was of opinion that the plaintiff had not established his claim. In that I think he was right, and that this appeal ought to be dismissed. I should add that the claim to a declaration made by the plaintiff is in respect of

"such proportion of his liability to surtax . . . as his share in the profits of the said partnership business bore to his total income for each of the said years."

The proportionate claim which is made is based on the judgment of SARGANT, J., in *Re Bowring* (2). In that case various annuities had to be considered, and the question arose as to the manner in which surtax (then supertax) should be borne. Various ways were put forward as to how the liability should be borne. SARGANT, J., said ([1918] W.N. 265):

"An intermediate course, in favour of which he should give judgment, was that the super-tax should be charged rateably as between the outside income on the one hand and the £4,000—increased, of course, by the fact that that was free of income tax . . ."

SARGANT, J.'s, decision related to what was the fair and right way to deal with the supertax on certain annuities. Counsel for the plaintiff said in the present case that his client had sought to adopt the same course in order likewise to be fair and not to ask for too much. But it seems to me, on the terms of the claim to an indemnity, that, if the plaintiff is right and income tax includes surtax, it is open to him (the plaintiff) to say: "I paid my 1945-46 surtax a good many years ago. Now I get some more income you have agreed to indemnify me not only against income tax, but also surtax. In the result I have to pay more surtax, and my indemnity means that you must pay at the highest rate at which I have to pay." The indemnity would cover that, I am inclined to think, and there is no reason why the plaintiff should be so moderate in his demand, as he is, if he is right. However, it is unnecessary to say more as the claim fails.

BIRKETT, L.J.: I agree.

MORRIS, L.J.: I agree. Under cl. 4 the vendor is given an indemnity against all liability for income tax, excess profits tax, and property tax of and relating to the partnership. The partnership, as such, is not liable to surtax. I consider, therefore, that, having regard to the context, there is a clear indication that the phrase "income tax" is used in its limited sense and not as including surtax. As to the words "(including that of the vendor personally)", I think that, whether they were strictly necessary or not, they were inserted to make it clear that the vendor was protected at all times from liability for income tax, excess profits tax, and property tax of and relating to the partnership, and that this protection applied even if, on a failure to pay, some kind of demand was made on him personally.

Appeal dismissed.

Solicitors: *Maltz, Mitchell & Co.* (for the plaintiff); *Ponsford & Devenish* (for the defendants).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

HAMER v. CUNARD WHITE STAR, LTD. THE QUEEN MARY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), February 18, March 3, 1952.]

Costs—Taxation—Money recovered by widow—Re-marriage after writ issued—R.S.C., Ord. 22, r. 14 (11).

A By R.S.C., Ord. 22, r. 14 (1): "In any cause or matter in the King's Bench Division and in any Admiralty action in the Probate, Divorce and Admiralty Division in which money or damages is or are claimed . . . no settlement or compromise or payment or acceptance of money paid into court . . . shall . . . be valid without the approval of the court or a judge." By r. 14 (9): "The provisions of this rule shall also apply to . . . money which under [the Fatal Accidents Acts, 1846 to 1908] is recovered by or adjudged to be paid to the widow of the person killed . . . " By r. 14 (11): "The costs of the plaintiff . . . in any such cause or matter . . . shall be taxed by the taxing master, or, if such cause or matter is proceeding in a district registry, by the district registrar . . . "

B
C On Jan. 20, 1950, the plaintiff, as administratrix and sole beneficiary of her deceased husband, issued a writ in the Admiralty Court against the defendants claiming damages in respect of his death under the Fatal Accidents Acts, 1846 to 1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934. On Mar. 25, 1950, the plaintiff re-married and on May 28, 1951, the writ was amended accordingly. The defendants admitted liability subject to a reference to the registrar to assess the amount of the damages. The registrar's report was accepted by both parties, but the
D defendants objected to taxation of the plaintiff's costs under R.S.C., Ord. 22, r. 14 (11).

HELD: the plaintiff, having re-married, was not "the widow of the person killed" within the meaning of R.S.C., Ord. 22, r. 14 (9), and, therefore, there could be no order to tax the plaintiff's costs under R.S.C., Ord. 22, r. 14 (11).

E Dictum of MORTON, L.J., in *Re Embleton* ([1946] 2 All E.R. 544), applied.

Per LORD MERRIMAN, P.: "Though the question is not strictly before me . . . I would say that this decision equally applies to the question of the damages awarded to the plaintiff [under the Fatal Accidents Acts] being paid into court. In my opinion, the court has no discretion to control the money awarded to the plaintiff in circumstances such as these."

F FOR R.S.C., ORD. 22, r. 14 (1), (9) and (11), see the ANNUAL PRACTICE, 1951, Vol. 1, pp. 402, 406 and 408.

Case referred to:

(1) *Re Embleton*, [1946] 2 All E.R. 542; [1947] K.B. 142; [1947] L.J.R. 423; 175 L.T. 451; 2nd Digest Supp.

G SUMMONS adjourned into court.

The plaintiff, as administratrix, issued a writ in respect of the death of her husband under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants who admitted liability subject to a reference to the registrar to assess the amount of the claim. In his report the registrar assessed the damages at £1,148, being £500
H under the Law Reform (Miscellaneous Provisions) Act, 1934, £628 under the Fatal Accidents Acts, 1846 to 1908, and £20 as special damages. This report was accepted by both parties, and the plaintiff's solicitors submitted a draft consent order incorporating a clause providing for the taxation of the costs of the action. The defendants objected to this clause on the ground that, as the plaintiff had re-married before the registrar's report, R.S.C., Ord. 22, r. 14 (11), did not apply. The parties came before the registrar who referred the matter to the President.

J. H. Barrington for the plaintiff.

Olson for the defendants.

Cur. adv. vult.

Mar. 3. **LORD MERRIMAN, P.:** This is a summons which was referred to me by the registrar because it was thought to raise a question of principle which may affect other similar cases. It is one of the claims arising out of the collision between the Queen Mary and the Curaçoa, and it was brought by the plaintiff as administratrix of her deceased husband. The claim was under two heads, for damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, and it is important to notice that the sole beneficiary is the plaintiff herself. She is not suing on behalf of any other dependants under Lord Campbell's Act, still less any dependant who is an infant. The writ in the action is dated Jan. 20, 1950, but, on Mar. 25, 1950, the plaintiff re-married. At that time there had been no reference to the registrar regarding the amount of her claim, which was not disputed, nor, of course, had there been any order for costs.

By R.S.C., Ord. 22, r. 14 (9), which is one of the provisions dealing with infants and persons under a disability, it is provided as follows:

"The provisions of this rule shall also apply to all actions in which damages are claimed or recovered by or on behalf of or adjudged or ordered or awarded or agreed to be paid to an infant or person of unsound mind under the Fatal Accidents Acts, 1846 to 1908, and also to money which under those Acts is recovered by or adjudged to be paid to the widow of the person killed as they apply to money recovered by or adjudged or ordered to be paid to an infant. Where such proceedings are taken by or for the benefit of more than one person and the amount recovered is to be divided amongst such persons, the judge or jury as the case may be shall divide and apportion the share to be paid to each of the said persons and the amount so apportioned shall be specified in the order or judgment made or directed in the High Court."

The important phrase is "to money which under those Acts is recovered by or adjudged to be paid to the widow of the person killed." As I have already said, the latter part of that rule does not arise, because there is no person interested in this amount other than the plaintiff herself. I was assured that it was impossible to distinguish in any way the costs incurred in this matter as between the claim under Lord Campbell's Act and that under the Act of 1934 and I can well understand that that must be so, but, so far as the Law Reform damages are concerned, sub-r. (9) does not apply at all. On Dec. 11, 1951, the registrar made his report on the claim, and he awarded £500 under the Law Reform Act, £628 under the Fatal Accidents Act, and £20 special damages. On that award this summons came before him asking that the £520 be paid to the solicitors acting for the plaintiff, that the £628 be paid into court, and that the plaintiff's costs be taxed in accordance with R.S.C., Ord. 22, r. 14 (11). I need not, I think, read sub-r. (11). Suffice it to say there is abundant authority that, if the rule applies at all, taxation of costs is mandatory. If the plaintiff is not subject to the rule, she can, as can any other plaintiff *sui juris*, make any arrangement she likes about costs incurred in her claim under the Fatal Accidents Acts. On that summons being served on the defendants' solicitors, they took exception to the paragraph about taxation, and struck it out. The plaintiff's solicitors reinstated it, and so the matter arose.

The question is whether sub-r. (9) and sub-r. (11) of R.S.C., Ord. 22, r. 14, apply at all at this stage when, though the plaintiff was a widow when the action started, she had ceased to be a widow at the relevant time. There is no direct authority, but there is a very strong indication of the way in which this question

ought to be decided in a decision of the Court of Appeal in *Re Embleton* (1). In that case an infant had recovered a sum of money which was transferred to the county court under the County Courts Act, 1934, s. 164, to be dealt with for his benefit. Having come of age, the infant applied for payment out to him of the whole fund, and the Court of Appeal held that, since the infant was no longer under a legal disability, the court had no power over the fund. MORTON, L.J., giving the judgment of the court, said ([1946] 2 All E.R. 544):

“ In s. 164 (3) the provisions of the section are applied to money ‘ adjudged or ordered to be paid to the widow of the person killed ’ . . . In my view, the application . . . to the case of a widow would be that the words ‘ [the money . . . shall . . . be invested] for the benefit of the person to whom the order relates ’ mean for the benefit of a person already described, namely, a person who is the widow of the person killed, and when the person in question ceases to answer that description the discretion ceases also. Thus, if the widow re-married, she would be entitled to have the money paid out to her. That case is not before us, but it seems to me that that result must logically follow.”

It is, of course, true that the observations of MORTON, L.J., are obiter as regards the present case, but they form so integral a part of the reasoning on which that case was decided, that I would hesitate long before dissenting, even if I disagreed with them. As I entirely agree with them, I accept them gladly.

I think that the defendants are right and that it is not necessary for the plaintiff to tax her costs which only accrue under an order made some eighteen months or more after she ceased to be a widow, and, therefore, the paragraph relating to taxation of costs must be struck out. Though the question is not strictly before me, as I am asked by counsel, I would say that this decision equally applies to the question of the damages awarded to the plaintiff being paid into court. In my opinion, the court has no discretion to control the money awarded to the plaintiff in circumstances such as these. The order, therefore, will be that all the money awarded to the plaintiff by the registrar will be payable to her solicitors, on their receiving authority from her, and that the paragraph relating to the mandatory taxation will be struck out.

Order accordingly.

Solicitors: *Clyde & Co.* (for the plaintiff); *Hill, Dickinson & Co.* (for the defendants).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

JEFFREY v. JEFFREY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), March 4, 5, 1952.]

Variation of Settlement—Application by wife for maintenance—Desirability of both applications being heard together—New circumstances arising after hearing in court below—Consideration by Court of Appeal.

In 1936 the parties entered into a deed of separation by which the husband covenanted to pay to the wife during their joint lives and *dum casta* the sum of £275 a year free of tax. At that time he was earning £1,500 a year, and the wife had no means. In 1946 the husband's income was reduced to £450 a year, his capital being some £2,500. On Dec. 9, 1949, the wife, having instituted divorce proceedings on the ground of the husband's adultery, applied for an order for maintenance, but her application still remained to be heard. On Jan. 9, 1950, the wife obtained a decree nisi. On May 25, 1950, the husband applied to vary the deed by extinguishing his liability to pay under it. On July 7, 1950, the decree was made absolute. In April, 1951, the registrar recommended a variation of the terms of the deed by a reduction of the annual payments to £75 less tax, without prejudice to the wife's right to obtain maintenance, and this report was confirmed by COLLINGWOOD, J. Subsequently the husband was appointed as managing director of a company at a salary of £1,250 a year.

HELD: where the Court of Appeal was exercising a discretionary remedy and the question was what justice required to be done between two parties for an indefinite period of time, as distinct from a case in which the question was what was the right of a particular party at the time when he issued his proceedings, the court must have regard to new circumstances arising since the hearing in the court below; in the present case the new circumstances struck at the basis of the decision in the courts below; the function and the duty of the court was to see that proper provision was made for the wife by her former husband from one source or another, and the court should deal with the application for variation and the application for maintenance at the same time; and, therefore, the case would be remitted for further consideration.

Decision of COLLINGWOOD, J. ([1951] 2 All E.R. 805), reversed.

AS TO PRINCIPLES ON WHICH SETTLEMENTS WILL BE VARIED, see HALSBURY, Hailsham Edn., Vol. 10, pp. 803-807, paras. 1280-1285; and FOR CASES, see DIGEST, Vol. 27, pp. 521-528, Nos. 5632-5703, and Digest Supps.

Cases referred to:

- (1) *Johnson v. Johnson*, [1949] 2 All E.R. 247; [1950] P. 23; 2nd Digest Supp.
- (2) *Tomkins v. Tomkins*, [1948] 1 All E.R. 237; [1948] P. 170; [1948] L.J.R. 1028; 2nd Digest Supp.
- (3) *Reid v. Reid*, [1926] P. 1; 95 L.J.P. 30; 134 L.T. 24; 27 Digest 503, 5384.

APPEAL by the wife from a decision of COLLINGWOOD, J., dated Oct. 10, 1951 and reported [1951] 2 All E.R. 805, confirming the report of Mr. Registrar FORBES that the payments due under a deed of separation should be reduced from £275 a year free of tax to £75 a year less tax without prejudice to the wife's right to obtain maintenance.

J. B. Gardner for the wife.

Petrie for the husband.

SIR RAYMOND EVERSHERD, M.R.: This appeal raises the question whether the court should vary a deed of separation which was entered into by the parties to the appeal in 1936, a long time before the divorce proceedings

in which, on the petition of the wife, a decree absolute was eventually pronounced against the husband on the ground of his adultery. There is no question that such a deed is properly treated as a post-nuptial settlement within the terms of the Matrimonial Causes Acts, and there is no question but that the court has jurisdiction to vary such a deed even at the suit of the guilty husband in the divorce proceedings. If authority be needed for the latter proposition it is sufficiently to be found in the judgment of this court in *Johnson v. Johnson* (1). That also was a case in which a deed of separation had been entered into between the two spouses whose marriage was eventually dissolved on the wife's petition alleging adultery against the husband. The particular problem there arose because there had been a considerable lapse of time before the husband applied to vary the deed, and in the meantime not only had he himself re-married, but his former wife had also re-married. In his judgment which was assented to by the other two members of the court DENNING, L.J., said ([1949] 2 All E.R. 248):

"It is plain that this separation deed was a post-nuptial settlement which the court has power to vary under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. Settlements of this kind are always subject to variation by order of the court in the event of the marriage being dissolved: see *Tomkins v. Tomkins* (2)."

Counsel for the wife in the present case has not challenged the existence of the jurisdiction, though he has pointed out that the variation of any settlement which results in benefit to a guilty husband is not a variation which the court lightly makes—to which, perhaps, one might add that no variation of a deed solemnly entered into is lightly made.

The deed in suit was entered into in 1936. Both husband and wife had then fallen apart, and the occasion of the making of that deed was, in fact, the presentation of a petition by the wife for judicial separation on the ground of cruelty. Those proceedings were settled, and one of the terms of the settlement was the execution of this deed. Like all such deeds it proceeded on the footing that the husband and wife would remain married, though living apart, so that there were contained in it the usual covenants, for example, against molestation. The relevant financial provision is as follows:

"The husband shall during the joint lives of himself and the wife so long as the wife shall perform and observe the covenants on her part herein contained and so long as she shall remain chaste pay to the wife an annual allowance which after the deduction of income tax thereon and a due proportion of supertax when the husband is liable to pay the same at the standard rates for the time being in force will yield to the wife the clear sum of £275 per annum."

When the divorce proceedings supervened more than ten years later the situation of the husband was financially less happy than it had been in 1936, and after the decree nisi he issued the present application for variation of this deed. In all the circumstances it is not surprising that the wife strongly resented that application. She applied to PEARCE, J., for the substitution, for a decree dissolving the marriage, of a decree for judicial separation. PEARCE, J., did not accede to that request: see [1950] 2 All E.R. 449. The decree became absolute and there was no appeal from the order of PEARCE, J. Later, the husband re-married. The wife has not re-married. The ages of the two parties are, in the case of the husband sixty-two or sixty-three years, and in the case of the wife fifty-eight or fifty-nine. Before the issue of the summons to vary the deed there had also been set on foot by the wife an application for maintenance on the footing that the marriage was to be dissolved. The present appeal, being an appeal from the order made on the husband's application to vary, has come before us independently of the wife's application for maintenance,

which is still pending and has never been heard, and for reasons which I shall show I think that is a very material circumstance—and, I think, an unfortunate one.

The deed, as I have said, provided for payment, during the joint lives only, of a sum which I may, for convenience, call £275 free of tax. Having regard to the date and to the intervention of certain well-known legislation in relation to these matters, the result has been to impose on the husband an obligation during the joint lives at the present rate of tax to pay a sum of about £340 per annum. At the date of the deed the husband (who was then fifteen years younger) was enjoying an earned income of over £1,500 a year. When the matter came before the registrar the evidence showed that, taking an average of three years, his income had been reduced to no more than £450 a year.

Proceeding on that premise, the registrar thought that in justice the deed should be varied by reducing the figure from £275 a year free of tax to £75 a year subject to tax. So large a variation would be startling if it were not pointed out in the registrar's report and the judge's judgment that the order reducing the figure was made without prejudice to the wife's right, as the petitioner in the divorce proceedings, to obtain maintenance, including secured maintenance. The registrar took the view that the just thing to do was to leave the amount of the husband's earnings to be, so to speak, the subject-matter from which maintenance could be ordered. An order for maintenance may be varied from time to time, so the court could adjust the sum payable for maintenance according as his earned income increased or diminished. The registrar thought that under the deed of separation there should only be paid such a sum as might be taken to represent the earnings of the invested capital of the husband. At that time the figure of such invested capital was £2,500, and on a three per cent. basis he thought it would be right, therefore, to substitute for the £275 free of tax £75 less tax as being the sum that that invested capital could fairly be expected to earn. I think that that method of calculating the just sum is open to this criticism. I have drawn attention to the fact that the deed of separation provided for payment to be made, not during the life of the wife, but only during the joint lives of the parties, and, that being so, the existence of this particular sum of capital may be said not to have been the vital consideration. If the covenanted sum were treated as payable during the wife's life, then, bearing in mind the possibility, and, indeed, having regard to the ages it might be said the probability, that the husband would be the first to die, it would be appropriate to look to the capital as the source from which the covenanted sum could be provided after the husband's death. In any case, since the date when the matter was before the judge further evidence has come to light. It appears, indeed, that it may have come to the knowledge of the legal representatives of both parties before the judgment was delivered by COLLINGWOOD, J. He delivered a reserved judgment on Oct. 10, 1950, having completed the hearing in July. The new facts to which I am about to allude were unknown to the judge and to the registrar, when they decided the matter according to what, on the facts before them, they thought justice required.

The new facts are that the husband has obtained a position as the managing director of a company at a salary of £1,250 a year. It is true that some deduction may have to be made from that gross sum in arriving at the actual annual income which the husband will have to spend, but, to my mind, it is beyond question that the new situation resulting from that appointment is inconsistent with that which I think to have been the basis on which the registrar and the judge decided to vary the deed of separation by reducing the sum payable under it to £75 a year gross. The question has been debated whether on this appeal this court ought to take into account these new facts, but where the court is exercising a discretionary remedy and the question is what justice requires to be done between these two parties for an indefinite period of time, as distinct from a case in which the question is what was the right of a particular party at the time that

he issued his proceedings, I feel no doubt that the court must have regard on appeal to the new circumstances, and, because they have struck at the basis of the decisions in the courts below, as well as because I have felt doubtful of the propriety of relating the £75 to the produce of the capital in the circumstances, I have myself come to the conclusion that the decision in favour of the husband represented by the variation I have already mentioned ought not to stand.

A During the course of the argument picturesque phraseology has at times been used. It has been urged by counsel for the wife, that, in exercising the power to vary a settlement in circumstances such as these, the court should, *prima facie*, leave matters as they are because otherwise the court is, so to speak, rewarding the guilty husband for his infidelity, and that, if the result of divorce proceedings in the present case has been so much to depreciate the wife's financial position, that is something which on the face of it seems wrong. I am not very
B greatly moved by that particular consideration. One need not say that the court would not, on this or any other application, take steps which could only fairly be characterised as rewarding an adulterer for his adultery. On the other hand, the function of the court (and I am, I think, reflecting the language of LORD GREENE, M.R., in *Tomkins v. Tomkins* (2)), is not to punish an adulterer for his adultery. The function of the court in such a case as this is to see that
C a wife who has been the petitioner in a divorce suit is fairly provided for out of such resources as the husband has and as are fairly applicable to make provision for her.

That brings me at once to the close relationship which, I think, should be preserved in matters of this kind between what should be ordered for maintenance and what order should be made by way of variation of a post-nuptial settlement.

D If reference is made to the few cases in the books in which variations of this kind have been made, it will be seen that they are linked with orders for maintenance. Let me take, first, *Reid v. Reid* (3), in which under a deed of separation a wife had been in receipt of a sum of 25s. a week. Counsel for the wife drew attention to the language of LORD MERRIVALE, P., in that case, indicating the paucity of precedents for variation, at the instance of a guilty party, of a settlement consisting of a deed of separation. The force of that generality is, I think, somewhat qualified when you observe that at the end of the judgment the President directed maintenance at the rate of 25s. a week, but at the same time imposed on the wife the obligation that, so long as she received that maintenance, she should not enforce the deed of separation. If, therefore, I am right in putting the matter as I have done—that the function and duty of the court is to see
E that in such a case as this the wife has proper provision made for her from one source or another by her former husband—it is highly important (I had almost said essential, though there may be cases in which it is not practicable for the two things to come on together) that the court should deal with both matters at the same time. The registrar and the judge obviously proceeded on the assumption that some appropriate order would be made on the wife's application for
G maintenance, and, if the application for maintenance had come on first, I doubt not that the court, in ordering maintenance, would have had to make some assumption in regard to what would continue to be payable under the deed of separation. It seems to me far more satisfactory, where it is possible (as it was here), instead of dealing with them separately, to deal at the same time with both applications and to decide what should be paid under an order for
H maintenance and to what extent, if at all, the deed of separation ought to be varied.

Counsel for the wife has pointed out that the great advantage to the wife of preserving rights under the deed of separation is that, once varied on this occasion, they then remain continuous for the period during which the deed is expressed to operate. They are not liable to further variation. There is, therefore, that security which comes from the certainty that the deed goes on until by its terms it comes to an end. If the deed can be varied at all, I think it is a

circumstance that ought to be considered by the court whether it is right that its terms should be limited to the joint lives. Having expressed the view that I have in regard to the new circumstances and having regard to the great desirability of these matters being heard together, it will follow that I think the order so far made should be set aside and that this matter should be referred back to the Divorce Division so as to be heard together with the wife's application for maintenance. The court can then decide the matter in the light of the facts as they now are or may ultimately emerge as the result of further discovery or cross-examination. The court will, no doubt, consider the point I have mentioned as to the duration of this deed of separation. I would add this. Whatever view one may take of the conduct of either of these parties from 1936 onwards, it is important to note that the deed of separation was entered into on a certain assumption, namely, that these two parties would remain married, but would live apart, and that the provision made by the deed was to be the limit of the husband's liability to his wife. Whatever her motives may have been, the wife in point of fact, by an act entirely voluntary on her part, destroyed the basis on which this document was entered into and substituted for the state of facts on the basis of which the deed was entered into a new state of facts which involved the right for her to go to the court and seek maintenance dehors this deed. It is not to be forgotten that the obligations of the husband to pay under the deed were limited to the performance by the wife of various covenants—a covenant against molestation, a covenant to remain chaste, and other matters which can have but little significance today—and I have already alluded to the term of the deed as being one for joint lives in any case. I, therefore, think that in the circumstances the proper order for this court to make is to set aside the order varying the separation deed in the way I have indicated and to refer the matter of the husband's application for variation back to the court below to be heard and disposed of together with the wife's application for maintenance, which I assume, of course, she is intending to prosecute with proper diligence.

JENKINS, L.J.: I agree. As appears from *Johnson v. Johnson* (1), the court has jurisdiction to vary a deed such as this even in favour of a guilty husband. The question, therefore, is whether, in all the circumstances of this case, any, and if so, what, reduction should be made in the sum covenanted to be paid. The evidence now before the court as to the husband's present circumstances destroys the essential basis of fact on which the registrar reported and on which the judge confirmed the registrar's report. As I am clearly of opinion that the evidence as to the husband's present circumstances ought to be taken into account in this appeal, it follows, in my view, that the present order cannot stand and the matter must be re-considered in the light of the husband's circumstances as they now are. I think it is impossible to deal satisfactorily with the question of variation in relation to a deed of covenant such as this except in conjunction with the whole question of the wife's maintenance. The object of the court must be to see that the wife is adequately provided for having regard to the means of both parties and all the circumstances of the case. I do not see how that end can be satisfactorily achieved if the husband's obligation under a deed of separation like the present deed is considered as a separate and distinct matter from the whole question of maintenance. The proper course, therefore, would be that which my Lord has proposed, namely, to discharge the learned judge's order and send this matter back with a direction that it should be dealt with at the same time as the wife's application for maintenance.

HODSON, L.J.: The application to the court in this case was made by a husband who had been divorced on the ground of his adultery, the application being made under s. 25 of the Matrimonial Causes Act, 1950, which provides:

"The court may after pronouncing a decree for divorce . . . inquire into the existence of . . . settlements made on the parties whose marriage

is the subject of the decree, and may make such orders with reference to the application . . . of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit."

A It cannot be doubted that there is jurisdiction, on the plain language of the section, to entertain an application by a respondent who has been found guilty of adultery, but the matter has been put before the court on behalf of the wife, if not as a matter of law, at any rate as a matter of principle, that the court should not, as it were, reward a guilty party who has been divorced by enabling him to escape from the contractual obligations which he freely entered into with his wife while the marriage was subsisting—obligations which he could not otherwise have escaped. On the other hand, the wife, whether urged by her husband or not, nevertheless instigated the proceedings and altered the situation between herself and her husband. Once she destroyed the marriage by obtaining a divorce she enabled the jurisdiction to be invoked and enabled the court to regulate the financial position as between herself and her husband as the court thought fit. I am bound to say that I think that it is not easy for a man in this position and on these bare facts successfully to achieve the object I have mentioned. As LORD MERRIVALE, P., pointed out in *Reid v. Reid* (3) ([1926] P. 3):

C "the records of the court will be searched in vain for any instance where the court at the instance of a guilty party has varied or annulled the settlement in his favour."

D On the other hand, as appears from *Johnson v. Johnson* (1), a decision of this court, such an application was entertained by the court and the husband succeeded, although in that case there was the important additional fact that the wife had re-married. The order in question here, I think, was arrived at in an unsatisfactory manner. Apart from the change in circumstances which necessitates the matter going back for re-hearing, it was impracticable to endeavour to deal with the question of variation independently of that of maintenance. Where

E the object of the variation of a settlement is to alter the amount of the financial provision for children or a wife who is applying for maintenance, it seems to me to be essential that the two matters should be dealt with together. Otherwise, difficulties such as have arisen in this case must necessarily arise. The registrar, in fixing the amount which he thought ought to be substituted for the amount provided for in the covenant contained in the deed of separation, had in mind an

F affidavit put in by the husband in the maintenance proceedings in which he stated his average profit from his business over the last three years as £450. That profit had never been investigated. It was merely extracted from a summary of profits and losses as agreed with the inspector of taxes. The wife had never had an opportunity—perhaps through her own fault, as she had not proceeded with the application for maintenance up to that time—of arguing whether the

G deduction allowed against profits by the Commissioners of Inland Revenue was properly to be allowed against the husband in considering what were his available means for her support. The £75 was fixed by the registrar as if he were considering what would be a proper provision to be made for the wife for her life, because he based it on a calculation of the productivity of the husband's investments, whereas what he was considering was what was a reasonable sum to be

H paid to the wife during their joint lives. In any event, therefore, I think that this order must be re-considered, and I agree that the matter should go back for investigation at the same time as the wife's application for maintenance.

Appeal allowed.

Solicitors: *Alfred Cox & Son*, agents for *Clarke & Nash*, High Wycombe (for the wife); *Gregory, Rowcliffe & Co.*, agents for *Neal, Scorah, Siddons & Co.*, Sheffield (for the husband).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

STRAND ELECTRIC AND ENGINEERING CO., LTD. v. BRISFORD ENTERTAINMENTS, LTD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), February 28, March 14, 1952.]

Detinue—Damages—Measure—Detention of goods normally let out on hire—Owner entitled to reasonable hiring charge.

Where a defendant has detained and used a chattel of the plaintiff which the plaintiff, as part of his business, hires out to users, the measure of damages in an action for the detinue of the chattel is a reasonable sum for the hire of the chattel during the period of the detention.

The defendants, who were negotiating for the sale of a theatre to B.T., Ltd., having allowed that company to go into possession before completion, the plaintiffs, in the ordinary course of their business, hired to B.T., Ltd. portable switch-boards to control the stage lighting of the theatre. B.T., Ltd., being unable to complete the purchase of the theatre, informed the plaintiffs that they were willing to return the equipment to them, but were prevented from doing so by the defendants who had taken possession of the theatre. The plaintiffs demanded from the defendants the return of the equipment, but the defendants retained possession of it. On the question of damages,

HELD: the plaintiffs were entitled to a sum representing a reasonable charge for the hire of the goods from the date on which the defendants took possession of them to the date of the return of the goods.

AS TO REMEDIES IN ACTIONS FOR TROVER AND DETINUE, see HALSBURY, Hailsham Edn., Vol. 33, pp. 69-74, paras. 115-124; and FOR CASES, see DIGEST, Vol. 43, pp. 512-534, Nos. 504-701.

Cases referred to:

- (1) *Mediana (Owners) v. Comet (Owners, etc.). The Mediana*, [1900] A.C. 113; 69 L.J.P. 35; 82 L.T. 95; 41 Digest 811, 6733.
- (2) *No. 7 Steam Sand Pump Dredger (Owners) v. Greta Holme (Owners). The Greta Holme*, [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 41 Digest 808, 6689.
- (3) *Admiralty Comrs. v. S.S. Valeria. The Valeria (No. 2)*, [1922] 2 A.C. 242; 92 L.J.K.B. 42; 128 L.T. 97; 41 Digest 803, 6635.
- (4) *Admiralty Comrs. v. Susquehanna (Owners). The Susquehanna*, [1926] A.C. 655; 95 L.J.P. 128; 135 L.T. 456; 41 Digest 802, 6624.
- (5) *Pillott v. Wilkinson*, (1864), 3 H. & C. 345; 34 L.J.Ex. 22; 11 L.T. 349; 159 E.R. 564; 3 Digest 102, 293.
- (6) *Liesbosch, Dredger v. Edison S.S.*, [1933] A.C. 449; 102 L.J.P. 73; *sub nom., The Edison*, 149 L.T. 49; Digest Supp.
- (7) *Slater v. Hoyle & Smith*, [1920] 2 K.B. 11; 89 L.J.K.B. 401; 122 L.T. 611; 39 Digest 481, 1026.
- (8) *Smiley v. Townshend*, [1950] 1 All E.R. 530; [1950] 2 K.B. 311; 2nd Digest Supp.
- (9) *Haviland v. Long (Dunn Trust, Ltd., Third Party)*, [1952] 1 All E.R. 463.
- (10) *Reading v. A.-G.*, [1951] 1 All E.R. 617; [1951] A.C. 507.
- (11) *Whitwham v. Westminster Brymbo Coal & Coke Co.*, [1896] 2 Ch. 538; 65 L.J.Ch. 741; 74 L.T. 804; 34 Digest 717, 1011.
- (12) *Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 All E.R. 583; [1946] K.B. 374; 115 L.J.K.B. 215; 174 L.T. 214; 2nd Digest Supp.
- (13) *S.S. Celia v. S.S. Volturmo*, [1921] 2 A.C. 544; 90 L.J.P. 385; 126 L.T. 1; 17 Digest 159, 602.
- (14) *Sachs v. Miklos*, [1948] 1 All E.R. 67; [1948] 2 K.B. 23; [1948] L.J.R. 1012; 2nd Digest Supp.

APPEAL by the plaintiffs from an order of PILCHER, J., dated Nov. 16, 1951, in an action in detainue.

The plaintiffs, who were suppliers of electrical apparatus, claimed the return of certain switch-boards, their property, which, they alleged, the defendants had wrongfully detained, and, alternatively, the sum of £714, the value of the goods, and £401 6s. 8d. damages for their detention for forty-three weeks. The defendants denied liability. PILCHER, J., held that the defendants had wrongfully detained the equipment and made an order for its return. In assessing damages for its detention, he deducted a period of a month as a reasonable time for the defendants to investigate their position, considered what the plaintiffs might have realised by hiring out the equipment if it had been returned at the proper time, and awarded £200. The plaintiffs appealed against this assessment of damages.

Caplan for the plaintiffs.

I. S. Warren for the defendants.

Cur. adv. vult.

Mar. 14. The following judgments were read.

SOMERVELL, L.J.: This is an appeal from a judgment of PILCHER, J., in a claim in detainue. The learned judge found for the plaintiffs, and this is an appeal by the plaintiffs who submit that in awarding damages for the detention the learned judge applied the wrong principle.

In 1949 the defendants were negotiating for the sale by them of a theatre to Bedford Theatre (London), Ltd. That company was allowed to go into possession before completion. Under a contract made by it with the plaintiffs, the plaintiffs lent to the Bedford Theatre company certain portable switch-boards. This was done pending the manufacture and installation by the plaintiffs of permanent switch-boards. No hire was charged in the first instance, but, as the Bedford Theatre company failed to take delivery of the permanent switch-boards when made, but desired to retain the portable switch-boards, it was agreed that as from Jan. 1, 1951, the company should pay the plaintiffs' usual charge which was £9 6s. 8d. per week. The hiring out of the portable switch-boards was a normal, though minor, part of the plaintiffs' business. On Jan. 12, 1951, the company wrote the following letter to the plaintiffs:

"This is to inform you that Bedford Theatre (London), Ltd. ceased responsibility as regards the hire articles from Saturday night, Jan. 6, when the theatre was closed and wished to return the equipment on hire to you. Although my company is allowed access to the theatre the vendor's agent who took possession of the theatre on Monday, Jan. 8, has given instructions that nothing whatsoever must be removed. We, therefore, disclaim any responsibility for hire equipment in the theatre as from when the vendor's agent took possession."

The vendor referred to is the defendant company.

Between January and March, 1951, the plaintiffs wrote a number of letters to the defendants demanding the return of their property, but received neither their property nor any satisfactory answer. The writ was issued on Mar. 7, 1951, claiming the return of the property or its value and damages for its detention. The defendants disputed liability up to the trial. The learned judge held that the plaintiffs were entitled to succeed. He made an order for the return of the goods, or, alternatively, for a sum of £714, their value. There is no appeal on this part of his judgment. With regard to damages he assessed them at £200. From that decision the plaintiffs appeal on the ground that the learned judge went wrong in law. Damages were claimed for detention for forty-three weeks. The learned judge deducted a period of a month as a reasonable time for the defendants to investigate the situation and consider their position. Counsel for the plaintiffs submits that on the other findings of the learned judge this was wrong.

The main contest turned on the learned judge's basis for assessing damages. What he did was this. He considered what sum the plaintiffs might have been expected to realise by hiring out these switch-boards if they had been returned when they should have been. He took into account the fact that of some eighty switch-boards of this kind owned by the plaintiffs about seventy-five per cent. were out on loan or hire at any one time, that not infrequently (as here) they were hired gratis for a period, that in other cases there was a forty per cent. reduction from the £9 6s. 8d., and that the switch-boards might have been accidentally destroyed. The full figure for thirty-nine weeks at £9 6s. 8d. a week was between £350 and £400. The learned judge awarded £200.

If this had been a case where the plaintiffs had been deprived of the use of their switch-boards because they had been damaged by the negligence of the defendants, the principles applied by the learned judge would, I think, have been right. It is, however, submitted that in a claim in detinue, and one in which the defendants have used a profit-earning chattel, they must pay by way of damages a fair sum for that user. They cannot as wrongdoers have the use of the chattels for less than a fair price for their hire. Otherwise they would be benefiting by their own wrong. It is curious that there is no authority on the point. Before considering it I will deal with the learned judge's finding on user. The learned judge found that the defendants did not want to let the plaintiffs remove their apparatus from the theatre because without it the theatre could not be let or sold. The theatre was not, over the relevant period, being used as a theatre, but a prospective purchaser or lessee would presumably want to see, and, if the theatre was taken, to operate, the stage lighting. The learned judge found that the defendants were determined not to let the plaintiffs have their switch-boards for the reason that without the switch-boards the theatre was virtually useless. From the facts to which I have referred permanent switch-boards to replace the plaintiffs' might take some time to obtain. Later in his judgment the learned judge said that there was no evidence of "commercial user", though he did not regard that as important. He was, no doubt, referring to the fact that the theatre was not used as a theatre. The findings must be read together, and, to my mind, the conclusion is that the defendants "used" the plaintiffs' articles. There may be a distinction in the measure of damage in detinue between, say, a warehouseman who merely stores and a person who during the period of detention enjoys the beneficial use of the chattels. It is the latter case with which we are concerned.

Both counsel referred to *The Mediana* (1) and sought to support their arguments by dicta from the speech of the EARL OF HALSBURY, L.C. In that case the respondents' lightship was damaged in a collision by the negligence of the appellants. The respondents were a harbour board and in their hands the lightship was not a profit-earning asset. They had a spare lightship and did not have to hire a substitute during the period the lightship was out of action as the result of the collision. It was argued, therefore, that under this head they could recover only nominal damages. They had suffered no loss. The House of Lords held that the case was governed by their earlier decision in *The Greta Holme* (2) and that the plaintiffs were entitled to substantial damages. In the course of the argument for the appellants that nominal damages only could be recovered, counsel is reported as saying:

"This is not a case of trover or detinue in which damages may be given on grounds not applicable here."

The sentence in LORD HALSBURY'S speech on which counsel for the plaintiffs here relies is the sentence ([1900] A.C. 117):

"What right has a wrongdoer to consider what use you are going to make of your vessel?"

LORD HALSBURY went on to say that a defendant who had deprived the plaintiff of the use of a chair cannot diminish damages by showing that the plaintiff did

not usually sit on it. The damages are at large, they are a matter for the jury, but are not nominal. In a later passage, on which counsel for the defendants relies, LORD HALSBURY referred to the passage which I quoted from the argument and says (*ibid.*, 118):

A "Of course I observe that it has been suggested that this was not an action for trover or detinue; but although those are different forms of action, the principle upon which damages are to be assessed does not depend upon the form of action at all."

He goes on to except punitive damages in trespass.

B In *The Valeria* (No. 2) (3), which was also a collision case, LORD BUCKMASTER distinguished *The Greta Holme* (2) and *The Mediana* (1) in that there the subject-matter of the suit was a vessel which in the ordinary course would have earned nothing at all. With regard to a freight-earning vessel LORD BUCKMASTER said ([1922] 2 A.C. 247):

C "What has to be considered is what would this vessel have earned for the period of the seven days that she was incapacitated owing to the accident; and that amount is the true measure of the damage which the vessel who was to blame is called on to pay . . ."

D That decision, I think, shows that what LORD HALSBURY said must be confined to the class of case which he was considering, and, with great respect, his statement that the principle on which damages are to be assessed does not depend on the form of action at all is too widely stated, unless one construes the word "principle" in a very general sense as meaning reparation to the injured party for the wrongful act and its natural and direct consequences: see *The Susquehanna* (4) ([1926] A.C. 661).

E *The Mediana* (1) was a claim in negligence in respect of a chattel which in the hands of the plaintiff did not earn profits. In the present case the chattel was profit-earning in the hands of the defendants. The learned judge applied the principle as laid down in *The Valeria* (No. 2) (3). The question is whether that is the right measure in this case. This is a claim in detinue. On the findings the defendants had for their own benefit the use of the plaintiffs' chattels. This is an incident which is not present in the damage by negligence cases. Why is not the plaintiffs' loss the value in the market of the user? The wrong is not the mere deprivation as in negligence, and, possibly, some detinue cases, but the user. I am, of course, not overlooking the fact that, if the chattel has been F damaged and depreciated, this may be an item in a claim for special damage. There are, no doubt, some cases in which a wrongdoer may be called on to account for profits, but, in considering the measure of damages as raised here, I think the actual benefit which the defendants have obtained is irrelevant. The damages could not, in my view, be increased by showing that a defendant by his use of the chattel had made much more than the market rate of hire. Equally, G they cannot be diminished by showing that he had made less.

H It is curious that there is no authority on this point. The nearest analogy is a claim for mesne profits. The measure there is a reasonable sum in the nature of rent for the user during the period of the defendant's trespass. In other words, the defendant must pay what the plaintiff would have obtained if the defendant had lawfully been in possession. In principle the same measure should, I think, apply where a defendant has detained and used a chattel of the plaintiff which the plaintiff as part of his business hires out to users. I have added these latter words because I do not wish in this so far uncharted field to go beyond the facts of the case. We were referred to statements as to the law in the United States of America: see SEDGWICK ON DAMAGES, 9th ed., vol. 2, p. 1031, and p. 1045; CORPUS JURIS SECUNDUM, vol. 26, p. 1286. It would appear from the statements in these books that the principle may be more widely applied in the United States of America and would cover, for example, detention and use of a private motor

car. I am not saying this is wrong. There may be no distinction in principle. The question had, however, better be left till it arises.

I will now deal with the learned judge's deduction of a month for investigation. It is true that in deciding whether a conversion has taken place a refusal by a defendant who has a bona fide doubt as to the plaintiff's title will not necessarily establish conversion. It was for the jury to consider whether the defendant was disputing the plaintiff's title or was merely asking for a reasonable time to clear up a bona fide doubt: see *Pillott v. Wilkinson* (5). I cannot think this principle is available to a defendant who, as in the present case, persists in retaining the goods long after a reasonable time has expired. The learned judge's findings lead to the conclusion that the defendants were determined to retain the goods irrespective of the plaintiffs' title, and I do not, with respect, think that they can claim to deduct a notional period for investigation. I, therefore, think that the plaintiffs are entitled to a sum representing the reasonable hire of the goods over forty-three weeks. The learned judge accepted the plaintiffs' figure for hire, and, in my opinion, the appeal should be allowed and judgment entered for £401 6s. 8d.

DENNING, L.J.: In assessing damages, whether for a breach of contract or for a tort, the general rule is that the plaintiff recovers the loss he has suffered, no more and no less. This rule is, however, often departed from. Thus, in cases where the damage alleged is too remote in law the plaintiff recovers less than his real loss: *Liesbosch, Dredger v. Edison S.S.* (6). In other cases the plaintiff may get more than his real loss. Thus, where the damage suffered by the plaintiff is recouped or lessened owing to some reason with which the defendant is not concerned, the plaintiff gets full damages without any deduction on that account: *Slater v. Hoyle & Smith* (7); *Smiley v. Townshend* (8); *Haviland v. Long* (9). Again, in cases where the defendant has obtained a benefit from his wrongdoing he is often made liable to account for it even though the plaintiff has lost nothing and suffered no damage: *Reading v. A.-G.* (10).

The question in this case is: What is the proper measure of damages for the wrongful detention of goods? Does it fall within the general rule that the plaintiff only recovers for the loss he has suffered, or within some other, and, if so, what, rule? It is strange that there is no authority on this point in English law, but there is plenty on the analogous case of detention of land. The rule there is that a wrongdoer who keeps the owner out of his land must pay a fair rental value for it, even though the owner would not have been able to use it himself or to let it to anyone else. So, also, a wrongdoer who uses land for his own purposes without the owner's consent, as, for instance, for a fair ground or as a wayleave, must pay a reasonable hire for it even though he has done no damage to the land at all: *Whitwham v. Westminster Brymbo Coal & Coke Co.* (11). I see no reason why the same principle should not apply to detention of goods. If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them even though the owner has, in fact, suffered no loss. It may be that the owner would not have used the goods himself, or that he had a substitute readily available which he used without extra cost to himself. Nevertheless, the owner is entitled to a reasonable hire. If the wrongdoer had asked the owner for permission to use the goods the owner would be entitled to ask for a reasonable remuneration as the price of his permission. The wrongdoer cannot be better off because he did not ask permission. He cannot be better off by doing wrong than he would be by doing right. He must, therefore, pay a reasonable hire. This will cover, of course, the wear and tear which is ordinarily included in a hiring charge, but for any further damage the wrongdoer must pay extra.

I do not mean to suggest that an owner who has suffered greater loss will not be able to recover it. Suppose that a man used a car in his business, and owing to its detention he had to hire a substitute at an increased cost. he would clearly

be able to recover the cost of the substitute. In such cases the plaintiff recovers his actual loss. I am not concerned with those cases. I am here concerned with the cases where the owner has, in fact, suffered no loss, or less loss, than is represented by a hiring charge. In such cases, if the wrongdoer has in fact used the goods, he must pay a reasonable hire for them. Nor do I mean to suggest that a wrongdoer who has merely detained the goods and not used them would have to pay a hiring charge. The damages for detention recoverable against a carrier or a warehouseman have never been measured by a hiring charge. They are measured by the loss actually sustained by the plaintiff, subject, of course, to questions of remoteness. They are like cases of injury to a ship or a car by negligence. If it is put out of action during repair the wrongdoer is only liable for the loss suffered by the plaintiff: see the principles set out in *The Susquehanna* (4), and many other cases. The claim for a hiring charge is, therefore, not based on the loss to the plaintiff, but on the fact that the defendant has used the goods for his own purposes. It is an action against him because he has had the benefit of the goods. It resembles an action for restitution rather than an action of tort. But it is unnecessary to place it into any formal category. The plaintiffs are entitled to a hiring charge for the period of detention and that is all that matters. I can imagine cases where an owner might be entitled to the profits made by a wrongdoer by the use of a chattel, but I do not think this is such a case. If the goods are retained by the wrongdoer up till judgment, the hiring charge runs up to that time, and in addition the owner will get the return of the goods or their value at the time of judgment: *Rosenthal v. Alderton & Sons, Ltd.* (12). If the goods have been disposed of by the wrongdoer, the hiring charge will cease at the time of such disposal, but the owner will get in addition damages for the loss he has sustained by the conversion, which is usually the value at the time of conversion: see *S.S. Celia v. S.S. Volturmo* (13) ([1921] 2 A.C. 548, 556, 563), and cf. *Sachs v. Miklos* (14). In the present case the defendants retained the goods until judgment, but have returned them in pursuance of the judgment. In these circumstances the hiring charge runs up to the date when the goods were returned. It starts from the very moment when the defendants took possession of the goods. They had, it is true, a reasonable time to make inquiries as to title, but once that time expired and they wrongly decided to retain them, then the wrong related back to the first taking. It became wrongful *ab initio*.

I ought, perhaps, to add a word about the cases to which we were referred. Counsel for the plaintiffs read to us a passage from HOLDSWORTH'S HISTORY OF ENGLISH LAW, vol. 7, p. 445, which quoted from the Year Books. I have looked up the origin of this quotation and find that it was a statement by counsel, Serjeant Catesby, in the course of an argument two years before he was made a judge, and it was immediately rejected by BRIAN, C.J. It is, therefore, no help to us. With regard to *The Mediana* (1) I need only say that the EARL OF HALSBURY, L.C., was not dealing with a case where the defendant had actually used the goods. In my opinion, the plaintiffs in the present case are entitled to the full hiring charge for the full period of forty-three weeks, without any of the deductions allowed by the judge. I agree that the appeal should be allowed.

ROMER, L.J. : In my judgment, the three salient facts on which the assessment of damages in this case depends are, first, that the equipment of the plaintiffs which the defendants detained was profit-earning property; secondly, that the plaintiffs normally hired out the equipment in the course of their business; and, thirdly, that the defendants during the period of wrongful detention applied the property to the furtherance of their own ends. As to the third point the defendants sought before us to contend that they could not be said to have used the equipment because they did not actively operate the switch-boards. This, in my opinion, is immaterial. The learned judge found that Mrs. Pearlberg (who substantially owns the defendant company) refused to

return the equipment to the plaintiffs because, without it, the Bedford Theatre could not be let or sold. This finding establishes, in my judgment, that the defendants put the switch-boards to the use of making their theatre more attractive and more readily disposable than it would have been without them. This amounts to a use of the equipment by the defendants for their own purposes.

In the light, then, of these three established facts, the question is whether counsel for the plaintiffs is right in his proposition that, if the use of an article has a recognised hiring value, then such value constitutes the measure of damages recoverable by the owner from a defendant who, by wrongful detention, has the use of that article. Although, curiously enough, this question seems never to have come up for decision in our courts, I am of opinion that on principle counsel's proposition is sound. The fundamental aim in awarding damages is in general to compensate the party aggrieved. The inquiry is : What loss have the plaintiffs suffered by reason of the defendants' wrongful act ? In determining the answer to this inquiry the question of quantifying the profit or benefit which the defendants have derived from their wrongful act does not arise, for there is no necessary relation between the plaintiffs' loss and the defendants' gain. It follows that in assessing the plaintiffs' loss in the present case one is not troubled by any need to evaluate the actual benefit which resulted to the defendants by having the plaintiffs' equipment at their disposal. That element, then, being out of the way, the only substantial reason put forward by the defendants why the plaintiffs should not receive the full hiring value of the equipment during the period of detention is that the plaintiffs might not have been able to find a hirer. In my judgment, however, a defendant who has wrongfully detained and profited from the property of someone else cannot avail himself of a hypothesis such as this. It does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer, for in using the property he showed that he wanted it and he cannot complain if it is assumed against him that he himself would have preferred to become the hirer rather than not have had the use of it at all. Apart from the minor matters which I mention later, it, accordingly, seems to me that the defendants are bound to pay the recognised hiring value for the property in question and that no sufficient answer has been made out to the proposition of counsel for the plaintiffs which, in my judgment, has common sense to support it and no authority against it. I say this because some reliance was placed by counsel for the defendants on the principles which have become established in assessing damages for negligence: see, for example, *The Susquehanna* (4). These principles seem to me to have no relation to cases where a wrongdoer detains property of another and uses it for his own purposes. One can postulate, as I have already indicated, that such a wrongdoer would have preferred to pay for the use of the property rather than have gone without it, but no such assumption can be made where negligence and not improper user is involved.

I agree with SOMERVELL, L.J., that in this comparatively virgin field it is better to confine our decision to the actual facts before us, and I express no opinion as to what the plaintiffs' rights would have been in the matter of damages had the property detained been of a non-profit earning character, or if, although profit earning, the plaintiffs had never applied it to remunerative purposes. The full hiring charge for the switch-boards over the period of unlawful detention has been found to be just over £400, and it follows from what I have said that in the absence of other considerations that is the sum which, in my judgment, should be awarded as damages to the plaintiffs. It is said, however, on behalf of the defendants, first, that they should not be charged for the use of the equipment during such reasonable time as was necessary for them to satisfy themselves with regard to the plaintiffs' title, and, secondly, that some allowance should be made for the possibility that the equipment might have suffered damage, or even destruction, during the period of detention if it had been restored to the plaintiffs at the beginning of that period. I do not think there is

anything in either of these points. As to the first, not only is there no evidence that the defendants ever entertained any doubt as to the plaintiffs' title or applied themselves to inquiring into that matter, but the evidence shows, and the learned judge so found, that from first to last the defendants' sole reason for refusing to deliver up the equipment was that they wanted to keep it themselves. Then, as to the possibility of damage to the equipment if the plaintiffs had been given possession of it, this is not a contingency of which, in my judgment, any account should be taken in the present action although it would have had some relevance if the defendants had been sued for negligence. I, accordingly, agree that the appeal should be allowed and that the damages awarded to the plaintiffs should be increased from £200 to £401 6s. 8d.

Appeal allowed.

Solicitors : *Samuel Tonkin & Co.* (for the plaintiffs) ; *M. Wilson Prentis* (for the defendants).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

NOTE.

R. v. MORAN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Ormerod and Parker, JJ.), March 17, 1952.]

Criminal Law—Demanding money with menaces—Attempt—Larceny Act, 1916 (c. 50), s. 30.

APPEAL against conviction.

The appellant was convicted before CROOM-JOHNSON, J., at the Suffolk Assizes, on an indictment charging him with demanding money with menaces, contrary to s. 30 of the Larceny Act, 1916. Knowing that a Mr. Fairweather had some money in his pocket when walking in a village street after dark, the appellant went up to him, offered to show him the way, and then said: "I want some money, and, if not, you have had it". Mr. Fairweather squared up to the appellant and then walked away, and the appellant did not follow him. The judge directed the jury that on these facts they could find the appellant guilty of an attempt to commit the offence charged. The jury convicted the appellant of attempted robbery.

Havers for the appellant.

Jellinek for the Crown.

LORD GODDARD, C.J., delivering the judgment of the court, said that, in view of the direction of the learned judge, the verdict of the jury amounted to a conviction of an attempt to demand money with menaces. In the opinion of the court it was not possible to find such a verdict. A man might form the intention of demanding money with menaces and then not put his intention into practice. In such a case he would not be guilty of demanding, but, also, he could not be convicted of an attempt to demand.

Conviction quashed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Gotelee & Goldsmith, Ipswich* (for the Crown).

J.D.P.

R. v. LAWSON.

[DURHAM ASSIZES (Lynskey, J.), January 30, 31, 1952.]

Criminal Law—Fraudulent conversion—Indictment—Charge of conversion of general balance.

The defendant, a solicitor, was charged in each of four counts of an indictment with the fraudulent conversion of a certain sum of money on a day between certain stated dates. The evidence for the prosecution showed that the defendant first paid amounts received by her on behalf of her clients into her clients' account. Later she drew from the clients' account various sums which she paid into her office account, and some of this money was used by her for her own purposes. It was impossible to trace all the moneys so received by the defendant from the office account into the clients' account and thence to any particular client. The sum charged in each count of the indictment was the sum due from the defendant to a particular client (after giving credit in one count for the sum standing to the credit of the clients' account). On a submission by the defence at the close of the case for the prosecution that there was insufficient evidence to establish the charge in each count and that the indictment was bad since the counts charged the fraudulent conversion of a general balance of account,

HELD: (i) as the evidence for the prosecution enabled a jury to come to the conclusion that on one day between the dates charged in each count of the indictment there had been a fraudulent conversion of some part of the amount charged, there was sufficient evidence to support the counts.

(ii) although in the ordinary case, where it was possible to trace and prove the conversion of individual items of property, it was undesirable to include them all in a count alleging a general deficiency, in a case such as the present, where the individual items could not be traced in detail, the prosecution were entitled to frame their counts in the indictment in the way in which they had been framed.

R. v. Morris (1933) (24 Cr. App. Rep. 105), doubted and not applied.

FOR THE LARCENY ACT, 1916, s. 20, see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 1022.

Cases referred to:

- (1) *R. v. Morris*, (1933), 24 Cr. App. Rep. 105; Digest Supp.
- (2) *R. v. Balls*, (1871), L.R. 1 C.C.R. 328; 40 L.J.M.C. 148; 24 L.T. 760; 35 J.P. 820; 15 Digest 931, 10,267.
- (3) *R. v. Sheaf*, (1925), 134 L.T. 127; 89 J.P. 207; Digest Supp.
- (4) *R. v. Wright*, (1858), Dears. & B. 431; 27 L.J.M.C. 65; 30 L.T.O.S. 292; 22 J.P. 71; 169 E.R. 1070; 15 Digest 891, 9781.
- (5) *R. v. Boseley*, [1937] 4 All E.R. 100; Digest Supp.
- (6) *Devaynes v. Noble, Clayton's Case*, (1816), 1 Mer. 529, 572; 35 E.R. 767, 781; 12 Digest, Replacement, 547, 4156.
- (7) *Re Hallett's Estate*, (1880), 13 Ch.D. 696; 49 L.J.Ch. 415; 42 L.T. 421; 12 Digest, Replacement, 554, 4195.

TRIAL on indictment.

The defendant, Phyllis Newman Lawson, was charged on an indictment in the first count with fraudulent conversion of property, contrary to the Larceny Act, 1916, s. 20 (1) (iv) (b), in that on a day between Apr. 5, 1950, and July 1, 1951, she fraudulently converted to her own use and benefit the sum of £2,519 6s. 2d. received by her for and on account of Fred Armour. The third and fourth counts were in respect of similar offences, but between different dates and in respect of different amounts received for other clients. The second count charged fraudulent conversion contrary to s. 21 of the Act of 1916, alleging that the defendant, being a trustee of a stated sum of money, converted the same to her own use with intent to defraud. At the close of the case for the prosecution,

counsel for the defendant submitted that there was insufficient evidence to establish the charge in each count and also moved to quash the indictment on the ground that it was bad in law, as, on the evidence adduced, the counts charged the fraudulent conversion of a general balance of account.

Veale, Q.C., and Cumming-Bruce for the Crown.

D. B. B. Fenwick and O. Wrightson for the defence.

- A **LYNSKEY, J.:** Counsel for the defendant submits (i) that on each count of the indictment, as framed, the evidence adduced by the prosecution is not sufficient to establish the charge contained in that count, and (ii) that all the counts ought to be quashed on the ground that, in view of the evidence adduced, they charge the fraudulent conversion of a general balance of account, and in law such an indictment is bad. The case for the prosecution in answer to the
- B first objection is that on the face of them the counts are regular. The prosecution say that on the evidence which they have adduced, if the jury accept it, there is ample evidence on which the jury could find the defendant guilty on one or more or all of those counts. The way the prosecution put their argument is that they are alleging here a fraudulent conversion of a sum, not on divers days between Apr. 1, 1950, and July 1, 1951 (to take the first count), but a
- C conversion on a day between those days. They say that the particular date does not matter, and that it is sufficient if the evidence is such as to satisfy a jury that there was a fraudulent conversion on one day between those particular dates. The prosecution say that the evidence which they have adduced clearly shows that there was a conversion between those dates. They further say that they are not called on to prove the conversion of the whole of the amount set out
- D in each count in the indictment, but that it is sufficient, to enable a jury to find a verdict of fraudulent conversion, for them to be satisfied on the evidence that there was a fraudulent conversion of some part of that money on a day between the periods mentioned.

- Authorities have been quoted to me to justify that contention, and it seems to me that the argument of the prosecution is correct. In the case of each of the
- E counts they have called evidence to show that the defendant did receive moneys on account of the clients, or (in the case of the second count), of the beneficiaries. They produced both oral evidence and documents which confirmed it. It appears from the defendant's books, which were produced by her cashier, and from the witnesses who have given evidence that the amounts named in the counts in the indictment were, in fact, received by the defendant on behalf of her clients. Further,
- F those books set out details of the expenses or charges or payments properly made against the moneys received, and in each case they show a balance due from the defendant to a particular person or persons on whose behalf the moneys were received. In the case of the first count, the amount actually charged is £2,519 6s. 2d., and that amount is actually shown in the books as being due from the defendant to a Mr. Fred Armour on Aug. 29, 1950. The evidence goes further
- G and shows that, for nine or ten months after that date, Mr. Armour was continually asking for his money, that he was put off with excuses, and, ultimately, in the middle of 1951, the defendant told him that she was in monetary difficulties, but that eventually he would be paid, not only his money, but also the interest he was losing by her failure to pay. On those facts, coupled also with the fact that, after being compelled to go to another firm of solicitors, Mr. Armour
- H has received payment of £1,010, and the balance has never been paid, it seems to me that there is ample evidence to enable the jury, if they accept it, to come to the conclusion that on some day during the period alleged there had been a conversion, and, if they were satisfied of an intention to defraud, a fraudulent conversion, of at least part of that money.

The scheme adopted by the defendant, as outlined in the evidence for the prosecution, was that all moneys received on behalf of clients were paid into her clients' account as the Law Society's regulations require. She also had

an office account for the general purposes of her business. The clients' account contained a mixed fund of the moneys of many clients. The defendant paid the amounts which she received on behalf of clients into her clients' account quite regularly. According to the journal kept by her cashier, on or about July 1, 1949, the defendant commenced to draw from the clients' account various sums which ought not to have been drawn, except for the purpose of paying them to the clients and for or on their behalf. These amounts she paid into her office account, and this went on until Jan. 12, 1951. The total amounts which were withdrawn by her from the clients' account and paid into the office account were, approximately, £4,050 over the whole period. The money so paid into the office account was used, in some cases, regularly, but, apparently, in other cases it was used by the defendant for purposes of her own—purposes for which she had no right to use it.

In those circumstances the prosecution submit that, although it is clear that there was a fraudulent conversion of the whole or part of the sum missing, it is impossible to trace the particular sums converted on any particular day from the office account through the clients' account to the particular account or trust of the client whose money was converted. The prosecution say, therefore, that, having regard to the method adopted by the defendant, they are entitled to take a sum—which happens to be the total sum which was due—and to say on the evidence that the jury must be satisfied that at least part of that sum was fraudulently converted during the period named in the particular count. I have dealt with the first count. The same can be said as to the other counts and to the evidence which supports them. So far as the second count is concerned, according to the entries in the books, on Oct. 19, 1950, there was £493 13s. 9d. due from the defendant to the beneficiaries of the estate of Cyrus William Robinson, deceased. On Feb. 14, 1951, there was £171 3s. 11d. due in respect of the estate of Emily Ann Kell, and, with regard to the final account, the position was that a sum of £400 odd was due in respect of the amounts that ought to have been paid over in respect of the estate of William Chapman, deceased. The prosecution say that a certain sum was standing to the credit of the defendant's clients' account, and that credit has been given to the defendant for that amount and she is only charged in the fourth count with the difference between what remained in the clients' account and what remained unpaid.

In my view, the prosecution have adduced sufficient evidence to support the counts laid in the indictment. My ruling, so far, is subject to the second submission made by counsel for the defendant, viz., that, on the evidence, the amount named in each count was a general balance of account and a count charging fraudulent conversion of such a balance is bad in law. In support of his submission counsel relied on *R. v. Morris* (1), which came before LORD HEWART, C.J., AVORY, J., and LAWRENCE, J. The headnote to the report reads:

“A count in an indictment should not charge the fraudulent conversion of a general balance alleged to be due.”

The case was a curious one. In the first three counts the appellant was charged with embezzling moneys received by him for and on account of his employers, a company. The court found that there was nothing to show that the appellant was the clerk or servant of the company, and, therefore, he could not be convicted of embezzlement. The report of the case is very unsatisfactory and contains little information in regard to the facts and none in regard to the form of the counts in the indictment with which the court was dealing. Delivering the judgment of the court in regard to the fourth count, which is the only part of the judgment material for the purpose of my ruling, LORD HEWART, C.J., said (24 Cr. App. Rep. 107):

“With regard to the fourth count, it is quite obvious that the appellant

was charged with the fraudulent conversion of a general balance alleged to be due and that is a course which cannot properly be taken."

No reasons are given for the decision, and, so far as argument is concerned, the only argument adduced for the appellant with regard to the count of fraudulent conversion was:

A "With regard to the count for fraudulent conversion, that was framed as alleging the conversion of a general balance alleged to be due."

B Unfortunately *R. v. Balls* (2) was not cited in *Morris's* case (1), and, so far as one can see, it was not drawn to the attention of the court. In *Balls' case* (2) the prisoner, who was a member of a co-partnership, had to account on each Tuesday for money received in respect of the sale of coal. Each count of the indictment alleged a failure to account each Tuesday for items which the prisoner had received during the previous week in smaller amounts, and the point was taken on behalf of the prisoner that that was wrong, that the counts ought to have been for the individual smaller items received by him during the week and converted to his own use, and, therefore, the count charging the conversion of a balance for that period was bad. The case came before an extremely strong court consisting of COCKBURN, C.J., WILLES, MELOR and MONTAGUE SMITH, JJ., and CHANNELL, B. Delivering the judgment of the court, COCKBURN, C.J., said (L.R. 1 C.C.R. 332):

D "It is quite true that if a man receives a number of separate sums and has to account for each of them separately, only three instances of failure to account can be proved under one indictment."

D In other words, the court was applying the principle that, if there is a separate liability to account in respect of each item, it would be wrong to include a number of such items in the same count in the indictment. COCKBURN, C.J., went on to say (*ibid.*):

E "Thus, if there were to be one accounting on Monday, and one on Tuesday, and one on Wednesday, and so on, only three defaults could be charged and proved; though even in such a case, evidence of other instances might be given in order to show that the instances charged were not merely accidental, but that what was done was done intentionally and fraudulently. But here no difficulty of this nature arises. I agree that the prisoner might have been indicted for embezzling any of the separate small sums received by him. But it appears upon the case that his duty was to receive the small sums from time to time; to send in the weekly accounts every Tuesday; and every Tuesday to pay the gross amount received by him during the preceding week into a bank. It is true that each of the small sums received had to be accounted for; but he might well be charged with embezzling the aggregate amount. And evidence of the individual items was admissible to show how this aggregate was made up. It would be very mischievous if, in such cases as these, servants could not be indicted for embezzling the aggregate amounts for which they fail to account. No doubt, in such cases, there is an embezzlement of each of the smaller sums going to make up the total not accounted for; but there is not the less an embezzlement of the whole."

G That is a strong judgment and, apparently, covers the case of what, over a short period, would be a general balance of account.

H Before *R. v. Morris* (1), there was another decision, *R. v. Sheaf* (3), dealing with this matter. AVORY, J., who was a member of the court in *R. v. Morris* (1), was also a member of the court in *R. v. Sheaf* (3) and delivered the judgment of the court [the other members of the court being SANKEY and SALTER, JJ.] The question whether the counts were bad in law did not arise for decision because the case was dealt with on other grounds and, therefore, what AVORY, J., said on the point was obiter to the decision. He said (134 L.T. 129):

"Reference to the authorities relating to embezzlement, in which it has

been made clear that it is not sufficient to charge the embezzlement of a general deficiency unless it appears that by the conduct or course of business it was the duty of the defendant on the date specified to hand over the lump sum which he had received, makes it clear . . . that these two counts in the circumstances of this case were bad in law and ought to have been withdrawn from the jury."

R. v. Balls (2) was not cited to the court, but the remarks of AVORY, J., would make it appear that he had that case in mind. The effect of what he said was that it is sufficient to charge a general deficiency if it appears by the conduct of the business in question that the practice is to account for the sums periodically. A

In view of the words in the judgment of the court, delivered by AVORY, J., in *R. v. Sheaf* (3) and having regard also to the decision in *Balls'* case (2), it seems to me that *R. v. Morris* (1) is in conflict with the earlier decisions. It states the law too widely. There may be cases where it is proper to allege what, in effect, is a general deficiency if one can prove that there was a fraudulent conversion of either the whole or a part of it at one time. In those circumstances, in a case like the present, it seems to me that the prosecution would be undertaking an impossible task to try to trace all the moneys received by the defendant from the office account into the clients' account and thence to the moneys of any particular client or beneficiary. In a case of this kind, if the jury accept the evidence, it seems to me that there is ample material on which they can find that there was a fraudulent conversion of part, at least, of the property named in each count on one date. In my opinion, this is a proper case for the indictment to go forward in this form. I agree that in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property and money, it is undesirable that one should include them all in a count alleging a general deficiency. Such a count may be bad for uncertainty, but in a case like this, where the individual items cannot be traced in detail, but where the evidence, if the jury accept it after hearing evidence for the defence, makes it clear that there has been a fraudulent conversion, it seems to me that the prosecution are entitled to frame their counts in the indictment in the way in which they have been framed here. In those circumstances, it seems to me that I must overrule the submission made by counsel for the defendant. D E

The trial having proceeded the jury found the defendant guilty and she was sentenced to three years' imprisonment.

Solicitors: *Director of Public Prosecutions* (for the Crown); *K. L. Lupton*, Sunderland (for the defence).

[Reported by G. M. SMAILES, ESQ., Barrister-at-Law.]

COPELAND v. GREENHALF.

[CHANCERY DIVISION (Upjohn, J.), March 4, 5, 6, 7, 1952.]

Easement—Use of land—Right to store vehicles for repair and repaired vehicles awaiting collection—Benefit to claimant's business.

For upwards of fifty years the defendant and his father before him had carried on business as wheelwrights. Their dwelling-house and workshop adjoined a road and in part confronted a strip of land on the opposite side of the road, some 150 feet long and of a width varying from fifteen to thirty-five feet, which gave access from the road to an orchard. During the whole of the said period the defendant and his father had placed vehicles, wheels, and other articles on the said land to await repair or removal after repair, and had from time to time carried out repairs to vehicles on the land. They had always left a way to permit access to and from the orchard from and to the road. On a claim by the plaintiff, the owner in fee simple of the orchard and the strip of land, for an injunction to restrain the defendant from continuing to place articles on the land, the defendant contended that he was entitled to an easement so to use the land by virtue of the Prescription Act, 1832, s. 2.

HELD: while it was no objection to the alleged easement that it related only to matters of trade or business, the right claimed by the defendant was virtually to joint user with the plaintiff of the land and was of too wide and ill-defined a nature to constitute an easement.

Dictum of FRY, J., in *Moody v. Steggles* (1879) (12 Ch.D. 266), applied.

AS TO CHARACTERISTICS OF AN EASEMENT, see HALSBURY, Hailsham Edn., Vol. 11, pp. 273-275, paras. 502-504; and FOR CASES, see DIGEST, Vol. 19, pp. 9-17, Nos. 6-48.

Cases referred to:

(1) *Pye v. Mumford*, (1848), 11 Q.B. 666; 5 Dow. & L. 414; 17 L.J.Q.B. 138; 11 L.T.O.S. 62; 116 E.R. 623; 19 Digest 77, 462.

(2) *A.-G. of Southern Nigeria v. Holt (John) & Co. (Liverpool), Ltd.* [1915] A.C. 599; 84 L.J.P.C. 98; 112 L.T. 955; 19 Digest 19, 56.

(3) *Dyce v. Hay (Lady)*, (1852), 1 Macq. 305; 19 Digest 16, 42.

(4) *Hill v. Tupper*, (1863), 2 H. & C. 121; 32 L.J.Ex. 217; 8 L.T. 792; 159 E.R. 51; 19 Digest 23, 91.

(5) *Home v. Young*, (1846), Dunl. (Ct. of Sess.) 286.

(6) *Simpson v. Godmanchester Corpn.*, [1897] A.C. 696; 66 L.J.Ch. 770; 77 L.T. 409; 19 Digest 14, 29.

(7) *A.-G. v. Horner* (No. 2), [1913] 2 Ch. 140; 82 L.J.Ch. 339; 108 L.T. 609; 77 J.P. 257; 26 Digest 304, 356.

(8) *Moody v. Steggles*, (1879), 12 Ch.D. 261; 48 L.J.Ch. 639; 41 L.T. 25; 19 Digest 66, 381.

ACTION for an injunction to restrain the defendant, his servants or agents, from depositing or causing or permitting to be deposited on certain land at Winchcomb, Gloucestershire, carts, cartwheels, or other articles, or otherwise trespassing on the said land. The plaintiff also claimed a mandatory order to the defendant to remove any such articles deposited there by the defendant, his servants or agents.

The land in question was a strip of some 150 feet in length and a width varying from fifteen to thirty-five feet, giving access from a road to an orchard. Since 1901 the defendant and his father had carried on the business of wheelwrights on premises on the opposite side of the road to the strip. Owing to lack of space on these premises, throughout the whole of that period they had been accustomed to put on the said land vehicles, wheels, and other articles brought to their shop for, repair either while awaiting repair on the defendant's premises or after repair while awaiting removal by their owners, and sometimes to repair the

articles while they stood on the land. As a rule the articles would remain on the land for a few weeks, or, perhaps, a few months, but exceptionally vehicles had been left there for a year or more, and one vehicle had lain on the land for seven years and was still there. The defendant claimed, under the Prescription Act, 1832, s. 2, to be entitled to a valid easement over the land to continue putting articles there, and, if necessary, repairing them there, so, however, that they should not obstruct or interfere with access for all purposes from and to the orchard. A

In 1899 the orchard and the disputed land were purchased by one Burchell. On his death in 1927 he devised the orchard and the land to his widow. In December, 1938, the widow's personal representatives conveyed the property to one Holder and his wife, who held it on trust for sale. In May, 1946, Mr. and Mrs. Holder sold the property to the plaintiff. In 1901 the property was let to one Gardiner, and in 1908 to one Day. In 1938 Day gave up his tenancy and the property was in the occupation and possession of the owner until 1942, when it was let to the plaintiff, who acquired the fee simple in 1946. The defendant was entitled in fee simple to his house and workshop, and his immediate predecessor in title was his father, who was seised in fee simple of the premises from 1901 until 1933. B

R. Cozens-Hardy Horne for the plaintiff.

Boraston for the defendant. C

UPJOHN, J., stated the facts and continued: Counsel for the defendant said that a custom or practice of depositing objects on the land of another can form the subject-matter of a valid easement. He referred me to GALE ON EASEMENTS, 12th ed., p. 31, and showed me a long list of acts done on servient tenements which have been held to be valid easements. Some of those arose under express grants. He referred me to *Pye v. Mumford* (1) where it appeared to have been decided by COLERIDGE, J., at assizes that a custom or a practice of depositing muck from a dominant tenement on a servient tenement can be the subject-matter of a valid easement, the actual decision turning on another point. He also referred me to *A.G. of Southern Nigeria v. John Holt & Co. (Liverpool), Ltd.* (2). That is a complicated case. The respondents were the owners of certain lands in Lagos. Works of reclamation were carried out so that further land adjoining the original land was added thereto, but, it being the result, as I read the case, of artificial reclamation, the reclaimed land vested in the Crown and did not accrue to the respondents. The respondents did certain things on the reclaimed land, such as building walls and jetties and depositing certain casks and other articles on it, and it was found as a fact that they had exclusive possession of the reclaimed land. The judge of first instance, OSBORNE, C.J., found that they occupied the reclaimed land under an irrevocable licence from the Crown which was to be presumed from their acts and the acquiescence of the Crown in those acts over many years. On appeal, the case went to the Full Court, and they decided that that was not the right view to take, but that the respondents had an easement over the reclaimed land. Before the Judicial Committee of the Privy Council the judgment of the Court of Appeal was reversed on the simple ground that you cannot have an easement over land of which you are in exclusive possession, but the question what was capable of being an easement was argued and was discussed shortly in the judgment. That passage in the judgment is of great value to me, although it is obiter. LORD SHAW OF DUNFERMLINE, who delivered the judgment, said ([1915] A.C. 617): D

"The judgment of the Full Court has affirmed various easements over reclaimed land (1) in the case of William's land for the purpose of storing thereon coopers' stores, casks, trade goods and produce, and (2) and (3) in the case of Johannsen's and Dunkley's lands easements for jetties. Against these last the Crown has not insisted at their Lordships' board; but with E
F
G
H

regard to the first point it is maintained that such an easement is unknown to the law. It is also further maintained that in any view the use to which the land was put by the respondents and their predecessors in title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land of another; the possession founded upon was possession of the land as owner thereof. Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim."

I read that sentence as meaning that there is no reason why there should not be a valid easement for the purpose of storing on the land of another coopers' stores, casks, trade goods and produce. LORD SHAW continued:

"The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce v. Lady Hay* (3) by LORD ST. LEONARDS, L.C., who observed: 'The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind.'"

Counsel for the defendant presses me with that decision, which, he contends, shows that there can be an easement to deposit trade goods on the land of another, and that he says, in effect, is all that is done here.

Counsel for the plaintiff, on the other hand, says that there are two reasons why this cannot be a valid easement. First, he says it is uncertain. He says that the court is not in a position to control the exercise of this easement. He relies on *Hill v. Tupper* (4), and refers me to the well-known passage in which POLLOCK, C.B., says (2 H. & C. 127):

"A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property; but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by Act of Parliament. A grantor may bind himself by covenant to allow any right he pleases over his property, but he cannot annex to it a new incident, so as to enable the grantee to sue in his own name for an infringement of such a limited right as that now claimed."

Counsel for the plaintiff presses me very strongly with the well-known case of *Dyce v. Hay* (3) in the House of Lords, the sidenote reading as follows (1 Macq. 305):

"There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of lands affected. Semble—That where a claim in the nature of a servitude or easement is incapable of judicial control and restriction, it cannot be sustained by prescription. It does not follow that rights sustainable by grant are necessarily sustainable by prescription. The law of Scotland agrees with the law of England that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public. Where new inventions come into use they may have the benefit of servitudes and easements; the law accommodating its practical operation to the varying circumstances of mankind."

Counsel relied in particular on the passage in which LORD ST. LEONARDS, L.C., says (*ibid.*, 312):

"I apprehend, my Lords, that the case of *Home v. Young* (5) does not touch the question before you; but I entirely agree with the learned judges below that there is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles. Thus, when the art of bleaching came into use, there was

nothing in its novelty which should exclude it from the benefit of a servitude or easement, if such servitude or easement on other legal grounds was maintainable. The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles. But the argument to which I am referring can have no application to this case; because I fancy no-one supposes that recreation, taking the air and strolling, are to be regarded as any particular novelties; or that if you are tired in a meadow, and lie down to repose yourself, the refreshment thence arising can reasonably be described as an invention."

Counsel for the plaintiff says that there is nothing new or novel in the business of a wheelwright, but it is entirely a novel suggestion that a wheelwright or anyone else carrying on trade can have such a right as this. He points out the great ambit of the right claimed. Vehicles can be left on the strip for an indefinite time, years if necessary. They can be left in a vague and undefined part of the strip, leaving an ill-defined gangway, as it has been called, for the owner of the strip to use in getting to another part of his land. He also says that the defendant is doing much more than an ordinary wheelwright's business, that he is doing repairs to the woodwork of every form of modern type of vehicle, such as motor lorries, and that again makes this too uncertain to be enforceable.

The second point of counsel for the plaintiff was that the easement must be for the benefit of the land and not of a business carried on in connection with the land. He referred me to *Simpson v. Godmanchester Corpn.* (6) and *A.-G. v. Horner* (No. 2) (7) as showing that the benefit of an easement must be attached to the land and not to some business. It is true that certain words of BUCKLEY, L.J., do support that view, but it must be remembered, as HAMILTON, L.J., pointed out, that in that case the right over the servient tenement was not appurtenant either to land or any business carried on on the land, and I think that the judgment of BUCKLEY, L.J., must be read in the light of that circumstance.

I think that, so far as this point is concerned, the easement must be for the benefit of the land and not the business, but the matter is really concluded for me by *Moody v. Steggles* (8) where FRY, J., says (12 Ch.D. 266):

"The next point taken on behalf of the defendants is this: It is said that the easement in question relates, not to the tenement, but to the business of the occupant of the tenement, and that therefore I cannot tie the easement to the house. It appears to me that that argument is of too refined a nature to prevail, and for this reason, that the house can only be used by an occupant, and that the occupant only uses the house for the business which he pursues, and therefore in some manner (direct or indirect) an easement is more or less connected with the mode in which the occupant of the house uses it."

I also have in mind that in *A.-G. of Southern Nigeria v. Holt* (2) the Judicial Committee felt no difficulty in principle in holding that there might be an easement in connection with a right to deposit trade goods. So far, therefore, as that point is concerned, I decide that it does not avail the plaintiff in the present case.

To return to the plaintiff's first point that the right claimed is uncertain, in my judgment the right claimed here goes wholly outside any normal idea of an easement, that is, a right of the occupier of a dominant tenement over a servient tenement. This claim really amounts to a claim to a joint user of the land by the defendant. Practically he is claiming the whole beneficial user of the strip of land on the south-east side of the track so that he can leave there as many or as few lorries as he likes for any time that he likes and enter on it by himself, his servants and agents, to do repair work. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession, if

necessary to the exclusion of the owner, or, at any rate, to a joint user, and no authority has been cited to me which would justify me in coming to the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that for this claim to succeed it must really amount to a right of possession by long adverse possession. I say nothing, of course, as to the creation of such rights by grant or by covenant. I am dealing solely with the question of a claim arising by prescription.

Judgment for the plaintiff.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *H. W. Stephens & Gosling*, Winchcomb, Glos. (for the plaintiff); *Vizard, Oldham, Crowder & Cash*, agents for *J. L. E. Smith-Wood*, Winchcomb, Glos. (for the defendant).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

JOHN KAY, LTD. v. KAY AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), February 28, 29, 1952.]

Landlord and Tenant—Shop—New tenancy—Reasonableness of grant—Matters for consideration of court—Rent—Quantum—Hardship—Financial disadvantage to landlord—Leasehold Property (Temporary Provisions) Act, 1951 (c. 38), s. 12 (1), (3) (e).

In determining, under the Leasehold Property (Temporary Provisions) Act, 1951, s. 12 (1), whether in all the circumstances of the case it is reasonable to order that a new tenancy be granted to the tenant of shop premises, and, if so, for what period, at what rent, and on what terms and conditions, the court must take into account all relevant circumstances as they exist at the date of the hearing "in a broad, common-sense way as a man of the world," and come to its conclusion giving such weight as it thinks right to the various factors in the situation.

Observation of LORD GREENE, M.R., in *Cumming v. Danson* ([1942] 2 All E.R. 655), applied.

The rent to be paid under the new tenancy is rent arrived at by applying the subjective test of what the judge thinks is right and fair, as distinct, for example, from the objective test of what the evidence shows is the rent of the premises obtainable in the open market. When all the evidence has been given and attention has been directed to the right considerations, the exact quantification must be arrived at in the same way, for example, as that in which a jury fixes a figure when it comes to assess damages.

Under s. 12 (3) (e) the onus is on the landlord to prove that greater hardship would be caused by ordering the grant of a new tenancy than by refusing to do so. The mere fact that a landlord might, or would, be able, if the court did not order the grant of a tenancy to the existing tenant, to grant a tenancy to a third person at a rent in excess of what the court considered to be reasonable cannot, by itself, amount to hardship.

Per JENKINS, L.J.: I think that s. 12 (3) (e) is primarily directed to the kind of case, not specifically covered by the earlier provisions of that sub-section, where the landlord has in mind some project with respect to the premises or requires the premises for some purpose or scheme of disposal for which vacant possession is essential.

FOR THE LEASEHOLD PROPERTY (TEMPORARY PROVISIONS) ACT, 1951, s. 10 and s. 12, see HALSBURY'S STATUTES, Second Edn., Interim Service 1951, pp. 137 and 140, respectively.

Cases referred to:

(1) *Cumming v. Danson*, [1942] 2 All E.R. 653; 112 L.J.K.B. 145; *sub nom. Cumming v. Dawson* 168 L.T. 35; 2nd Digest Supp.

APPEAL of the landlords from an order of His Honour JUDGE CARY EVANS, made at Norwich County Court, on Dec. 11, 1951, granting the tenants of two shops known as No. 15, St. Stephens Street and No. 15, Magdalen Street, Norwich, new tenancies for one year under s. 10 (1) of the Leasehold Property (Temporary Provisions) Act, 1951. The old rents were respectively £160 and £100 a year and the landlords called evidence to show that the rents now obtainable were £750 and £520. The county court judge fixed the reasonable rents for the two shops at £550 and £400 respectively. A

C. Lawson for the landlords.

Hamawi for the tenants.

SIR RAYMOND EVERSHED, M.R.: This is an appeal by the landlords of two shop premises, No. 15, St. Stephens Street and No. 15, Magdalen Street, Norwich, against a decision of the county court judge at Norwich to exercise in favour of the tenants the power conferred on the court in Part II of the Leasehold Property (Temporary Provisions) Act, 1951, to grant for a limited period—a period of twelve months—a new tenancy to the tenants of each of those premises. Both premises are admittedly shops within the meaning of the provisions of that Part of the Act. B

The landlords are trustees. They do not themselves carry on a trade, nor do they desire themselves to occupy either of the shop premises, but, in execution of their duties as trustees, they desire, for the benefit of their cestuis que trustent, to obtain from these premises the best return they can. On the other hand, the tenants have been in occupation of both the premises in question under leases of twenty-one years' duration, both of which had, about the time of the application, expired by effluxion of time. They carry on in those two shops and in some sixty-nine other premises throughout the country the business of grocers and provision merchants, and may be described as "multiple shopkeepers". C D

The long title of the Leasehold Property (Temporary Provisions) Act, 1951, says:

"An Act to make temporary provision for the protection of occupiers of residential property against the coming to an end of long leases, and for the renewal of tenancies of shops; and for purposes connected with the matters aforesaid." E

In Part I of the Act are found provisions dealing with the first matter mentioned, namely, protection of occupiers of residential property against the coming to an end of long leases. There are powers to prolong the occupation of such property, and in those cases it is also provided that during the temporary provision in question the rents which formerly were being paid under the leases should be "frozen", i.e., any extension should be at the same rent as that which previously prevailed. Shops are dealt with in Part II, and there is at once to be noticed the distinction that if the tenancies are renewed the rent is not maintained at the figure previously payable, but has to be fixed according to the provisions of s. 12. Power to apply for the renewal of a tenancy is contained in s. 10 (1) which provides: F G

"The provisions of this Part of this Act shall have effect for enabling the occupier of a shop . . . to apply to the court for, and subject to the provisions of this Act to obtain, the grant of a new tenancy where apart from the next following section the expiring tenancy would come to an end . . ."

By s. 12 (1): H

"Subject to the provisions of this section, on an application under this Part of this Act duly made the court may, if in all the circumstances of the case it appears reasonable so to do, order that there shall be granted to the tenant a tenancy for such period, at such rent and on such terms and conditions as the court in all the circumstances thinks reasonable, and

thereafter the parties shall be deemed to have entered into a lease of the shop . . . ”,

on those terms. There is a proviso

“ that in fixing the rent, terms and conditions the court shall disregard any considerations arising from the personal circumstances of any of the parties.”

A Sub-section (2) provides that the period for which a tenancy may be ordered to be granted shall not exceed one year, and sub-s. (3) places a restriction on the power previously given, for it provides that

“ the court shall not order the grant of a new tenancy if it is satisfied—

B (a) that the tenant has broken any of the terms or conditions of the expiring tenancy, and that in view of the nature and circumstances of the breach a new tenancy ought not to be granted; or . . . (e) that having regard to all the circumstances of the case greater hardship would be caused by ordering the grant of a new tenancy than by refusing to do so.”

Counsel for the landlords drew attention to the repetitive use of the standard of reasonableness. In sub-s. (1) it occurs twice. It occurs as being the condition on which the court orders the grant of a tenancy at all. Secondly, it is to be applied to the rent, terms and conditions to be paid and observed if the court determines it to be reasonable to grant a tenancy. The conception of the reasonable man and the standard of reasonableness have for centuries been enshrined in our common law, but the conception of leaving it to a judge to decide whether it is reasonable to make particular orders, and, if so, on what terms, has been introduced into our statute law in recent years. Everybody knows that the standard of reasonableness, as a condition the satisfaction of which is required to justify the making of an order, has for years been a particular feature of the Rent Restriction legislation. It is convenient to recall the language of LORD GREENE, M.R., in *Cumming v. Danson* (1) in reference to the Rent Restrictions Acts. There the question was what were the circumstances which a judge should consider in deciding whether it was reasonable to make an order for possession. LORD GREENE, M.R., said ([1942] 2 All E.R. 655):

F “ . . . the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad, common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation. Some factors may have little or no weight, others may be decisive . . . ”

I conceive that when Parliament again introduced this conception of the standard of reasonableness, it intended to impose on the judge a corresponding duty, so that in deciding whether it was reasonable to grant a tenancy the judge “ is to take into account all relevant circumstances as they exist at the date of the hearing ”, and would have to exercise his powers in a “ broad, common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation.” That exegesis does not, perhaps, greatly help to advance the solution of the present case, nor do I think the matter is much advanced by saying that what is reasonable is at least that which is not unreasonable. The question which has to be decided here is whether the judge applied the right test and directed his mind aright in concluding, first, that it was reasonable to grant a tenancy, and, secondly, that it was reasonable to do so on the terms, *inter alia*, that the rent which should be paid for 15, St. Stephens Street should be £550 per annum, and the rent which should be paid for 15, Magdalen Street should be £400 per annum. It is on the second of those matters that the argument has mainly turned, for counsel for the landlords did not contend that it was not reasonable to grant a tenancy on any terms or in any circumstances.

I think, as did the judge, that some significance is rightly attached to the language of the short and the long titles to the Act as indicating the kind of thing to which Parliament was directing this remedial measure. I say "remedial measure" meaning that the Act has been passed in order to remedy something which otherwise might be thought defective in the conditions to which it applies. And I notice that, *prima facie*, some derogation from the rights of the landlord to deal with his property as he will must necessarily be involved. If power is given to grant, on the tenant's application, a new tenancy, it pre-supposes that the parties have not themselves agreed that such should happen. The court is, therefore, invited to make such an order, so far as the landlord is concerned, in invitum. Secondly, I think that some importance does attach to the phrase "temporary provision". In the context in which it appears in the long title, the phrase indicates, in my view, that Parliament intended, on whatever should be found to be reasonable terms, that tenants should be protected for a short period in their existing rights of occupation, but that those rights should be extended only to a limited extent. One other general remark, which serves to emphasise what I have already said, is this. Under the familiar provisions of the Rent Restrictions Acts, in certain circumstances the court is directed not to make the order claimed if, having regard to all the circumstances, the court is satisfied that it would cause greater hardship to make the order than not to do so, and the onus in such a case has been held to be on the tenant. In this case, the position is reversed by the import of the language of s. 12 (3) (e), whereby it is for the landlord to show, if the other conditions are satisfied, that the making of an order extending the tenant's right of occupation would cause to the landlord greater hardship than that which the tenant would suffer if the order were not made.

I have referred to the conception of reasonableness, and he would, indeed, be a bold judge who tried to formulate with precision the significance that the wording implies. One is inevitably, sooner or later, thrown back on generalities of the kind I have already quoted from LORD GREENE, M.R. I think this much must be clear, that there is involved in it the conception of a standard of that which is regarded as reasonable by the judge who tries the case, and which is, or may be, distinct from standards which may be found to be appropriate by applying other tests. Let me take the second question, that of rent, and try to illustrate the point in regard to that. The landlords here could obtain in respect of 15, St. Stephens Street a tenant willing to pay for a term of twenty-one years a rent of £750 and a premium of £1,500, and that might be said, at any rate with some show of justice, to be the present market value of the premises. The phrase "economic rent" has been used during the argument, but I prefer to avoid it since the phrase has, in some contexts and to economists, as I believe, a particular and technical significance. The market value of certain premises is one thing, and, as I read this Act, it seems to me that the reasonable rent may be something different. The reasonable rent seems to be a rent arrived at by applying the subjective test of what the judge thinks is right and fair, as distinct, for example, from the objective test of what the evidence shows is the market value.

In this case the facts as regards rent were these, that before the lease expired (and I will confine myself for the moment to St. Stephens Street) the tenants had been paying a rent of £160. That figure had been fixed twenty years before, and the tenants, as the evidence showed, had suggested that they should be granted a renewal or a fresh tenancy for a short period at that rent, or something very like it. On the other hand, the landlords were saying that, since the market value now was £750 plus, the standard of reasonableness would only be satisfied by reference to that fact. The judge arrived at the figure of £550. Obviously, the judge must decide the question in the light of the evidence before him. I am so far confining myself to saying that, as I construe the Act, if the evidence justifies it, a judge may conclude that a reasonable rent is a figure which is neither the rent, on the one hand, which the tenant has previously paid,

nor the market value rent which the landlord has shown that he is able to obtain, but is some other figure in between those two rents, being the rent which he thinks is reasonable in all the circumstances of the case. That question is largely what one might call a jury point. When all the evidence has been given and attention has been directed to the right considerations, the exact quantification must be arrived at in the same way, for example, as that in which a jury
A fixes a figure when it comes to assess damages.

The evidence with regard to the premises in St. Stephens Street shows that the market value for renting was £750 or more. The judge also states that it was wrong to suggest, as the tenants suggested, that the reasonable rent was the existing rent of £160, for the obvious reason that a rent fixed in 1931 was
B changed. The judge drew attention also to the distinction between Part I and Part II of the Act as showing that it was not the intention of Parliament that the rent should be frozen. In reaching his £550, the judge said this:

“I cannot think it is reasonable that landlords who like the rest of us have to meet inflated prices for everything which they buy should be restricted to a 1931 rent for their property though this, of course, is the fate
C of landlords of many rent controlled dwelling-houses, but I have yet to hear or read any fair argument that this is reasonable.”

I venture to dissociate myself with that last sentence as tending to criticise the policy of Parliament, but it does not, I think, go to the root of the judge's reasoning, for he goes on:

“On the other hand, I think that it is not reasonable in making temporary
D arrangements pending new legislation that the whole burden of inflation of shop rents should be automatically passed on to the tenant. Where to find a reasonable figure between these two extremes may be a problem of the greatest difficulty. But, in this case, I have the evidence of the tenants' valuer, who said that in his judgment and with his experience £600 would be a 'fair rent' for a twenty-one years' lease. Presumably a 'fair rent'
E means a reasonable rent. True, he thought that for a new tenant taking for one year only, a fair figure would be very much less. I have already given my reasons for rejecting this view, though perhaps the 'fair rent' for a year might be a little below the rent for a term of years. I reach the conclusion that £550 would be a fair rent in all the circumstances for a new
F tenancy in favour of the sitting tenant for one year, with the very indefinite prospect of some further security arising from future legislation.”

In my judgment, in those passages the judge has not misdirected himself in any material respect. He has placed, perhaps, a little more weight than I might have done on the prospect of new legislation giving some unspecified benefit to the sitting tenant, though I think he is entitled to rely on the terms of the Act,
G and on the titles in particular, as showing that some temporary relief from eviction was in contemplation. The evidence before the court, and, in particular, the evidence of the re-valuation for rating purposes in 1950, seems to me sufficient to justify the view that the figure of £750 is derived, not merely from the increase in general costs or the decrease in the value of money (whichever way you look at it), but is further inflated by the particular—and, one hopes, temporary—
H circumstance of shortage of this sort of property. In other words, though £750 per annum is the market rent, that figure is one which is inflated by the particular circumstance of shortage. The judge has rightly said that, in so far as the figure has been inflated by that circumstance, it becomes an unreasonable figure, or, at least, that it is unreasonable to impose on the tenant the obligation of having to pay that inflated sum. I think the judge is, therefore, deliberately arriving at a figure which pays due regard to the change in the value of money and to economic conditions generally, and so achieves a figure of £550 as the figure

which he regards as reasonable. If the considerations taken into account are correct the sum of £550 is not one which this court will vary by reducing it by some small amount, or adding some small amount to it. Unless the Court of Appeal thought that the figure fixed was based on an entirely erroneous estimate, the court would not interfere with it.

I have answered the first two questions which the section poses. There still remains the matter of greater hardship under s. 12 (3) (e) of the Act, and it is argued by counsel for the landlords that, even though the first two matters are disposed of, in the circumstances the granting of this tenancy on these terms would impose greater hardship on the landlords than the refusal so to do would impose on the tenants. The onus is on the landlords, and the conclusion that the judge draws is that they have failed to satisfy him about it. In my judgment, once it has been decided that X is a reasonable rent and that it is reasonable to grant a tenancy at X pounds per annum—and I assume, though nothing turns on it, that the other conditions are also reasonable—it is no longer open for the landlords to say that the result is to impose greater hardship on them than the refusal of the order would on the tenants by reference merely to the quantum, “£X”. In other words, I do not think that the landlords can now say that because a rent of £550 means £200 less rent to the landlords than if the premises were let at the market rate, that fact by itself establishes greater hardship. I refrain from trying to say what matters should be considered under the title of greater hardship. I am not saying that financial considerations must be wholly excluded, but I do say that, having determined on the reasonableness of the £550, it cannot then be said on the landlords’ side that that sum of itself, being less than £750, creates “greater hardship” for the landlords.

There remains only the question under s. 12 (3) (a) whether the tenants have broken the terms and conditions of the previous deed and so a new tenancy should not be granted. Dealing with the premises in St. Stephens Street, the judge found that there had been breaches of the repairing covenant in the lease. A reference, however, to para. 3 (a) shows that that of itself does not suffice, because a court must also be satisfied, in view of the nature and circumstances of the breach, that a new tenancy ought not to be granted. Again I refrain from attempting any exhaustive exposition of the significance of that phrase, but plainly the second half of the paragraph involves the judge in the duty of considering whether, if the tenancy is extended as suggested, the breach is such as will really prejudice the proper interests of the landlord. It is not suggested that the premises have got into a disreputable condition—indeed, the attractive offers which other persons apparently made for a lease of them negatived such a view. I think the judge rightly concluded that, having regard to the extent of the business of the tenants and taking into account that they undertook forthwith to do some urgent repairs, the existence of these breaches ought not to prevent him from making an order, and that, as a ground for that conclusion, the landlord would not suffer prejudice or damage as a consequence. The result is that the restrictions imposed by s. 12 (3) (a) were not shown to be satisfied, and I think the reasoning of the judge was correct. As regards the earlier matter with which I have already dealt, in the final analysis the whole question, I think, turns on the quantum of rent. In my view, in the light of the evidence the judge rightly concluded (or, at any rate, he cannot be held to have wrongly concluded) that the figure of £550 was the reasonable sum payable for rent. That disposes of St. Stephens Street, Norwich. [HIS LORDSHIP dealt with the facts relating to the premises in Magdalen Street and concluded:—] The two cases have not been treated by counsel for the landlords as being in any material respect different, and what I have said, therefore, as to St. Stephens Street is, *mutatis mutandis*, applicable to Magdalen Street. I think, therefore, that the appeals should be dismissed.

JENKINS, L.J.: I agree. Under s. 12 (1) and s. 12 (2) of the Act two questions arise for the consideration of the court. The first is whether, in all the circumstances of the case, it would be reasonable to order the grant to the tenant of a tenancy for such period not exceeding one year at such rent and on such terms and conditions as the court, in all the circumstances of the case, thinks reasonable. If that question is answered in the affirmative, but not otherwise, then the further question arises: For what period, at what rent, and on what terms and conditions, would it in all the circumstances be reasonable to order the tenancy to be granted? The judge did not, I think, in terms answer the first question, that omission presumably being accounted for by the circumstance that neither party appears seriously to have contended that this was a case in which it would not, in all the circumstances, be reasonable to order the grant of a tenancy of some sort.

The landlords, however, raised a point under s. 12 (3) which sets out five cases in which an order for the grant of a new tenancy is not to be made. Paragraph (a) deals with the case where the tenant has broken any of the terms and conditions of the expiring tenancy and the court is satisfied

“ . . . that in view of the nature and circumstances of the breach a new tenancy ought not to be granted.”

Breaches of repairing covenants were relied on as bringing this provision into operation in the present case, but the judge held that in the circumstances these breaches should not be regarded as a bar to an order for the grant of a new tenancy. I agree that the judge came to a right conclusion as to that matter, and that his decision on it should not be disturbed. The other cases which operate as a bar to the grant of a new tenancy, those in s. 12 (3) (b) (c) (d) and (e), are, first (b), the case in which

“ . . . the landlord has offered to afford to the tenant, on terms and conditions which in the opinion of the court are reasonable, alternative accommodation which, in the opinion of the court, is suitable for the purposes of the tenant's business.”

The use in that paragraph of the words “ terms and conditions which in the opinion of the court are reasonable ” is, I think, not without significance. It is to be observed that in a case under para. (b) it would, *prima facie*, not be reasonable to order the grant of a tenancy of the old premises on any terms whatever in view of the offer of suitable alternative accommodation, and, presumably, that is why this circumstance was made a positive bar to the order for the grant of a new tenancy of the premises. So, under para. (c) the case in which

“ . . . the landlord reasonably requires possession in order that the premises the subject of the expiring tenancy, or a substantial part of those premises, may be demolished or reconstructed ”

any project of that sort on the part of the landlord would be defeated by the grant to the tenant of any new tenancy whatever of the old premises. Paragraph (d) is the case “ where there subsists in the premises an interest belonging to a public authority ”, and the court is satisfied that “ in the public interest a new tenancy ought not to be granted.” It is not, and could not, be suggested that paras. (b), (c) and (d) have any application to the present case. Finally, para. (e) provides for the case where the court is satisfied

“ that having regard to all the circumstances of the case greater hardship would be caused by ordering the grant of a new tenancy than by refusing to do so.”

That provision seems to mean that a new tenancy is not to be granted if it is shown that the order granting a new tenancy on any terms would cause greater hardship to the landlord than refusal to do so would cause to the tenant. By

"on any terms" I mean a case in which the mere grant of a new tenancy, whatever its terms, would cause greater hardship. I think that para. (e) is primarily directed to the kind of case, not specifically covered by the earlier provisions of s. 12 (3), where the landlord has in mind some project with respect to the premises or requires the premises for some purpose or scheme of disposal for which vacant possession is essential. For example, in the present case it will be remembered that the landlords relied on a firm offer they had got from a prospective tenant to take the St. Stephens Street premises on a twenty-one years' lease at a rent of £750 a year and to pay a premium of £1,500. If the landlords had been able to show that this offer was an extraordinarily munificent offer at an outside price which was never likely to be repeated, I think they might have gone some way towards making out a case of hardship under s. 12 (3) (e), by saying: "No lease for one year on any terms could possibly compensate us for our loss of this exceptional bargain." That, however, was not the landlords' case here. They never put forward this offer of a twenty-one years' lease as an exceptional bargain. They put it forward, with two or three other offers broadly speaking comparable to it, to show what the current market letting value of the property was. It was not sought to make out that the loss of this particular offer which the grant of a new tenancy would entail in itself involved such hardship on the landlords as to make it wrong, having regard to s. 12 (3) (e), to order the grant of any new tenancy at all. Accordingly, in my view, the judge was not precluded by any of the provisions of s. 12 (3) from ordering the grant of a new tenancy on any terms, and in all the circumstances of the case could properly come to the conclusion (as by implication at all events he clearly did) that it would be reasonable to order the grant of a new tenancy on some terms.

With regard to what terms, as to rent and otherwise, would, in all the circumstances of the case, be reasonable for the purposes of the new tenancy, in s. 12 (1) the court is expressly made the judge of what is reasonable. The contest was centred entirely on the question of rent, and the issue between the parties is this. Counsel for the landlords forcibly argues that a reasonable rent is such rent as the premises will command in the open market, and no more and no less. He says the evidence before the judge established that a rent of £750 a year was the rent which this property would fetch in the open market, and, therefore, there can be no justification for arriving at any lower figure as representing the reasonable rent, with the result that the judge erred in fixing the figure of £550. I cannot agree that "such rent as the court in all the circumstances thinks reasonable" means the rent which the property would fetch if put up in the open market as property to let. If that had been intended by the legislature, I cannot doubt but that the section would have been framed in very different language. The judge referred to the significant contrast presented by the proviso to s. 5 (2) of the Landlord and Tenant Act, 1927. That is a section under which a tenant in certain circumstances may obtain a new lease in lieu of compensation for goodwill. The section deals with the terms on which a new lease is to be granted in a proper case, and as to the rent there is this proviso:

"Provided that the rent fixed by the tribunal as the rent payable under the new tenancy shall be such rent as the tribunal may determine to be the rent which a willing lessee other than the tenant would agree to give and a willing lessor would agree to accept for the premises, having regard to the terms of the tenancy, but irrespective of any goodwill which may have become attached to the premises by reason of the tenant or his predecessors in title having carried on thereat a particular trade or business."

That sets out a careful formula for arriving at a figure representing the rental value of the premises in the open market. Inevitably, if a similar calculation had been contemplated under the present Act, a similar provision would have been put in. Instead of that the only guide given is "such rent as the court in all the circumstances thinks reasonable". In my view, that form of words

plainly was used with the intention of giving the court the greatest latitude in the matter and not tying it down to the figure found to represent the actual contemporary letting value in the open market. That conclusion, as a matter of construction, seems to me to be borne out by the proviso to s. 12 (1), itself which says:

- A "Provided that in fixing the rent, terms and conditions the court shall disregard any considerations arising from the personal circumstances of any of the parties."

If in the body of the section "such rent as the court thinks reasonable" had been used as meaning simply the open market rent, I cannot see what room this proviso would have in the section, for how could the personal circumstances of any of the parties have any bearing on the question of open market rental? B Further support, I think, is to be found in the reference I have already noted in s. 12 (3) (b), to the "terms and conditions which in the opinion of the court are reasonable" in relation to alternative accommodation. I think it impossible to hold that the court would be obliged to find terms and conditions on which alternative accommodation was offered to be reasonable simply because it could be demonstrated that the alternative accommodation in the open market would command the rent which the landlord was asking the tenant to pay. Accordingly, C I think that all the indications in the section, considering the question as one of construction, are against the view that the words "at such rent as the court in all the circumstances thinks reasonable" mean simply the open market rent ascertained by evidence as regards offers for the particular property in question or for comparable property, and by other evidence of that type.

D There is a more general reason supporting this view. It is manifest that the object of this enactment was to protect sitting tenants, as they are called, at the end of their leases from being faced with the choice between the disturbance caused by removing their business to some other premises, if they could find any, and being compelled to pay an inflated rent for their existing premises. That clearly was the state of affairs which the legislature set out to deal with, E and, in my view, to meet that state of affairs it was necessary that the court should be given the greatest latitude in determining what would be a reasonable rent. If the only power the court had was to ascertain and fix the open market rent as the reasonable rent to be paid under a new tenancy, plainly this legislation, so far as it is concerned with shop tenants, would be in a great measure defeated, because the whole difficulty which has to be met is that, in conditions F of scarcity, the open market value may be forced up to a point which exceeds all reason, and it is essential, to make legislation of this kind effective, that the tribunal which is to fix the rent should be able to discount contemporary open market values to the extent necessary in its opinion to arrive at a fair result. The judge came to his conclusion on the principle, with which I entirely agree, that the court is not asked to ascertain the open market rent in the face of G scarcity and inflation, but is required to form an opinion as to the reasonable rent, and, in my view, it would be wholly wrong for this court to disturb his decision.

I should, perhaps, say a further word on the question of greater hardship under s. 12 (3) (e). An argument was raised by counsel for the landlords at a later stage than, *prima facie*, I should have thought would be, generally speaking, appropriate. I think, *prima facie*, the point at which greater hardship comes into the calculation is the stage at which the court is considering whether it would be reasonable in all the circumstances to grant a new tenancy at all. Counsel for the landlords sought, however, to make use of the greater hardship provision in this way. He said that, if a lease of the St. Stephens Street premises is granted at £550 a year, on the current results of their trading the tenants will make a loss in carrying on their business on those premises, and, therefore, they would lose nothing if a new tenancy was refused, while, on the other hand, the landlords

will suffer a substantial hardship inasmuch as, if the new tenancy is granted at £550 per annum, they will lose £200 a year in rent, not to mention any premium they might obtain, such as the premium for £1,500 offered for a lease for twenty-one years. Therefore, he says, purely as a financial calculation, greater hardship would be caused to the landlords by ordering this tenancy to be granted than would be caused to the tenants by refusing to do so. The judge rejected that contention, and, in my view, rightly, but, in doing so, he gave more weight than I myself would have been disposed to do to the possible benefit that the tenants might gain from future legislation in the event of their being successful in obtaining a new tenancy under the Act of 1951. Those considerations seem to me to be too problematical and speculative to be deserving of any great weight. The matter which influences me in rejecting the landlords' argument on greater hardship is this. The rent fixed by the judge is, *ex hypothesi*, the reasonable rent. The hardship complained of is that, if the tenancy was not granted the landlords would be able to let to somebody else at a rent greater than the reasonable rent, and it is said that this amounts to a hardship within the meaning of the Act. For my part I cannot agree that the mere fact that a landlord might, or would, be able, if a tenancy at a reasonable rent was not granted, to grant a tenancy to somebody else at a rent in excess of what was reasonable, amounts to hardship for this purpose. I say "the mere fact" advisedly, for I wish to lay down no general rule to embarrass any tribunal on any future occasion when similar questions may arise with reference to landlords, who are, either on their own account or when acting as trustees for beneficiaries, able to show there is some real financial stringency or emergency arising in their case which would make the operation of this section work some hardship on them. There is no distinction in principle between these two cases. I have been discussing the *St. Stephens Street* case. I think the same result follows in the *Magdalen Street* case. Accordingly I agree that both these appeals fail and should be dismissed.

HODSON, L.J.: I also agree. While holding, as my Lords do, the opinion that it is undesirable to generalise as to what may or may not be hardship in any given case, I would like to guard myself against being thought to take the view that the mere existence of a financial loss is to be accepted as being hardship although financial loss may, of course, produce hardship. Counsel for the landlords pressed s. 12 (3) (e) strongly, maintaining that there was a hardship to the landlords in losing a firm offer of a £1,500 premium and a twenty-one years' lease at £750. In my view, hardship involves something more than the mere loss of money. To my mind, it indicates something much nearer the imperilment of livelihood, and the legislature must have had in mind an example of a landlord who wanted the premises for himself to carry on a business thereon. In the circumstances of this case there seems to me to be grave danger of misapprehension if one merely looks at the balance sheet to see how the money results work out in considering what amounts to hardship. The other branch of the landlords' argument on this topic was a curious one indeed, because they said that the tenants have made a profit at the old rent and at the new rent they will make a loss, and, therefore, it would be no hardship on them to lose the tenancy. That was a matter for the tenants to decide, and not, I think, a matter on which this court or the county court is in a better position than the tenants to express an opinion. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Thornton, Lynne & Lawson* (for the landlords); *Hardcastle Sanders & Co.* (for the tenants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

EVERETT v. RIBBANDS AND ANOTHER.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), March 12, 13, 1952.]

Malicious Prosecution—Plaintiff bound over by court of summary jurisdiction—Competency of action—Summary Jurisdiction Act, 1879 (c. 49), s. 25.

A On the hearing of an information laid by a police officer at the instance of a third person the plaintiff was ordered by the magistrate to enter into a recognizance and to find two sureties to keep the peace and be of good behaviour for twelve months or in default to serve one month's imprisonment. In an action by the plaintiff against the police officer and the third person for damages for malicious prosecution,

B HELD: in view of the provisions of s. 25 of the Summary Jurisdiction Act, 1879, the proceedings before the magistrate could have been determined in favour of the plaintiff; they were not so determined; and, therefore, no action for malicious prosecution lay.

Steward v. Gromett (1859) (29 L.J.C.P. 170), distinguished.

Decision of *DEVLIN, J.* ([1951] 2 All E.R. 818), affirmed.

C AS TO THE ESSENTIALS TO THE ACTION FOR MALICIOUS PROSECUTION, see *HALSBURY*, Hailsham Edn., Vol. 22, pp. 10-13, paras. 11-14; and FOR CASES, see *DIGEST*, Vol. 33, pp. 481-483, Nos. 167-181.

Cases referred to:

- (1) *Steward v. Gromett*, (1859), 7 C.B.N.S. 191; 29 L.J.C.P. 170; 141 E.R. 788; 33 Digest 481, 164.
- D (2) *Castrique v. Behrens*, (1861), 3 E. & E. 709; 30 L.J.Q.B. 163; 4 L.T. 52; 121 E.R. 608; 11 Digest 463, 1193.
- (3) *Bynoe v. Bank of England*, [1902] 1 K.B. 467; 71 L.J.K.B. 208; 86 L.T. 140; 33 Digest 478, 120.

E APPEAL by the plaintiff from an order of *DEVLIN, J.*, dated Oct. 11, 1951, and reported [1951] 2 All E.R. 818, in an action for damages for malicious prosecution.

The plaintiff was ordered by a metropolitan magistrate to enter into recognizances and to find two sureties of £20 each to keep the peace and be of good behaviour, or, in default, to serve a month's imprisonment, on an information laid by the second defendant, a police officer, at the instance of the first defendant, a Miss Ribbands. When the action came before *DEVLIN, J.*, a preliminary point F was taken by the defendants that there was no case to go to the jury because the statement of claim disclosed no cause of action, the prosecution having been successful. *DEVLIN, J.*, upheld this objection and gave judgment for the defendants.

The plaintiff appeared in person.

G Pearl for the first defendant.

G. Howard for the second defendant.

SOMERVELL, L.J., stated the facts and continued: The preliminary objection taken by the defendants was based on the rule that a plaintiff cannot bring proceedings for malicious prosecution unless the prosecution previously brought against him has failed. If he has been convicted, the action does not H lie. It was submitted that the rule applied to the present claim. The plaintiff submitted, on the authority of *Steward v. Gromett* (1), that the rule does not apply where a magistrate orders a person to enter into recognizances to keep the peace and be of good behaviour. In such a case, the plaintiff says, it is not necessary that the proceedings should have failed. It was submitted, however, for the defendants that the basis of that decision, creating this exception to the general rule, ceased to exist by reason of provisions of the Summary Jurisdiction Act, 1879, s. 25.

To see whether that is right one must look, in the first instance, at the ratio in *Steward v. Gromett* (1). ERLE, C.J., said (29 L.J.C.P. 175):

"The question is, whether the plaintiff had an opportunity of obtaining a determination in his favour on the demand for sureties of the peace."

He decided that the answer was "No", because, the application being made ex parte, the justices were bound to grant the order provided that the statements on oath before them satisfied the general conditions for the exercise of the jurisdiction. WILLIAMS, J., put it in this way (*ibid.*):

"In the case of exhibiting articles of the peace, or in the precisely analogous case of demanding sureties of the peace, the proceedings must end against the plaintiff, because he is not allowed to answer; and it is manifestly impossible to say, under those circumstances, that the existence of the proceedings, and the fact that they have not ended favourably to the plaintiff, is evidence of reasonable and probable cause for the defendant's instituting them."

CROWDER, J., said (*ibid.*, 176) (and this is very much in accordance with ERLE, C.J.):

"The question is, whether the plaintiff had the opportunity of controverting the oath of the defendant before the magistrates? If he had, the rule applies that it is necessary for the plaintiff to show a termination of the proceedings in his own favour."

BYLES, J., in the earlier part of his judgment would appear to be following on precisely the same lines. He says (*ibid.*):

"The only objection made on behalf of the defendant, as I understand it, is, that the inquiry here had terminated unfavourably to the plaintiff. Whether that objection is of any force depends upon whether the plaintiff had the opportunity of being heard in his own defence."

Later, however, he indicates that he would want to reserve the point whether in all cases, even if there is a power to appear, the rule that the proceedings must have resulted in the plaintiff's favour necessarily applied. He refers to the power of challenging the issue of a *capias* under the Judgments Act, 1838, s. 3. So far as I follow that section, the *capias* issued ex parte though there was a right under s. 6 to challenge it later. That, therefore, was the position and that was the ratio of it in 1859.

The Summary Jurisdiction Act, 1879, s. 25, provides:

"The power of a court of summary jurisdiction, upon complaint of any person, to adjudge a person to enter into a recognizance and find sureties to keep the peace or to be of good behaviour towards such first-mentioned person, shall be exercised by an order upon complaint, and the Summary Jurisdiction Acts shall apply accordingly, and the complainant and defendant and witnesses may be called and examined and cross-examined, and the complainant and defendants shall be subject to costs, as in the case of any other complaint."

The effect of that section was that this jurisdiction was no longer to be exercised ex parte. The defendant is before the court and can cross-examine, give evidence, and call witnesses in precisely the same way as in any other proceeding. The learned judge held that that removed the basis of the decision in *Steward v. Gromett* (1) and brought proceedings of this kind under the general rule.

In his submission to us the plaintiff emphasised, first, that in proceedings of this kind there is no conviction. An order to enter into sureties can issue although no criminal offence is disclosed in the complaint. I think that is right. He referred to a passage in STONE'S JUSTICES' MANUAL, 1951, vol. 1, p. 301, which says that an order under this procedure is not by way of punishment. It

has been said many times that its purpose is to prevent breaches of the peace or other types of act against which an order can be directed. The plaintiff also relied on the fact that there was no appeal except possibly—and this does not seem to have been decided—by way of Special Case. There is no appeal in the ordinary way to quarter sessions. He also emphasised the general position under this procedure. As he stated, it is of somewhat vague extent, and there are very pertinent and wise observations in STONE'S JUSTICES' MANUAL, particularly with regard to the type of case which falls under "good behaviour" (*ibid.*, p. 303). He submitted, therefore, that we ought to have regard to the nature of this jurisdiction in considering whether there ought not to be a remedy of the kind which he seeks in these proceedings. A great deal of what the plaintiff said might be relevant if anybody was considering the general nature of this jurisdiction and whether it could or could not be more precisely defined. It might also be very relevant if the appropriate authorities were considering whether it would be right to introduce a right of appeal to quarter sessions. But those are not matters with which we are concerned, nor do they, in my opinion, affect the problem before us.

I can put my reasons for coming to that conclusion quite shortly by referring to one passage from a judgment of CROMPTON, J., in *Castrique v. Behrens* (2) which will be found cited in *Bynoe v. Bank of England* (3). That was a confirmation by this court of what I have called the general rule. The passage reads ([1902] 1 K.B. 470):

"There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage . . . But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such a termination. The reason seems to be that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principle on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause'."

The principle is there stated as covering a wider field than prosecutions. Where an action of this kind is brought in respect of civil process the plaintiff has, I think, to show special damage. But the principle is the same and it seems to me clear, having regard to the change made by s. 25 of the Act of 1879, that proceedings of this kind before justices are capable of being terminated in favour of the plaintiff. He can appear and give evidence and dispute what is said by the complainant. He may be believed and, if so, no order will be made. The question is not: Was it a prosecution? It is: Were the proceedings capable of being terminated in the plaintiff's favour? I have, therefore, come to the conclusion that the learned judge was right and that the appeal fails and should be dismissed.

DENNING, L.J.: This case concerns the very ancient power of a magistrate to require a man to provide sureties. It appears from the old books that it was of two kinds—surety of the peace, which was authorised by the commission of the peace, and surety for good behaviour, which was authorised by the Justices of the Peace Act, 1361. A magistrate could not order a man to find sureties unless just cause was shown on oath. He could not order sureties of the peace unless the accused man had actually threatened the complainant with personal violence or had lain in wait for him to do him violence. He could not order sureties for good behaviour unless the accused man was of evil fame and had actually threatened to break the law of the land or by his conduct had

evinced an intention to break it. In either case, if the man failed to find anyone to stand surety for him, the magistrate could commit him to prison. All this was done without the man being heard in his own defence at all. What happened was that the complainant gave evidence on oath of the relevant facts, and, thereupon, the magistrate, if satisfied by the oath, could make an order that the man should give sureties. The order might even be made in his absence. The best discussion of this subject before 1879 will be found in HAWKINS, *PLEAS OF THE CROWN*, vol. 1, c. 28, and BURN'S *JUSTICE OF THE PEACE* (1869), 30th ed., vol. 5, pp. 743-768.

It is quite plain that this procedure was not a prosecution. It was a legal process intended to prevent the man from doing wrong. It was a drastic form of *quia timet* proceedings. As such it had many parallels in ancient times. For instance, in a civil action if there was any suspicion that the defendant intended to abscond, a writ of *capias* would issue to arrest him so as to ensure his attendance in court: see BLACKSTONE'S *COMMENTARIES*, vol. 3, p. 282, and the Judgments Act, 1838. In these cases where the process of the law was invoked without the other party being heard, it was settled law that the injured party could bring an action for damages if he could show that the process was obtained maliciously and without reasonable and probable cause: *Steward v. Gromett* (1). This action was known as an action for malicious process. It differed from malicious prosecution in that there was no need for the plaintiff to prove that he had been acquitted. There could be no question of acquittal because the process issued without his innocence or guilt being decided. It issued, indeed, without his being heard at all. A modern parallel is the issue of a search warrant. If it is obtained maliciously and without reasonable and probable cause, an action lies. Since 1879 an order for sureties has entirely changed its nature. It has ceased to be a mere legal process and has become a full legal hearing. A complaint has to be served on the defendant and he must be given a full opportunity of being heard in his own defence. The procedure is the same as on any other complaint. If the court finds against the defendant, it may order him to find sureties, or, in default, be imprisoned for six months: see the Summary Jurisdiction Act, 1879, s. 25.

The plaintiff argued that, despite this change of procedure, the law remained as it was laid down in *Steward v. Gromett* (1). He said that an order against a man to find sureties was an anomaly, because a man who was friendless and had the misfortune not to be able to find sureties might find himself in prison without being charged with any criminal offence or having been found guilty of it. There was, he said, no appeal from the order and no power to quash it on *certiorari*. The only possible way of questioning it was by Case Stated on a point of law; and that was no remedy in the case of perjury by the complainant. He urged, therefore, that there should be a remedy by an action for malicious process, even though an order had been made against him.

If I thought that an order to find sureties was today a mere legal process, as it was before 1879, I would be in favour of the plaintiff's argument. But I do not think it is today a mere legal process. It now bears many of the characteristics of a criminal proceeding. The procedure is much the same as in the case of a summary offence. The substance of the matter is not only fear of what the accused man may do, but also a complaint of something he has already done—some words or conduct which give rise to apprehension of disorder or other breach of the law. An order can only be made against him if two things exist—(i) a threat by words or conduct to break the law of the land or to do something which is likely to result in a breach, and (ii) a reasonable fear that this threat will be carried into effect. The order, once made, will result in imprisonment if the accused man has no friends to stand by him. This imprisonment must be founded on something actually done by him. It would be contrary to all principle for a man to be punished, not for what he has already done, but for what he may hereafter do. Hence there must be something actually done by

him, such as threats of violence, interference with the course of justice, or other conduct which gives rise to the fear that there will be a breach of the law. It is this conduct which is the subject of the complaint and which must be proved before an order for sureties can be made. In these circumstances it seems to me that the proceedings are analogous to a criminal proceeding and that no action lies for maliciously instituting them unless they have ended favourably for the plaintiff. In the present case they ended unfavourably for the plaintiff. An order was made against him. This action, therefore, does not lie. I agree that the appeal should be dismissed.

ROMER, L.J.: I agree that this appeal fails. I think it is a pity that this point was not set down as a preliminary point of law before the hearing. The action was a substantial one. I understand it was estimated to last three days, and I can well believe that it would. The point of law, if decided, as it has been, against the plaintiff, would have been decisive of the case. Although there may have been good reason for not applying, I should have thought this was the very class of case in which an application ought to have been made under Ord. 25, r. 2, to have the point determined before the hearing so as to save all discovery of documents, the collecting together of witnesses, and so on, and have the question decided at a very early stage. Where there is a point of law which, if decided in one way, is going to be decisive of litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or very shortly afterwards.

Appeal dismissed.

Solicitors: *Gale & Phelps* (for the first defendant); *Solicitor, Metropolitan Police* (for the second defendant).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

Re GAPE'S WILL TRUSTS. VEREY AND ANOTHER v. GAPE AND OTHERS.

C.A. [1952] 2 All E.R. 579.

[CHANCERY DIVISION (Roxburgh, J.), March 13, 1952.]

Will — Condition — Certainty — Condition subsequent — "Take up permanent residence in England".

By her will, dated Oct. 27, 1942, a testatrix, who died on Dec. 30, 1950, directed that her residuary estate should be held on trust for various people in succession. She further provided: "every person who under the trusts aforesaid (including the divesting limitations in this clause contained) shall become entitled in possession of my residuary estate as tenant for life or in tail male or in tail shall within six months from the date of becoming so entitled take up permanent residence in England and in default of continuance of compliance with this condition or in case of subsequent discontinuance of compliance with this condition the trusts hereinbefore declared in favour of such person and his issue shall determine . . ."

HELD: the words "take up permanent residence in England" meant "take up residence in England with the intention that such residence should be permanent", and, so construed, the words embodied a concept of a sufficient degree of certainty for the defeasance clause to be valid.

Re Hatch ([1948] 2 All E.R. 288), applied.

Sifton v. Sifton ([1938] 3 All E.R. 435) and *Re Coxen* ([1948] 2 All E.R. 492), considered.

AS TO UNCERTAINTY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 219-222, paras. 274-277; and FOR CASES, see DIGEST, Vol. 44, pp. 440-444, Nos. 2667-2687.

Cases referred to:

- (1) *Clayton v. Ramsden*, [1943] 1 All E.R. 16; [1943] A.C. 320; 112 L.J.Ch. 22; 168 L.T. 113; 2nd Digest Supp.
- (2) *Sifton v. Sifton*, [1938] 3 All E.R. 435; [1938] A.C. 656; 107 L.J.P.C. 97; 159 L.T. 289; Digest Supp.
- (3) *Re Hatch*, [1948] 2 All E.R. 288; [1948] Ch. 592; [1948] L.J.R. 1393; 2nd Digest Supp.
- (4) *Clavering v. Ellison*, (1859), 7. H.L. Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282; *affg.* (1857), 8 De G.M. & G. 662; 44 E.R. 545; *affg.* (1856), 3 Drew 451; 61 E.R. 975; 44 Digest 440, 2667.
- (5) *Bell v. Kennedy*, (1868), L.R. 1 Sc. & Div. 307; 11 Digest 312, 36.
- (6) *Bowie (or Ramsay) v. Liverpool Royal Infirmary*, [1930] A.C. 588; 99 L.J.P.C. 134; 143 L.T. 388; Digest Supp.
- (7) *Re Coxen*, [1948] 2 All E.R. 492; [1948] Ch. 747; [1948] L.J.R. 1590; 2nd Digest Supp.
- (8) *Re Wilkinson*, [1926] Ch. 842; 95 L.J.Ch. 528; 135 L.T. 736; 44 Digest 442, 2678.
- (9) *Re Talbot-Ponsonby's Estate*, [1937] 4 All E.R. 309; Digest Supp.

ADJOURNED SUMMONS to determine, inter alia, whether on the true construction of the will of Sibyl Marion Geraldine Gape, deceased, a condition subsequent contained therein requiring the persons beneficially entitled "to take up permanent residence in England" was valid or was void for uncertainty or for any other reason.

Peter Foster for the plaintiffs, the trustees of the will.

C. Montgomery White, Q.C., and *Hunter-Brown* for the first four defendants, James Nugent Gape and his children, who resided permanently in America.

K. J. T. Elphinstone for the fifth, sixth, seventh and eighth defendants, Kenneth Henry Surtees Gape and his children, who resided permanently in America.

Cross, Q.C., and *T. A. C. Burgess* for the remaining defendants, who either resided or were prepared to reside in England.

ROXBURGH, J.: The testatrix, Sibyl Marion Geraldine Gape, of Caxton Manor, Caxton, Cambridgeshire, a widow, made her will on Oct. 27, 1942, and died on Dec. 30, 1950. She directed that her residuary estate should be held on the following trusts, that is to say:

"upon trust for James Nugent Gape . . . for his life with remainder in trust for the first and every other son of the said James Nugent Gape successively according to their respective seniorities in tail with remainder Upon trust for Kenneth Henry Surtees Gape . . . for his life with remainder in trust for the first and every other son of the said Kenneth Henry Surtees Gape successively according to their respective seniorities in tail",

with divers remainders over. By cl. 10 she provided:

"every person who under the trusts aforesaid (including the divesting limitations in this clause contained) shall become entitled in possession of my residuary estate as tenant for life or in tail male or in tail shall within six months from the date of becoming so entitled take up permanent residence in England and in default of continuance of compliance with this condition or in case of subsequent discontinuance of compliance with this condition the trusts hereinbefore declared in favour of such person and his issue shall determine and become void as if such person were then dead and if tenant in tail male or tenant in tail there was a general failure of his or her issue and in such case the residuary estate shall be held "

on certain trusts therein set out.

James Nugent Gape and his children and Kenneth Henry Surtees Gape and his children are permanently residing in America. On the other hand, other remaindermen are either residing or prepared to reside in England. Mr. James Gape and Mr. Kenneth Gape and their families are anxious to obtain the benefits provided for them by the testatrix without being made subject to the burden to which she plainly intended to subject them. It is plain that, if the testatrix

A were asked whether these latter persons should in the circumstances inherit any part of her residuary estate, her answer would be "No", but it is said, and said truly, that the forfeiture clause is a condition subsequent and that there are decisions of highest authority which, in certain cases, empower beneficiaries subjected to a forfeiture clause to take the benefit of a testator's dispositions without accepting the burdens which he plainly sought to impose. Counsel for

B Mr. James Gape and Mr. Kenneth Gape argued that this is such a case and that it is wholly irrelevant that their clients are in America and are flouting the intentions of the testatrix. To that extent they are right. In deciding the question of law with which I am confronted, it is wholly irrelevant that they are flouting the testatrix' intentions.

Counsel for Mr. James Gape and Mr. Kenneth Gape rely on the well-known cases of *Clayton v. Ramsden* (1) and *Sifton v. Sifton* (2), a decision of the Privy Council. *Sifton v. Sifton* (2), undoubtedly, bears a close resemblance to the present case. The principle to be deduced from *Clayton v. Ramsden* (1) and *Sifton v. Sifton* (2) I have already endeavoured to formulate in *Re Hatch* (3), and I desire to add nothing to what I there said. I said ([1948] 2 All E.R. 291):

"The next question which arises is whether the defeasance clause is void for uncertainty. Here I must apply the principles enunciated in *Clavering v. Ellison* (4) and *Clayton v. Ramsden* (1). To do this I must first construe the clause in its context and then I must see whether any phrase, when so construed, embodies a concept which lacks a sufficient degree of certainty."

Then I discussed the phrase in that case, which was quite different from that in the present case. I continued (*ibid.*):

"It is true that cases can be propounded which to one mind may seem to fall within the ambit of the phrase and to another mind may seem to fall outside it. Several such cases have been propounded during the argument, but, on analysis, they all seem to me merely to raise doubts which can be resolved by properly applying the ordinary principles of construction to the phrase employed in the circumstances supposed. I do not think they point to any inherent uncertainty in the phrase itself."

I cite that passage as indicating my approach to the present problem.

The first thing I have to do is to construe the words in the present case. The words are "take up permanent residence in England". I do not feel much doubt about their meaning. I understand them to mean "to take up residence in England with the intention that such residence should be permanent".

G The question, then, which I have to determine is whether that phrase, when so construed, embodies a concept which lacks a sufficient degree of certainty. First, I must consider *Sifton v. Sifton* (2). The disposition in the defeasance clause in that case was

"payments to my said daughter shall be made only so long as she shall continue to reside in Canada."

H LORD ROMER said ([1938] 3 All E.R. 445):

"If the clause in question be in truth a condition subsequent—a point with which their Lordships will deal later on—it can be of no validity unless, to use the words of LORD CRANWORTH [in *Clavering v. Ellison* (4) (7 H.L. Cas. 725)], the court and, their Lordships venture to add, the parties concerned—can see from the beginning precisely and distinctly upon the

happening of what events it is that the payments to the appellant are to cease. In their Lordships' opinion, it is impossible to define these events precisely or distinctly."

Later, he said (*ibid.*):

"None of those judges [in the courts below] defined, or attempted to define, precisely or distinctly the events that would constitute a ceasing on the part of the appellant to reside in Canada. Had they attempted to do so, they must, in their Lordships' judgment, have failed, because they would have been attempting the impossible. Their Lordships' attention was called during the arguments to numerous authorities in which the court has been called upon to consider the meaning of the words 'reside' and 'residence', and the like. These authorities, however, give their Lordships no assistance in construing the present will. The meaning of such words obviously depends upon the context in which the words are used. A condition, for instance, attached to the devise of a house that the devisee should reside in the house for at least six weeks in a year can present no difficulty. In some contexts, the word 'reside' may clearly denote what is sometimes called 'being in residence' at a particular house. In other contexts, it may mean merely maintaining a house in a fit state for residence. It is plain, however, that in the present case the word 'reside' means something different from either being in residence or merely maintaining a residence. No one can suppose that the testator intended either that his daughter should never leave Canada, or that, so long as she maintained a residence in Canada, she might spend the whole of her time abroad. He must have intended that, though Canada was to be her home in general, yet she was to be at liberty to leave Canada for some purposes and for some periods of time. Unfortunately, he omitted to define either the purposes or the periods."

There are, undoubtedly, passages in that speech which favour Mr. James Gape and Mr. Kenneth Gape, and it is, therefore, necessary for me to consider very carefully how *Sifton v. Sifton* (2) has been dealt with in a later case. It was certainly approved in *Clayton v. Ramsden* (1) which related to quite a different set of words, but it has been more closely considered in a more similar case to which I must shortly return. For the moment I propose to consider how far the present phrase "take up permanent residence in England" is to be assimilated to and how far it is to be differentiated from the phrase in *Sifton v. Sifton* (2). For the moment I will leave out the words "continue to", because in his discussion of the words "reside" and "residence", to which I have just referred, LORD ROMER does not refer to the possible bearing on those words of the words "continue to". It seems to me that, if somebody said to me: "I am going to reside in South Africa", I should instinctively ask: "For how long?", because the phrase presents an incomplete mental picture, an incomplete concept. It is quite ambiguous. It might mean for a few weeks; it might mean for ever; it might mean for a particular mission. It is, I should have thought, a concept which lacks a sufficient degree of certainty. Supposing a person from South Africa said to me: "I am going to continue to reside in South Africa", I think that that phrase, without further explanation, would also embody a concept which lacked a sufficient degree of certainty. If one knew something about the circumstances of the speaker and the circumstances in which he had gone to reside in South Africa, that knowledge might supply the answer to the uncertainty involved in the concept, but to a person who was in complete ignorance of those circumstances I do not think the mere statement: "I shall continue to reside in South Africa", would present a mental picture having a sufficient degree of certainty. If, however, somebody said to me: "I am going to take up permanent residence in South Africa", I think that that, as a concept, would be plain and precise. Yet, on the other hand, those very questions could

be asked which LORD ROMER asked in *Sifton v. Sifton* (2). Even though a person told me that he intended to take up permanent residence in South Africa, I should not suppose that he never intended to leave South Africa for any period or for any purpose, and yet he had omitted to define either the purposes or the period in respect of which he might be absent from South Africa. Am I bound to say that the phrase "permanent residence" embodies a concept having an insufficient degree of certainty because those questions are unanswered?

A I must find the answer to my own question by looking further into the authorities.

First, I refer to three lines in the speech of LORD CHELMSFORD in *Bell v. Kennedy* (5). That was a case of domicile, but it is not for that reason that I am referring to it. Before considering the facts of the case at all, LORD CHELMSFORD said (L.R. 1 Sc. & Div. 319):

B "It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile."

I am not considering those lines as an exposition of the law of domicile, but

C "the intention of permanently residing in a place" appears to me to be a phrase embodying a concept. It was used for the purpose of expounding the ingredients of domicile, and it would be strange if LORD CHELMSFORD, in making such an exposition, made use of a phrase which did not embody a concept having a sufficient degree of certainty, and yet LORD ROMER's questions in *Sifton v. Sifton* (2) could be put to him too. He might have been asked: "How long may a man leave the place in question and for what purpose, and yet be able to

D say that he is permanently residing there?" and in answer I suspect that LORD CHELMSFORD would have said that no certain answer to those questions could be given, but I do not think that he would have admitted that his phrase embodied a concept having an insufficient degree of certainty.

Precisely the same process can be applied to a passage in the speech of LORD MACMILLAN in *Bowie (or Ramsay) v. Liverpool Royal Infirmary* (6) which is

E another case of domicile. LORD MACMILLAN said ([1930] A.C. 597):

"The acquisition of a domicile of choice is a legal inference which is drawn from the concurrence of evidence of the physical fact of residence with evidence of the mental fact of intention that such residence shall be permanent."

F There, again, the same questions, I think, could be put to LORD MACMILLAN, and he would, I think, give the same answer, but I do not think that he would admit that his phrase embodied an uncertain concept.

Next I would refer to the decision of JENKINS, J., in *Re Coxen* (7), and to the cases cited by him. The phrases in that case were that the trustees were to permit the testator's wife "to reside" in a certain dwelling-house, "during her

G life or for so long as she shall desire to reside therein" and declared "that from and after her death or if in the opinion of my trustees she shall have ceased permanently to reside therein", the house was to fall into his residuary trusts. JENKINS, J., held that the provision for the determination of the wife's interest was sufficiently defined to enable the trustees to come to a proper decision, and yet I should have thought that the same questions which LORD ROMER propounded in *Sifton v. Sifton* (2) might have been applied in connection with the

H phrases there used and would have been equally difficult to answer.

There are many passages in the judgment in *Re Coxen* (7) which throw light on the present case. JENKINS, J. ([1948] 2 All E.R. 501), discussed the decision of TOMLIN, J., in *Re Wilkinson* (8). In that case—which was before *Sifton v. Sifton* (2) and did not in fact relate to a condition subsequent, and I must, therefore, be careful not to place too much weight on it on this occasion—the testatrix had given the income of a fund to a niece

"for and during the term of her natural life or until she shall voluntarily cease to make the said dwelling-house her permanent home."

In his judgment TOMLIN, J., said ([1926] Ch. 849):

"I confess I do not feel any difficulty in giving a rational meaning to the words 'to make the dwelling-house her permanent home'; I think it is reasonably plain what that means; it seems to me it means, to keep it up as what may be colloquially called her headquarters. I do not think there is any particular difficulty in attaching a reasonable meaning to the phrase. I do not propose, and I do not think it necessary for me today to define precisely what I understand the phrase to mean. I am satisfied that it bears a sufficiently definite meaning to enable me to say that there is no case of uncertainty which renders the gift in any way bad, or defective."

JENKINS, J., then discussed *Re Talbot-Ponsonby's Estate* (9), where CROSSMAN, J., held

"with respect to a devise of an estate to the testator's son 'upon condition that he made the same his home' that the condition was not void for uncertainty."

JENKINS, J., then reverted to *Sifton v. Sifton* (2) and he said ([1948] 2 All E.R. 501) that he deduced from that

"(a) that the meaning (whether definite or uncertain) of the words 'reside' and 'residence' in a will depends on the context in which the words are used, (b) that in some contexts a perfectly definite meaning can be attached to such words, and (c) that the words 'reside' and 'residence' have different (and less readily ascertainable) implications when used in relation to residence in a particular country from those which they have when used in relation to residence in a particular house."

I may say as regards that last deduction, that whilst I recognise the passages in LORD ROMER's speech which led JENKINS, J., to that conclusion, I am not quite clear why, as a matter of principle as distinct from context and construction, the word "reside" should have different and less readily ascertainable implications when used in relation to "residence in a particular country." I should have been inclined to think that the implications and differences would arise almost entirely from the context in which the words were used and the circumstances in which the words were used. JENKINS, J., proceeds (*ibid.*):

"There is, therefore, nothing in *Sifton v. Sifton* (2) which precludes me from holding the condition here in question to be a valid condition provided I am able to attach a sufficiently definite meaning to it in the context afforded by the codicil, and (as shown by *Re Wilkinson* (8) and *Re Talbot-Ponsonby's Estate* (9)) in deciding whether I am able to do so or not I must keep in mind the distinction between uncertainty as to the events prescribed by the testator as those in which the condition is to operate (which is, generally speaking, fatal to the validity of such a condition) and difficulty in ascertaining whether those events (sufficiently prescribed by the testator as a matter of definition) have happened or not, which is not necessarily fatal to such validity."

I do not understand JENKINS, J., as predicating an approach different from that which I have adopted, though we have expressed ourselves in different language. I think that there is really no difference in meaning between "sufficiently prescribing the events as a matter of definition" and using a phrase "embodying a concept having a sufficient degree of certainty." As I say, JENKINS, J., was able to hold that the phrase with which he was concerned was valid. He said (*ibid.*, 502):

"It seems to me that so far as definition goes the double event involved

in the condition as I have construed it is prescribed with sufficient certainty and precision."

In my judgment, those questions which were asked by LORD ROMER could have been put to the draughtsman of the will in *Re Coxen* (7) and would not have been susceptible of an answer. Therefore, it seems to me, for the reasons which I have given, that a phrase may embody a concept of sufficient certainty, or, putting it in another way, "events may be sufficiently prescribed by a testator as a matter of definition", even though those questions cannot be answered. If that be so, in my judgment, the phrase "take up permanent residence in England" embodies a conception which is clear and precise even though I cannot answer every question which might be asked with regard to it.

Order accordingly.

Solicitors : *Field, Roscoe & Co.* (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

BENN v. KAMM & CO., LTD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), March 13, 14, 1952.]

Factory—Dangerous machinery—Duty to fence—Horizontal milling machine—"Stop" at side of platform—Factories Act, 1937 (c. 67), s. 14 (1)—Horizontal Milling Machines Regulations, 1928 (S.R. & O., 1928, No. 548), reg. 3.

The plaintiff, a charge hand employed by the defendants, was injured while adjusting a stop on a horizontal milling machine in a factory occupied by the defendants. The Horizontal Milling Machines Regulations, 1928, reg. 3, provides for the fencing of horizontal milling machine cutters by a strong guard, but the regulations do not prescribe fencing for any other part of the machine. In an action by the plaintiff against the defendant for breach of their statutory duty to fence the machine,

HELD: the regulations did not define exhaustively the duty of the occupier of a factory qua horizontal milling machines; so far as fencing was concerned, they regulated only the fencing necessary for a cutter and did not apply to a dangerous part of the machine other than a cutter; and, therefore, the general duty laid down in s. 14 (1) of the Factories Act, 1937, applied to the absence of fencing of the stop and the plaintiff was entitled to recover.

Decision of PARKER, J. ([1952] 1 All E.R. 56), reversed.

FOR THE FACTORIES ACT, 1937, s. 14, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1009.

AS TO ABSOLUTE DUTY TO FENCE DANGEROUS MACHINERY, see HALSBURY, Hailsham Edn., Vol. 14, p. 594, para. 1130, and 1951 Supplement; and FOR CASES, see DIGEST, Vol. 24, pp. 908-910, Nos. 65-76, and Digest Supps.

Cases referred to

(1) *Miller v. Boothman (William) & Sons, Ltd.*, [1944] 1 All E.R. 333; [1944] K.B. 337; 113 L.J.K.B. 206; 170 L.T. 187; 2nd Digest Supp.

(2) *Davies v. Owen (Thomas) & Co.*, [1919] 2 K.B. 39; 88 L.J.K.B. 887; 121 L.T. 156; 83 J.P. 193; 24 Digest 908, 68.

(3) *Nicholls v. Austin (Leyton), Ltd.*, [1944] 2 All E.R. 485; [1945] K.B. 50; *affd.* H.L., [1946] 2 All E.R. 92; [1946] A.C. 493; 115 L.J.K.B. 329; 175 L.T. 5; 2nd Digest Supp.

(4) *Franklin v. Gramophone Co., Ltd.*, [1948] 1 All E.R. 353; [1948] 1 K.B. 542; [1948] L.J.R. 870; 2nd Digest Supp.

APPEAL by the plaintiff from the judgment of PARKER, J., dated Dec. 7, 1951, and reported ante, p. 56, dismissing his claim against the defendants, his employers, for damages for personal injuries sustained in an accident in their factory.

The plaintiff, who had suffered amputation of part of a finger, contended, first, that the defendants had been guilty of common law negligence because, while he was adjusting a machine, another employee failed to turn off the power and so caused the accident, and, secondly, that the defendants had committed a breach of statutory duty in not fencing or otherwise providing a safeguard for a dangerous machine.

F. Donald McIntyre for the plaintiff.

Marven Everett for the defendants.

SOMERVELL, L.J.: The plaintiff claims damages for personal injury against his employers, the defendants. At the time of the accident he was working at their factory as a charge hand, and, in carrying out his duties, he went to adjust a horizontal milling machine, had an accident, and had to have the top of the index finger of the left hand completely removed. He was called to that machine by an apprentice, then aged about nineteen, named Toombs. The machinery wanted adjusting. The evidence as accepted by PARKER, J., was that the plaintiff told Toombs to switch off the power which operated the machine, but it is clear that he began his adjustment before the power was switched off, and so the accident was caused. In his claim as originally put forward one of the allegations against his employers was that Toombs had been negligent, and, if that were so, under the law as it now is, the defendants would be liable. PARKER, J., found against that, and that is not proceeded with before us. The plaintiff also claimed against the defendants on the ground of breach of statutory duty, and, alternatively, a breach of their common law obligation to take reasonable care for his safety. In respect of those matters, the defendants alleged that, if they were liable, the plaintiff's own negligence contributed to the accident.

The main structure of the machine at which the accident happened consists of a moving platform where pieces of metal are placed on which a circular saw is to operate. The platform with the pieces of metal on it proceeds under hydraulic pressure electrically operated either from left to right or right to left, and while that is happening the saw operates on the pieces of metal. When the platform has reached the end of its journey it returns under power very suddenly to the position from which it started. The accident happened in this way. The plaintiff was seeking to adjust what is called a "stop" at the side of the platform. He believed that the power had been switched off, but it had not been. It may be that, when he actually put his hand and fingers round the stop, the platform had reached the instant of time when, having moved, say, from left to right, it was on the point of shooting back from right to left. It shot back and the plaintiff's finger was crushed between the stop and a piece of metal under the platform against which the stop came. The judge, having considered the evidence and the question of Toombs's negligence, dealt with the position under s. 14, the relevant section, of the Factories Act, 1937. He came to the conclusion that it would be possible to fit a guard over the dangerous part of the machine where the stop comes in front of the base of the platform. It is plain that, apart from the point with which I am about to deal and which was the main point argued in this court, PARKER, J., would have come to the conclusion that there was here a breach of s. 14 (1), the relevant words of which are as follows:

"Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . ."

The point taken was similar to one which came before this court for the first time in 1944 in *Miller v. William Boothman & Sons, Ltd.* (1) with reference to a circular saw. There had been a decision by SALTER, J., in *Davies v. Thomas Owen & Co.* (2) that the application of s. 10 (1) (c) of the Factory and Workshop Act, 1901 (the predecessor of s. 14 (1) of the Act of 1937) to a circular saw involved

A that the saw could not be worked at all, because, if it were securely fenced, access could not be got to it to enable it to cut whatever it was intended to cut. The Woodworking Machinery Regulations, 1922, reg. 10, provided that a guard was to extend from the top of the riving knife to a point as low as practicable at the cutting edge of the saw. The question in *Miller v. Boothman (William) & Sons, Ltd.* (1) was whether that regulation modified the effect of s. 14 (1) of the Act of 1937, it being deemed, under s. 159 (1) of the Act to have been made under that Act. In *Miller's* case (1) this court held that regulations made under the earlier Act and continued in force by the provision to which I have referred in the later Act could modify the effect of any relevant section in the later Act. The judgment of the court was read by GODDARD, L.J. He referred to the decision of SALTER, J., in *Davies' case* (2) and to the importance of there being a regulation-making power and later held that there was power to modify what I may call the rigour of the general words of the Act. Otherwise the result of the general words of s. 14 (1) would render the use of circular saws for the industry of the country wholly impossible. GODDARD, L.J. said ([1944] 1 All E.R. 335):

C “In our opinion, these regulations must be regarded as modifying the provisions of s. 14 in respect of these machines and of substituting the prescribed guarding and fencing for the absolutely secure fencing which the section would otherwise require.”

D That principle was applied in this court in *Nicholls v. Austin (Leyton), Ltd.* (3), which again dealt with the Woodworking Machinery Regulations, 1922, as applicable to a circular saw. In that case a piece of wood shot out from the machine and did the injury. The decision of this court was based on the principle in *Miller v. William Boothman & Sons, Ltd.* (1). *Nicholls' case* (3) went to the House of Lords where it was decided on another ground which I need not trouble to state, the correctness of the decision in *Miller v. William Boothman & Sons, Ltd.* (1) not being dealt with, and so it continued to bind this court. The same point came before this court in *Franklin v. Gramophone Co., Ltd.* (4). There the regulations were the Grinding of Metals (Miscellaneous Industries) Regulations, 1925. There was an exemption in those regulations that nothing in them was to apply to

“any processes in or incidental to the sharpening of tools . . . except as regards any part of the factory in which one or more persons are wholly or mainly employed in such work.”

F The first issue was whether the place where the plaintiff was came within the exception and also whether it was a place in which one or more persons were wholly or mainly employed in such work. I only mention that to show that the argument turned on matters which were expressly dealt with (as, in my opinion, in the circular saw case) by the regulations.

G I do not think that there is any real assistance in those cases on the point which has arisen here. They show, of course, that this court will proceed on the basis that regulations can modify the liabilities and duties imposed by the Act, but the point which arises here is whether the regulations with which we are concerned—the Milling Machines Regulations, 1928—relieve the defendants of the duty under which PARKER, J., I think, would have found them to be if no regulation had been made. The regulations were made in pursuance of s. 79 of the Factory and Workshop Act, 1901, and were continued under the Act of 1937 and under the heading “Duties” they provide:

“It shall be the duty of the occupier to observe Part I of these regulations.

It shall be the duty of every person employed to observe Part II of these regulations.”

H Part I of the regulations deals with various matters other than fencing. In reg. 1 they deal with maintaining in good order, and so on, the floor immediately surrounding the machine. That matter is dealt with in s. 25 and s. 26 of the

Factories Act, 1937. There is a regulation which deals with sufficient and suitable lighting, and then, by reg. 3 (i), on the construction of which this case turns:

"The cutter or cutters of every horizontal milling machine shall be fenced by a strong guard, properly adjusted to the work, which shall enclose the whole cutting surface except such part as is necessarily exposed for the milling operations . . . "

It goes on to say that a guard shall be provided with adequate side flanges and so on. There are exemptions which come before Part I, by way of anticipation of it, and they start in this way: "Nothing in reg. 3 shall apply to any milling cutter used on" and then an example is given, "or when used for", and other examples are given. Then there is a proviso:

"Provided that these exemptions shall not prejudice the application of s. 10 of the Factory and Workshop Act, 1901, in regard to fencing of such machinery."

That shows that, so far as the exemptions are concerned, the general provisions of s. 10 of the Act of 1901 (now s. 14 of the Act of 1937) apply.

Counsel for the defendants—and this is the view accepted by PARKER, J.—submits that these regulations define exhaustively the duty of an occupier quoad fencing horizontal milling machines. Applying, therefore, *Miller v. William Boothman & Sons, Ltd.* (1) and the other cases, if an occupier quoad the cutter complies with the regulations, he will have done all that the law requires, and it cannot be said that the necessity of any further precautions are to be derived from the general words of s. 14 (1) of the Act. Counsel for the plaintiff submits that if, as here, there is on a milling machine a dangerous part other than the cutter, that is a subject-matter with which the regulations do not purport to deal and the general duty under s. 14 (1) is applicable. I have come to the conclusion that that is right. I think that, if it had been intended by the regulation to define exhaustively the fencing duties in respect of these machines, different words would have been used. Counsel for the defendants admitted that, notwithstanding the regulation, if a machine of this kind contained a flywheel within s. 12 or transmission machinery within s. 13, the duties under those sections remained. I cannot see why, if there is what I call a separate subject of danger which falls within the general words of s. 14 (1), the duty under that section should be regarded as removed by the words of this regulation. I think they are inapt to have that effect. For these reasons, in my opinion, this appeal should succeed. PARKER, J., adopted the wider construction. The case must depend on the construction of the regulations, and in that respect I have come to a different conclusion which I have stated. The question of common law liability does not arise, but it was dealt with in argument and I see no reason to dissent from the conclusion of PARKER, J., that there was no breach at common law for the reasons which he gave. On the question of contributory negligence I think on the evidence that the conduct of the plaintiff contributed to the accident and that, therefore, he must bear a part of the damage. I think the damages should be borne equally by the plaintiff and the defendants. On the basis of the figure found by PARKER, J., that would involve judgment for £817 10s. To that extent I think the appeal should be allowed.

DENNING, L.J.: I agree. I am confirmed in the view that we should allow this appeal because PARKER, J., would have himself decided in favour of the plaintiff, but for the fact that he felt himself bound by authority. He said ([1952] 1 All E.R. 57)

"... it seems ... an extraordinary proposition that, because the regulations have said that dangerous part A shall be guarded in a particular way, there is no obligation to guard dangerous parts B, C, D, and E."

Now that we have had the benefit of full argument on the cases, I think that proposition is no part of the law. It seems to me that when the regulations say that a particular dangerous part is to be guarded in a particular way, the occupier satisfies his statutory obligations in regard to that part by guarding it in that way, but he remains under his ordinary statutory obligations in regard to other dangerous parts. In the present case these regulations prescribe the way in which one particular danger is to be met, namely, the danger from the cutter of a milling machine, but they do not prescribe anything about any other dangerous part of the machine. The obligation to provide safeguards for those dangerous parts is to be found in the Act itself, in particular, s. 14 (1). That sub-section contains an absolute obligation which the occupier has not fulfilled. He is not absolved from responsibility by the fact that the factory inspector never required him to fence those parts, nor do I think we should pay any regard to that fact when assessing the share of responsibility which the parties should bear. A breach of statutory duty having been proved, which would give a careful plaintiff a cause of action for his full damages, the only question under the Law Reform (Contributory Negligence) Act, 1945, is by what amount the full figure should be reduced, having regard to this plaintiff's share in the responsibility for the damages. PARKER, J., on reviewing the facts, felt bound to say that the plaintiff did an act which was, to say the least, extremely rash. In the circumstances, I agree with my Lord that the proper proportions are half and half, and that we should allow the appeal accordingly.

ROMER, L.J.: I also agree. As we are differing from PARKER, J., on the question of the liability of the employers I would just add a few words on the question of the regulations and the liability under s. 14 (1). Counsel for the defendants pointed to s. 79 of the Factory and Workshop Act, 1901, the section under which these regulations were made in 1928, which provides:

"Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour is dangerous . . . he may certify that manufacture, machinery, plant, process, or description of manual labour to be dangerous; and thereupon the Secretary of State may, subject to the provisions of this Act, make such regulations as appear to him to be reasonably practicable, and to meet the necessity of the case."

That provision is repeated in s. 60 of the Factories Act, 1937, but that section omits the requirement as to certifying. Counsel for the defendant contends that the section was dealing with machinery as a unit, that the function of the Secretary of State is to pay regard to a unit of machinery, that, if he contemplates that it is dangerous machinery, he may give a certificate, and that then he has to diagnose the dangers and make regulations to meet them. Thus, says counsel for the defendants, you arrive by means of a series of regulations at a code which covers all the dangers of the unit. He suggests that that is just what has happened in this case. It is plain that a set of regulations may be so comprehensive as to prescribe safeguards for all known dangers, and, if so, they would amount to a complete code which, on the authorities to which my Lord has referred, would supersede s. 14 (1) or any other relevant enactment, but it is always a question whether that has or has not been done. I am of opinion on the whole that on the construction of s. 79 of the Factory and Workshop Act, 1901 (or s. 60 of the Factories Act, 1937), it is open to the Minister to deal with some specific dangers and not others. He does not have, as counsel for the defendants suggested, to exercise his functions by taking a piece of machinery as a unit, considering all its dangers, and prescribing remedies and safeguards to meet them. In the present case he has merely selected one dangerous feature of the particular machinery, namely, the cutters, and has made regulations to deal with that feature. In so far as the regulations prescribe safeguards for the cutters, on the authorities those

regulations are sufficient, but, in so far as they do not deal with other dangers, those other dangers remain subject to s. 14 and the obligation of the employer in relation to them continues. Consequently, as this piece of apparatus was undoubtedly dangerous in a way that was not mentioned in the regulations, the employers were still liable under s. 14 (1) in relation to it, and the regulations afford no answer to the claim. I do not think that the cases which were cited carry the matter very far, because the point never actually arose in any of them, and, although some of the language which is to be found in them appears to be wide enough to afford support for the contrary view, they have to be read in relation to the facts before the court, and, read in relation to those facts, I do not think they provide any assistance. They certainly do not compel this court to arrive at a contrary view to that which has been indicated. For the rest I entirely agree with what has been said, including the apportionment of fifty per cent.

Appeal allowed.

Solicitors: *Bryan O'Connor* (for the plaintiff); *Stanley & Co.* (for the defendants).

[*Reported by J. D. PENNINGTON, ESQ, Barrister-at-Law.*]

RICHMOND v. RICHMOND.

*Approved CA
Goshey v Goshey 1964*

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), February 21, 1952.]

Divorce — Connivance — Adultery by husband — No condonation by wife — Continuance of connivance — "Natural consequence" of wife's connivance — Husband's desertion and wilful neglect to maintain.

In August, 1950, the husband and the wife went on a caravan holiday with Mr. and Mrs. B., the husband then committing adultery with Mrs. B. and the wife with Mr. B., each party knowing of the adultery of the other. Shortly after the return home of the husband and wife, the wife gave up her adulterous association with Mr. B. In June, 1951, Mrs. B. gave birth to a child of which the husband admitted paternity. On Nov. 15, 1951, he left the matrimonial home and went to live with Mrs. B., and since that date he had paid no maintenance to the wife. Justices found the husband guilty of adultery, desertion, and wilful neglect to maintain, and made an order for maintenance in the wife's favour. On appeal by the husband,

HELD: (i) the husband's adultery in August, 1950, had been connived at by the wife; there was no finding by the justices that this adultery had been condoned; and, therefore, her connivance continued in existence and she was not entitled to an order on the ground of the husband's adultery.

Gorst v. Gorst ([1951] 2 All E.R. 956), distinguished.

(ii) the husband's conduct in leaving the wife and failing to pay her maintenance was not the "natural consequence" of her connivance at his adultery, and, as her own adultery had been connived at by the husband, she was entitled to an order for maintenance on the grounds of desertion and wilful neglect to maintain.

AS TO CONNIVANCE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 674-676, paras. 995-999; and FOR CASES, see DIGEST, Vol. 27, pp. 326-332, Nos. 3052-3122.

Case referred to:

(1) *Gorst v. Gorst*, [1951] 2 All E.R. 956; 115 J.P. 634.

APPEAL by the husband against an order of Southampton borough justices dated Dec. 12, 1951, whereby they directed him to pay maintenance to his wife on the ground of his adultery, desertion and wilful neglect to maintain her.

Willett for the husband.

Brodrick for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from an order for maintenance at the rate of £2 15s. a week made by justices for the borough of Southampton on Dec. 12, 1951, in favour of the wife, on the three grounds of the husband's adultery, desertion and wilful neglect to provide her with reasonable maintenance. The substance of the case is whether any, and if so which, of the findings can stand.

It is common ground that in August, 1950, this husband and wife went with another couple, named Burfitt, for a caravan holiday together with the three daughters of the Burfitts and another child and that in that atmosphere, with those young people about, on at least two occasions, by mutual consent these spouses agreed to an exchange of partners. It is common ground that both pairs of spouses have committed adultery, and, so far, it is as plain a case of connivance on both sides as could well be imagined, and there is no more to be said about that. But it is said that there came a change. The justices have found that, shortly after this holiday period the wife and Burfitt came to the conclusion that they had been very wrong in what they had done, and they refrained from any further intercourse. On the other hand, Mrs. Burfitt had conceived, and, according to the wife, the husband, who was not called before the justices, admitted the paternity of her child, which was born in June, 1951. It is clear that from the middle of November, 1951, they have thrown in their lot together, and, according to the evidence of Mrs. Burfitt, are still living together and committing adultery with each other. The husband left the matrimonial home with which we are concerned on Nov. 15, 1951. He has never returned, and, so far as I can see from the evidence and the findings, he has no intention of returning. It is in respect of that parting and the fact that since that parting he has not been maintaining, or adequately maintaining, his wife that she has brought the charges of desertion and wilful neglect to maintain. The justices held as regards the adultery that, although it is unquestionable that there was mutual connivance in the first instance, in connection with the later adultery as from the time when the husband left the wife (and, of course, strictly speaking, it is the later adultery with which the court was concerned, because it had to be satisfied that adultery was committed within six months of the issue of the summons) the earlier connivance had spent itself within the meaning of the judgment of KARMINSKI, J., in *Gorst v. Gorst* (1). I do not think it necessary to pursue the argument about the finding of adultery on which in part the justices have based their order, because it is clear that the vital point on which counsel for the wife would have been prepared to rely has not been the subject of a specific finding. We do not know what view the justices would have taken about the all-important point whether the original connivance had been got rid of by subsequent condonation.

I propose, therefore, now to deal solely with the findings of desertion and wilful neglect to maintain. I have already said that it is impossible to dispute the finding of the justices that there has been a parting with the intention of breaking up cohabitation finally and against the will of the wife. It is not sought to argue that the wife's original adultery in August and September, 1950, is a bar under s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, to her obtaining an order on the ground of desertion, because that adultery was connived at, even if it has not subsequently been condoned, by the husband. But it is said that it follows from the fact that she connived at her husband's adultery that she is precluded for ever, whatever the circumstances may be, from relying on any matrimonial offence which can possibly be said to flow from the adultery thus connived at. This is said to be an application of the principle that she must be taken to intend the natural consequences of her act in permitting this disgraceful business in August and September, 1950. It is said, of course truly,

that it does appear to have been one of the natural consequences that a child was conceived, but whether that is a "natural consequence" within the meaning of the proposition which has been put forward is another thing. It is said that the wife, in conniving at that adultery, must have contemplated that something of the sort would happen, that in any case the husband would get fonder of the other woman than he was of her, and that in the course of time it would necessarily lead to his leaving her for the other woman, and, therefore, that it is impossible for her to complain of desertion because she is really the authoress of her own wrong in that connection. Further, it is said that it is equally impossible for her to complain of wilful neglect to maintain.

I find it impossible to follow that sequence of ideas. The wife did everything that was possible to prevent the disruption of her marriage and to make it clear that she for her part was anxious, or, at any rate, ready and willing, to continue the cohabitation on the basis that what had happened was forgiven and forgotten. On the findings in this case (by which the husband is bound, as he has not given any evidence to contradict them)—that the wife made attempts to get her husband to change his attitude towards her, visited the probation officer for advice, and objected during the time she and her husband were still living together to his even taking Mrs. Burfitt out to a cinema or anything of that sort—it seems to me to be impossible to dispute the conclusion that when he left her on Nov. 15, 1951, it was against her will, and the further conclusion that since that date he has wilfully neglected to provide reasonable maintenance for her. To those findings the justices rightly applied the terms of s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, because, as was admitted, it is impossible to argue that, even if her adultery had not been condoned, it had not clearly been connived at by the husband. In my view, on the facts the justices were fully entitled to find that the husband had deserted the wife and that he had been guilty of wilful neglect to maintain her, and I decline to hold that his conduct in doing these things was a necessary or natural consequence of what happened in August and September, 1950, or that the wife is the authoress of her own wrong. The appeal should be allowed to the extent of varying the order by striking out the ground of adultery, but otherwise the appeal fails.

KARMINSKI, J.: I agree, and only wish to add a very few words for myself on the issue of adultery. The justices applied, perhaps too narrowly, some observations which appeared in *Gorst v. Gorst* (1) to which my Lord has referred, and they failed, in my view, to pay full attention to all the circumstances of the present case in deciding whether or not the wife's connivance of the husband's adultery had spent itself at the time of the adultery complained of. The facts in *Gorst v. Gorst* (1) were peculiar and very different from those in the present case. The petitioning wife in *Gorst v. Gorst* (1) had consented to adultery on the husband's part, though excluding the woman named in the case in the erroneous belief that thereby she might be saving or repairing the marriage which had become precarious. In the present case the wife consented to her husband's adultery with a known woman, while she at the same time consoled herself by committing adultery with that woman's husband. Moreover, there is a difference in the termination of the connivance. In *Gorst v. Gorst* (1) it was found as a fact that the petitioning wife had condoned the adultery of the husband at which she had connived, though in the erroneous belief that that adultery had then ceased, whereas in fact the husband committed further adultery. As my Lord has pointed out, in the present case the justices have not found as a fact whether or not the wife condoned the husband's past adultery, or whether, indeed, the husband had condoned the wife's. In all the circumstances of the case I have come to the conclusion that the justices were wrong in finding, as they did, that in the circumstances the wife had not connived at the adultery complained of, and I agree entirely that their finding on the issue of adultery cannot be upheld. So far as the findings of desertion and wilful neglect are concerned, I agree with

my Lord, and for the reasons given by him, that those findings are unimpeachable, and so I agree that this appeal fails save in so far as the order must be varied by discharging the finding of adultery.

Order accordingly.

Solicitors: *Geoffrey Wells & Woodford*, Southampton (for the husband);
Bernard Chill & Partners, Southampton (for the wife).

[*Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.*]

In the Estate of NEWLAND.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Havers, J.), February 25, March 3, 1952.]

Will—Seaman at sea—Deceased in service of shipowner—Document made in contemplation of voyage—Alteration—Presumption of alteration while “at sea” —Wills Act, 1837 (c. 26), s. 11.

On July 25, 1944, the deceased, an apprentice in the employ of a steamship company, executed a will while on leave ashore in England. Within the next week he returned to his ship which sailed on Aug. 1, 1944. At the date of making the will the deceased was under the age of twenty-one, and, therefore, the will was invalid unless the deceased were a seaman at sea within the meaning of s. 11 of the Wills Act, 1837 (as explained by s. 1 of the Wills (Soldiers and Sailors) Act, 1918). At a date unknown the will had been altered by the striking out of a bequest. This alteration had been initialled by the deceased, but there was no evidence to show whether it had been done before or after execution of the will. On an application for a grant of probate omitting the bequest,

HELD: (i) the deceased, being in the employment of the steamship company when he made the will and being then in contemplation of sailing on a fresh voyage within a very few days, was a seaman at sea within s. 11 at the material time, and the will was valid.

In the Goods of Hale ([1915] 2 I.R. 362), applied.

(ii) there was a presumption that the alteration was made while the deceased was “at sea”, and so no formalities were required for its alteration and the revocation of the bequest was valid.

In the Goods of Tweeddale (1874) (L.R. 3 P. & D. 204) and *In the Estate of Gossage* ([1921] P. 194), applied.

AS TO PRIVILEGED AND NUNCUPATIVE WILLS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 198-201, paras. 325-328; and FOR CASES, see DIGEST, Vol. 39, pp. 332-339, Nos. 180-252.

Cases referred to:

- (1) *In the Goods of Corby*, (1854), 1 Ecc. & Ad. 292; 23 L.T.O.S. 346; 164 E.R. 169; 39 Digest 332, 182.
- (2) *In the Goods of Lay*, (1840), 2 Curt. 375; 163 E.R. 444; 39 Digest 333, 189.
- (3) *Euston (Earl) v. Lord Henry Seymour*, (1802), cited in 2 Curt. 339; 163 E.R. 432.
- (4) *In the Goods of Hayes*, (1839), 2 Curt. 338; 163 E.R. 431; 39 Digest 333, 191.
- (5) *In the Goods of Patterson*, (1898), 79 L.T. 123; 39 Digest 333, 186.
- (6) *In the Goods of M'Murdo*, (1868), L.R. 1 P. & D. 540; 37 L.J.P. & M. 14; 17 L.T. 393; 32 J.P. 72; 39 Digest 333, 188.
- (7) *In the Goods of Austen*, (1853), 2 Rob. Eccl. 611; 21 L.T.O.S. 65; 163 E.R. 1431; 39 Digest 333, 185.
- (8) *In the Estate of Anderson*, [1916] P. 49; 85 L.J.P. 21; 114 L.T. 519; 39 Digest 332, 183.

- (9) *In the Estate of Stanley*, [1916] P. 192; 85 L.J.P. 222; 114 L.T. 1182; 39 Digest 336, 224.
- (10) *In the Goods of Hale*, [1915] 2 I.R. 362; 44 Digest 304, b.
- (11) *In the Goods of Hiscock*, [1901] P. 78; 70 L.J.P. 22; 84 L.T. 61; 39 Digest 334, 202.
- (12) *In the Goods of Godley*, (1907), 47 I.L.T. 160.
- (13) *Re Wingham*, [1948] 2 All E.R. 908; [1949] P. 187; [1949] L.J.R. 695; 2nd Digest Supp. A
- (14) *Barnard v. Birch*, [1919] 2 I.R. 404; 44 Digest 304, c.
- (15) *In the Goods of Tweedale*, (1874), L.R. 3 P. & D. 204; 44 L.J.P. & M. 35; 31 L.T. 799; 39 J.P. 152; 39 Digest 338, 250.
- (16) *In the Estate of Gossage*, [1921] P. 194; 90 L.J.P. 201; 124 L.T. 770; 39 Digest 338, 245.
- (17) *In the Goods of Itter*, [1950] 1 All E.R. 68; [1950] P. 130; 2nd Digest Supp. B

MOTION for grant of probate.

The deceased, Ian Frederick Charles Newland, was born on Sept. 30, 1925, and died on Aug. 8, 1951, at the Government General Hospital, Madras, India. On Apr. 19, 1944, he joined ss. Strathmore as an apprentice and he continued to serve in that vessel until Oct. 24, 1944. During the war the Strathmore was engaged as a troopship voyaging backwards and forwards between England and India. On July 4, 1944, she was in dock at Liverpool. On July 25, 1944, the deceased, while on leave with the approval of his employers, the owners of the ship, was ashore at the house of a friend at Walton-on-Thames, Surrey, and he then executed a will in the presence of two witnesses and in compliance with the formalities required by the Wills Act, 1837. At that date he was between eighteen and nineteen years of age and, therefore, unless he was a person who was entitled to make a privileged will under s. 11 of the Wills Act, 1837, his will would be invalidated by reason of the fact that he was under the age of twenty-one years. The deceased rejoined his ship on or before Aug. 1, 1944, on which date the ship sailed on a new voyage. C

R. L. Bayne-Powell for the applicants.

Hesketh for the beneficiaries under the bequest.

Bradburn for the parties cited.

Cur. adv. vult. D

Mar. 3. **HAVERS, J.:** This is a motion on behalf of Mr. Noel Johnstone Dodd and Mr. Stanley Makin for a grant of probate to them as executors of the will executed by the deceased on July 25, 1944, omitting from the will a gift to five cousins of the Dowell family. E

[Hrs LORDSHIP stated the facts and continued:] The Wills Act, 1837, s. 11, provides: F

"Provided always . . . that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act". G

Section 7 provides: ". . . No will made by any person under the age of twenty-one years shall be valid". It will be observed that the language of s. 11 differs according to whether it is referring to a soldier or to a mariner or seaman. As regards the soldier, the condition is that he must be in actual military service. As regards a mariner or seaman, the requirement is being at sea. H

It was always recognised by the courts that, if a person came within the scope of the proviso to s. 11 and so was entitled to make a privileged will, he was entitled to do it although he was not of the age of twenty-one years. That was recognised and approved by s. 1 of the Wills (Soldiers and Sailors) Act, 1918, which provides:

"In order to remove doubts as to the construction of the Wills Act, 1837, it is hereby declared and enacted that s. 11 of that Act authorises and always

has authorised any soldier being in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act, though under the age of twenty-one years”.

By s. 2:

A “Section 11 of the Wills Act, 1837, shall extend to any member of His Majesty’s naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section”.

It is to be observed, however, that s. 2 only applied to any member of His Majesty’s naval or marine forces. In my view, that section does not apply to persons who are seamen in the merchant navy.

B In considering the true construction of the words “at sea” it will be observed that the words contained in s. 11 are “seaman being at sea” not “on the sea”. It is clear from the authorities which have been cited to me that the court has put a liberal interpretation on those words. For instance, it seems to me to be clearly established by authority that a seaman who is ashore on leave at a port during the course of a voyage and while ashore on such leave makes a will is a seaman “at sea”. I have examined the various authorities which have been
C cited to me to see whether I could extract from them some principle of universal application, but I have been unable to find such a principle. The first authority cited to me was *In the Goods of Corby* (1). The facts of that case, according to the headnote, were:

D “A vessel was lying at Melbourne in Australia, when H.C., who had been some time resident there, shipped on board as an able seaman to return to England. The vessel did not sail for some days after. Irregular papers of H.C. dated the very day on which he shipped, not entitled to probate as a mariner’s will under s. 11 of the statute”.

DR. LUSHINGTON who tried that case, observed in the course of the argument: “You ask for probate of these papers as a seaman’s will, but have you any
E evidence that he was on board ship at the time he wrote them?” Dr. Middleton, one of the counsel engaged in the case, said: “The evidence is to the effect that he was shipped, as a mariner, on board this vessel on the day when the papers bear date”. Then Dr. LUSHINGTON intervened saying: “It seems to me running it rather close to say that he was a mariner when he made his will only on the very day when he was shipped, and when the vessel was in a British port. It is a
F very nice question, which the court must take time to consider.” On a subsequent day Dr. LUSHINGTON rejected the motion saying (1 Ecc. & Ad. 293):

“This case I have taken time to consider, as the question involved appeared to me of considerable importance, and it was my anxious wish to grant the motion for probate of these papers, if I thought I could do so consistently with my apprehension of the law. These papers are not executed according
G to the requirements of the statute, and the application is for probate of them as privileged under s. 11. That section, however, applies only to wills made at sea. Now, in the present case, there is no evidence whatever where these papers were written, nor whether the deceased was even on board the ship at the time. It appears that the deceased had not originally sailed to Australia in this vessel, but that he had been residing there for nearly a
H twelvemonth before he shipped as a mariner to return in her to England, and that he so shipped on Mar. 15. Now the paper marked A, bearing date Mar. 6, I think, must be put out of consideration altogether, as being clearly not entitled to the privilege. But with respect to the other two papers, it is a different question. They both bear date Mar. 15, on which day, it appears in evidence, the deceased shipped on board this vessel, as a mariner, to return to England. But, assuming that these papers were actually written on board this ship, I am not prepared to say they would be

entitled to probate as a mariner's will, for it must be borne in mind that the statute says 'mariner or seaman being at sea', and it appears that this vessel did not sail till Mar. 30, fifteen days afterwards. Can it then be said that these papers were written at sea, within the true meaning of the statute? I think not. I am aware of the case of *In the Goods of Lay* (2), but the circumstances of that case appear to me totally distinguished from the present. I must reject this motion."

I wish to stress that in that case this particular man, Henry Corby, had not originally sailed to Australia in that vessel at all; he had been living in Australia for nearly twelve months before he did ship as a mariner to return in this ship to England.

The next case which was cited to me was *In the Goods of Lay* (2). This case was relied on very strongly by the applicants. The deceased in this case was mate of H.M.S. Calliope, and, on Nov. 4, 1839, while the vessel was in the harbour of Buenos Ayres, he obtained leave to go on shore, where he met with a fall and was thereby so severely injured that he died on shore five days later. Immediately after the accident he wrote his will, in pencil, on a watch-bill which was cut out and certified by the officers on board the ship on Nov. 5, but it was unattested. The paper was rejected by the receiver of seamen's wills, in regard to prize money. The court, distinguishing the case from that of *Lord Henry Seymour* (3), who was living on shore at Jamaica and only occasionally going on board his ship, held that the case came within the exception of the Act, and that it was the will of a seaman at sea, although the deceased, having had leave to go on shore, was not actually on board ship at the time the will was made.

The case of *The Earl of Euston v. Lord Henry Seymour* (3) was referred to in *In the Goods of Hayes* (4) in which it was said that Lord Henry Seymour, who was the admiral of the station off Jamaica, made a nuncupative codicil which was rejected by the court on the ground of its having been made at the admiral's house on shore, it being held that he was, therefore, not "at sea" as required by the statute. The distinction there, apparently, was that the admiral had a permanent residence on shore and only occasionally went on board his ship.

Counsel who appeared to oppose this motion sought to distinguish *In the Goods of Lay* (2) on these grounds. He urged that the Calliope was in the middle of a voyage and that when the deceased made the document there in question he was only ashore during a short period of leave in the course of the voyage, whereas at the time he executed his will the deceased in the present case was in England, he had no fixed address, and in a sense it might be said that when he executed this document at his friend's house he was at home. Further, it was argued that this will was made, not during the course of a voyage, but between voyages.

The next case to which I was referred was the case of *In the Goods of Patterson* (5). The headnote to that case is:

"A letter containing testamentary dispositions written on a ship lying within a river, and before the ship has actually sailed, may be a valid will as made by a seaman at sea."

In the course of the argument BARNES, J., who tried that case, said (79 L.T. 123): "The will here was made in the river. Is there express authority covering these facts?" and he was told: "No express authority, but there are analogous cases." BARNES, J., then asked: "What is the evidence as to where he was at the time of writing this letter" and it was pointed out: "The heading of the letter shows that." BARNES, J., then said: "I think I can assume that he was on board and waiting to start". He was then referred to *In the Goods of Lay* (2) and *In the Goods of Hayes* (4) and he said that the first of those cases seemed to have been approved by WILDE, J., in *In the Goods of M'Murdo* (6). BARNES, J., then said (*ibid.*, 124):

"I think you may take the grant. The deceased had gone on board, and

the voyage had begun for the purposes of making this document the will of a seaman at sea."

The facts of that case are not analogous to the facts of the case with which I have to deal, but there the deceased had gone on board and it was held that the voyage had begun for the purpose of constituting the document the will of a seaman at sea although the ship was actually lying in the river preparatory to sailing.

A The next case cited was *In the Goods of M'Murdo* (6). This case was, I think, relied on by both sides. The headnote reads:

"A will made by a mariner serving on board H.M.S. Excellent whilst she was permanently stationed in Portsmouth harbour, was held to be the will of 'a mariner or seaman being at sea . . .'"

B and within the section. In the statement of facts it is said that the deceased was a mate in Her Majesty's service serving on board the Excellent which was a gunnery ship permanently stationed in Portsmouth Harbour. The application in that case was for the revocation of the grant of probate on the ground that the deceased was not a mariner or seaman at sea. SIR JAMES WILDE, in giving judgment, said (L.R. 1 P.& D. 541):

C "I think this application must be refused. The admitted facts are that the deceased was a mariner in Her Majesty's service, that at the time when the will was made he was a mate on board the Excellent, and that the will was executed on board the Excellent, that vessel being at the time laid up in Portsmouth harbour, and there being no immediate intention of sending her to sea. A will made under these circumstances, in my opinion, comes within the description of the will of a mariner or seaman being at sea. I see D a great distinction between this case and that of *In the Goods of Corby* (1), where the deceased wrote a letter of which probate was sought, stating that he had shipped on board a vessel lying in Melbourne harbour on the date of the letter. It did not appear whether the letter was written before or E after he went on board, and the expressions which he used may have meant nothing more than that he had signed ship's articles, and had bound himself to join the vessel on a certain date. If he used the expressions with that meaning, he could not be said even to have joined the vessel in the sense of having commenced his maritime service."

Then comes a passage on which both sides relied:

F "The cases appear to me to go this length, that where a man has joined a vessel on service, and has commenced a voyage in it, a will made in the course of that voyage will be within the exception in the Act, even although such will was in fact made on shore."

Now, if that was the sole and exclusive test to be applied to the facts of every case I should find very much greater difficulty in deciding this case than I do; G but, in my view, that case did not purport to lay down a criterion for every set of facts, but was merely laying down a principle which was applicable to the facts of that particular case. SIR JAMES WILDE continues (*ibid.*):

H "That was the case *In the Goods of Lay* (2). The Calliope was lying in the harbour of Buenos Ayres, but whether she had gone there to refit, or for provisions, or for some other temporary purpose, or whether she was stationed there, does not appear. But she was actually in the harbour at the time of the making of the will, and the will was in fact made on shore. In the case of *In the Goods of Austen* (7) the will was made whilst the admiral was engaged on an expedition up a river, when although he was not actually at sea, he was practically on maritime service, which he had commenced by going to sea. It seems to me impossible to draw a distinction for this purpose between the Calliope lying in Buenos Ayres harbour and the Excellent lying in Portsmouth harbour. Although a seaman on board the

Excellent is not in a foreign country, still he is subject to the restraints of the service, and might have no opportunity of making a will with the usual formalities if he was taken ill on board when no lawyer was at hand."

It is important, however, to observe that there SIR JAMES WILDE was citing with approval the case of *In the Goods of Lay* (2).

In contrast, *In the Estate of Anderson* (8) was cited to me. The headnote to that case is:

"A member of a local corps of the St. John's Ambulance Association, being about to start from home under orders to join H.M.S. Pembroke, permanently stationed at Chatham, wrote out at home on the morning of his departure a document disposing of his property. He remained in barracks at Chatham and did not go on board ship till he joined a transport on Aug. 17, 1914, and he was wrecked in her on Oct. 30, 1914. HELD, not within the exceptions in s. 11 of the Wills Act."

BARGRAVE DEANE, J., in giving his judgment, stated the facts, and, in particular, the fact that after the deceased had gone to Chatham and was attached to H.M.S. Pembroke he did not go on board that or any other ship until he joined the Rohilla on Aug. 17, and said ([1916] P. 51):

"This would be a perfectly good will if made when this man was at sea. The language of s. 11 of the Wills Act is peculiar: the words are not identical with regard to soldiers and mariners. To come within the exceptions in that section, a soldier must be in actual military service, and if this deceased man had been a soldier, or if those words had applied to sailors or mariners, it might have been argued successfully that he came within the exceptions. But when the deceased wrote out this document he was not at sea: he was in fact at home in his father's house. It is with the greatest regret that I feel compelled to hold that this document cannot be admitted as a will. Various cases have been cited, and the nearest in point seems to me to be *In the Goods of Lay* (2), where the court, in admitting the document, held that it was the will of a seaman at sea, although the deceased, having had leave to go on shore, was not actually on board ship at the time he wrote the document. That was referred to with approval by SIR J. P. WILDE in the case of *In the Goods of M'Murdo* (6). If the deceased in the present case had been at sea at any period before he wrote out the document now before me, it might have been argued, with some chance of success, that he was within the words of s. 11."

In *In the Estate of Stanley* (9) a nurse employed under contract by the War Office in hospital ships wrote a letter giving the addressee full liberty to deal with her affairs and giving directions as to the disposal of her property. The letter was written during an interval of leave on shore in this country, but after the writer had received orders to re-embark, and it was held that the letter, which was unattested, was privileged as a soldier's will within the meaning of the Wills Act, 1837, s. 11, and that the person to whom it was addressed was executor according to tenor, and, as such, entitled to probate of the document. In his judgment BARGRAVE DEANE, J., said ([1916] P. 194):

"I think that a nurse is entitled to make a privileged will upon the same footing as a soldier or a sailor, following the principle of the Irish case cited." The Irish case cited was *In the Goods of Hale* (10), to which I will refer in a moment.

"Probate will go of the letter as constituting a soldier's will, the contract of the deceased having been with the War Office, and the grant will be made to the applicant as executrix according to tenor."

It is to be observed that there had been some dispute whether a woman could properly be included in the description either of a soldier or sailor or a mariner or seaman. That had been argued and decided in *In the Goods of Hale* (10),

and I think that when BARGRAVE DEANE, J., was saying that he thought a nurse was entitled to make a privileged will on the same footing as a soldier or a sailor he was merely saying that a nurse employed as this lady was under contract with the War Office in hospital ships could properly fall within the description of a soldier following the principle of *In the Goods of Hale* (10).

In the Goods of Hale (10) was very strongly relied on on behalf of the applicant.

A The deceased, who had been for several years in the employment of a steamship company as a typist, was in the habit of travelling as a typist on the vessels of the company (large ocean liners) sailing between Liverpool and New York. She spent the periods between voyages working in the company's offices in Liverpool. Her testamentary dispositions were contained in three letters. None of these documents was signed or attested as required by the Wills Act, but all, though written from the deceased's lodgings in Liverpool, were written in contemplation of sailing. The deceased was afterwards lost in the sinking of one of the ships of the company. It was held that every person employed in any branch of the Royal Navy or Merchant Service, from the highest to the lowest, was included, when at sea, in the exceptions contained in s. 11 of the Wills Act, and that, consequently, the deceased came within the meaning of the term "mariner or seaman", a term which was not confined to the male sex.

C It was further held that the deceased was "at sea" within the meaning of s. 11 at the time of making her will. MADDEN, J., who delivered judgment, said ([1915] 2 I.R. 368):

D "The deceased Miss Hale had been for several years in the employment of the Cunard Steamship Co. as a typist, and was in the habit of travelling as a typist on the vessels of the company sailing between Liverpool and New York. A continuous certificate of discharge covering the period from May 25, 1909, to Mar. 6, 1915, is in evidence. She had in her possession at the time of her death, on May 7, 1915, the continuous certificate of discharge which covered the period from March 1915 onward, but this document is, of course, not forthcoming. The documents of Jan. 14, 1915 were found after the death of the deceased in a case at Mildmay House, Liverpool, where she had told her sister, the wife of the applicant, that she would find instructions, in the event of anything happening to her. The letter dated 'St. Patrick's Day' was delivered in course of post. The documents of Jan. 14 were written in contemplation of the sailing of the *Lusitania* from Liverpool. Miss Hale was in the service of the company at the time of the writing of those documents. She did not sign on for the voyage until Jan. 16. But it is evident from the letter of the 14th that she was under orders to sail on that date."

F Those seem to me to be the decisive facts on which MADDEN, J., founded his judgment. He goes on then to consider (i) whether or not in that particular case the lady was a "seaman", and, (ii) whether she was a seaman at sea, and he says G (*ibid.*, 370):

H "Then comes the question: Was the testatrix 'at sea' on Jan. 14, 1915? And here I derive assistance from the judgment, from which I have already quoted, of SIR F. H. JEUNE in *In the Goods of Hiscock* (11). It was there decided that a private in a volunteer battalion who had sent in his name for active service in the South African War, who had been certified as fit by the medical inspector, and who had gone into barracks with a view to being drafted for active service, and had there made his will, was at that time 'a soldier in actual military service'. The judge applied this test to the case of the soldier: 'Had he taken some step at the time when he made his will to bring himself within the words of the section? This brings us very close, if, indeed, not actually, to the same point as what the Romans meant by in expeditione, for when a Roman soldier did anything towards fighting the enemy, he would have been considered, under the law of his time, as

being in expeditions'. This case was followed and applied by *BOYD, J.*, in the case of *In the Goods of Godley* (12). There is less difficulty in applying a similar test to the case of a seaman preparing for a voyage, for the words 'in actual military service' are more definite and specific than the phrase 'being at sea'. In my opinion *Miss Hale* was 'at sea' at the time of making her will, in a more real sense than *Hiscock* was 'in actual military service' under the circumstances of the case stated in the judgment from which I have quoted of *SIR F. H. JEUNE*."

I do not derive the assistance which *MADDEN, J.*, derived from a comparison of this case with *In the Goods of Hiscock* (11). As I have already pointed out, the language of the section when it deals with soldiers is entirely different from the language dealing with mariners or seamen at sea. It has also been pointed out by the Court of Appeal in *Re Wingham* (13) that in the interpretation of the words relating to soldiers the position of the soldier in actual military service is not identical, as was at one time thought, with that of the Roman legionary who was in expeditions. It seems to me that the material facts on which the learned judge relied were the facts which I have indicated—that the documents were written in contemplation of the sailing in the *Lusitania*, that the lady at the time was in the service of the company, and that she was under orders to sail on that date. Counsel for the parties cited pointed out to me that this Irish case is not, of course, a binding authority upon me, although it is entitled to great respect. He also pointed out that it was an *ex parte* case and there was no argument on the other side, and he sought to distinguish it on the grounds that in *In the Goods of Hale* (10) each will and codicil was made two days before sailing and that the lady in question had been informed that she was about to sign on for the particular voyage. He argued that there was a closer link between the will and codicil and the respective events in *In the Goods of Hale* (10) than there was in the case before me. He also argued that in *In the Goods of Hale* (10) the documents were made with a particular voyage in mind whereas before me the voyage from India had actually finished and there was no evidence that the new voyage had begun.

There was another Irish case cited to me in which the decision went the other way—*Barnard v. Birch* (14). There the deceased was a captain in the mail service and commanded the ss. *Leinster* during its cross-Channel voyages between Holyhead and Kingstown. He was actually at sea for the time each day spent in transit, but was on shore for the remainder of each day. He had a house at Holyhead where he and his wife and family lived. His testamentary disposition was contained in a document purporting to be a will which he signed at his house at Holyhead between voyages. The deceased was drowned when the *Leinster* was sunk, and it was held that he was "a seaman", but was not "a seaman being at sea" within the meaning of s. 11 of the Wills Act when he signed the said document purporting to be his will. *DODD, J.*, who decided that case, said ([1919] 2 I.R. 408):

"It is said there are judicial decisions that control my judgment. *MADDEN, J.*, has given a considered judgment in *In the Goods of Hale* (10). The deceased in that case was a lady typist in the employment of the Cunard Steamship Company as a typist on the vessels of the company sailing between Liverpool and New York. She wrote some letters which were testamentary just as she was starting. The learned judge in a luminous judgment decided she was a seaman, and a seaman preparing for a voyage, and that she was a seaman being at sea. *BARGRAVE DEANE, J.*, in *In the Estate of Anderson* (8) decided that a man who was called up on the Naval Reserve, but had not actually been made a sailor, was not a seaman being at sea. The two cases are said to be in conflict. I do not think they are, in principle. Indeed in a subsequent case, *In the Estate of Stanley* (9), *BARGRAVE DEANE, J.*, adopts the principle of *MADDEN, J.*'s, decision. The lady there was a nurse under

the Queen Alexandra Imperial Nursing Service. The letter was written during an interval of leave on shore in this country, but after the writer had received orders to re-embark. The judge, applying the principle of MADDEN, J.'s, judgment, held that she was a seaman being at sea."

In my view, DODD, J., was under a complete misapprehension there. BARGRAVE DEANE, J., did not hold that the lady was a seaman at sea. What he held was that, just as in the case of *In the Goods of Hale* (10) the lady typist could be a seaman, so a nurse employed as she then was could be a soldier. The decision was not on the footing that she was a seaman at sea, but that she was a soldier. The learned judge goes on (*ibid.*, 410):

"When this case was opened, Mr. Hanna, for the defendant, admitted that if the judgment of MADDEN, J., in *In the Goods of Hale* (10) was good law, and that I was bound to follow it, he could not contend that the deceased was not a seaman at sea. In that case the deceased lady wrote out the documents some days before she sailed, in her own lodgings in Liverpool, where she stayed between voyages. She was a typist, in the habit of travelling as a typist for the company between Liverpool and New York. She went down in the *Lusitania*. MADDEN, J., held she was 'a seaman, being at sea when she wrote the documents'. Mr. Hanna said I was not bound to follow that decision, as there was a decision to the contrary in the English courts, decided by BARGRAVE DEANE, J.: *In the Estate of Anderson* (8). The decision of MADDEN, J., was, he said, an ex parte decision, and the case before BARGRAVE DEANE, J., was fully argued. I am of opinion that I am not called upon to decide what my duty would be under the supposed conflict of authority, for there is no conflict. There is a sentence in the English report—'The language of s. 11 of the Wills Act is peculiar. The words are not identical with regard to soldiers and mariners. To come within the exceptions in that section, a soldier must be in actual military service; and if this man had been a soldier, or if those words had applied to sailors or mariners, it might have been argued successfully that he came within the exceptions. But when the deceased wrote out this document, he was not at sea; he was, in fact, at home in his father's house'. 'The deceased was not a soldier, and he was not a seaman at sea'. The learned judge makes it clear 'This would be a perfectly good will if made when this man was at sea' . . . 'If the deceased had been at sea at any period before he wrote out the document before me, it might have been argued that he was within the words of s. 11'. MADDEN, J.'s, reasoning is alleged to be at variance with this. He traces the words 'in actual military service' back to the Roman phrase 'in expeditione' and cites *In the Goods of Hiscock* (11), which applied this test to a soldier: 'Had he taken some step at the time when he made his will to bring himself within the words of the section?' . . . The argument of Mr. Hanna is based upon the assumption that MADDEN, J., has decided that preparing to go to sea is equivalent to being at sea, and that BARGRAVE DEANE, J., decided that preparing to go to sea was not equivalent to being at sea. Neither judge so decided. On the facts before him MADDEN, J., decided that preparing to go to sea was equivalent to going to sea, and BARGRAVE DEANE, J., decided that, upon the facts before him, the man was not a seaman . . . In the English case the man had been merely called up. In the Irish case the lady was in the actual service of the company, and was resuming her occupation as a seaman. BARGRAVE DEANE, J., expressly, as I have shown, differentiated the two cases. This is not a matter left in any doubt. MADDEN, J.'s, judgment was not cited in the argument before BARGRAVE DEANE, J. It was not applicable. But in a subsequent case . . . *In the Estate of Stanley* (9), it was cited before BARGRAVE DEANE, J., himself, and the principle of it approved of and followed. The letter in that case was written during an interval of leave on shore in this country, but after

the writer had received orders to re-embark. The lady there was a nurse under the Queen Alexandra Imperial Nursing Service, and was on leave pending further orders."

The conclusion of the judgment is in these terms (*ibid.*, 413):

"The facts in this case clearly bring it within the principles laid down by MADDEN, J., namely—1. That the section of the Wills Act is not confined to actual seamen. 2. That the section extends to women. 3. That a person who is not actually at sea may be a seaman. I adopt these three principles, and apply them to the facts of the present case. It is not essential that he or she should be actually on the sea; but the contrary principle is not affirmed. It does not necessarily follow that a seaman who is looking forward to a voyage is a 'seaman being at sea'. Captain Birch was a seaman who had daily duties to perform. For six or seven hours a day he was on the sea; the rest of the day he was on shore. When his boat was laid up he remained on shore in his own house with his wife and family. He had been so living for some weeks, and his time for resuming his daily sailings was approaching when he made this will. Was he within the principle of a seaman preparing for a voyage? When the captain reached his home, was he a seaman being at sea or was he a seaman being on shore? . . . On these facts, was Captain Birch 'a seaman being at sea' within the principles of the authorities I have referred to? If he had made the will when he went ashore on Nov. 17, would he then have been a seaman being at sea? Apply other tests. 'Had he taken a step?' Was he preparing for a voyage? If not on the 17th, when, then, did the principle begin to operate? Is there anything to show that the captain was doing anything really preparatory to a voyage? Applying the legal principles which I accept to the facts of this case, I am of opinion that when Captain Birch was sitting in his own house on the day he made the will he was a seaman on shore, and not a seaman being at sea."

That case, I think, is very different from the other cases because there it could be really said of that particular captain that on every day he was for so many hours of the day at sea and for the rest of the day he was on shore at home. It was also the fact that the ship had been laid up for a very considerable period before another voyage was contemplated and it was during that period that the testamentary document was made.

My attention was also called to a decision of the Court of Appeal in *Re Wingham* (13). That case really lays down the true test for the interpretation of the words "in actual military service" as applied to soldiers, sailors, or airmen in the service of the Crown. It is not relevant to the matter which I have to decide. I may, however, refer to a short passage in the judgment of DENNING, L.J., in which he says ([1948] 2 All E.R. 914):

"Doubtful cases may arise in peace-time when a soldier is in, or is about to be sent to, a disturbed area or an isolated post where he may be involved in military operations. As to these cases, all I can say is that, in case of doubt, the serving soldier should be given the benefit of the privilege."

It seems to me that that passage is equally applicable to the case of a merchant seaman who was continually employed during the war in a ship engaged as a troopship between England and India.

Counsel for the applicants argued before me that, whether I approach this matter from the angle of *In the Goods of Lay* (2), or from the angle of *In the Goods of Hale* (10), I ought to decide this case in favour of the applicants. He pointed out that the deceased was throughout in continuous maritime service in this ship. He joined the ship when it was engaged in this service and he had commenced and carried out completed voyages in it, he was an apprentice bound to serve where ordered, and throughout the whole of the relevant period the ship was engaged as a troopship on a series of voyages between England and

India. If, for instance, while the ship was in dock at some port in India at the end of the voyage from England, the deceased had been given temporary shore leave for a day or two and while he was on such leave in India he had made this document, I think there would be great force in the argument that, following the decision in *In the Goods of Lay* (2), that document would have been made by him while he was a seaman at sea. I cannot see any distinction in principle between the instance which I have just given and a case where, while the ship is in dock in England for the necessary period of time for refitting and so on, the deceased is temporarily on leave ashore in England, and I see no reason why I should not similarly hold that during that period he was a seaman "at sea". If one approaches the matter in the light of *In the Goods of Hale* (10), I find that the deceased was in the service of this shipping company at the time of the writing of this document, that the document was written in contemplation of sailing in the Strathmore on a fresh voyage within a very few days, and that, therefore, he was a "seaman at sea" when he made this will on July 25, 1944.

There was a second question to be determined because at some time or other a bequest in this will—"also" (and there follows the symbol £ and a figure which is not decipherable to me) "to each of my five cousins of the Dowell family Claude Roy William Dennis Brian"—was struck out and initialled by the deceased. Counsel for the five cousins of the Dowell family, on learning that this will from the time it was made until the date of the death was at the bank, did not feel able to persist in the argument which otherwise he would have addressed to me on behalf of his clients. If this bequest had been struck out before the will were executed, then, of course, cadit quaestio. The alternative is that the alteration was made after the will was executed. On that issue I was referred to *In the Goods of Tweedale* (15). It is sufficient for me to read the headnote:

"Where a will in the testator's handwriting contains material alterations, about the making of which no information can be obtained, and such will was signed by the testator whilst as a soldier he was employed in actual military service, the alterations will be presumed to have been made during the continuance of such military service, and will be included in the probate."

I think the same principle must apply to a "seaman at sea" and the presumption, therefore, is that the alteration would have been made while the seaman was "at sea". It was argued before me by counsel for the applicants that in a case of a will which does not require any formality as to its making and execution, it could be equally well revoked without any formality. His authority for that was the case of *In the Estate of Gossage* (16). It is enough for me to read the headnote:

"Under the Wills Act, 1837, no formalities are required for the execution of a soldier's will and therefore none are required for its revocation."

On that principle, therefore, I hold that, if this alteration was made after the will was executed, it was a valid revocation of the previous bequest. In those circumstances I grant the application which is made to me. There will, therefore, be a grant of probate to the applicants as executors of the will, omitting from the will the gift to the five cousins.

Order accordingly.

Solicitors: *Russell-Cooke & Co.* (for the applicants); *Crawley & de Reya* (for the beneficiaries and for the parties cited).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

In the Estate of WILSON. WILSON v. COLECLOUGH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Havers, J.), February 25, March 3, 1952.]

Will—Seaman at sea—Deceased in service of shipowner—Nuncupative will made in contemplation of voyage—Wills Act, 1837 (c. 26), s. 11.

The deceased was a chief officer employed in the marine department of a petroleum company. On Jan. 11, 1946, he went on leave in England, and on Apr. 25 he received instructions to join a ship on Apr. 30. On Apr. 27 he made a nuncupative will by saying in the presence of witnesses: "If anything happens to me, I want everything to go to my mother".

HELD: the deceased made the will in contemplation of the voyage on Apr. 30, and, therefore, he was a "seaman at sea" within the meaning of s. 11 of the Wills Act, 1837, and the will could be admitted to probate.

In the Goods of Hale ([1915] 2 I.R. 362), applied.

AS TO PRIVILEGED AND NUNCUPATIVE WILLS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 198-201, paras. 325-328; and FOR CASES, see DIGEST, Vol. 39, pp. 332-339, Nos. 180-252.

Cases referred to:

(1) *In the Estate of Newland*, ante, p. 841.

(2) *In the Goods of Hale*, [1915] 2 I.R. 362; 44 Digest 304, b.

ACTION to determine whether the plaintiff was entitled to a grant of letters of administration of the estate of the deceased with the contents of a nuncupative will annexed. The defendant filed no defence and took no part in the proceedings.

Hesketh for the plaintiff.

Cur. adv. vult.

Mar. 3. **HAVERS, J.:** The plaintiff, Mrs. Sophia Wilson, asks the court to order a grant to her of letters of administration of the estate of her son, Alfred John Wilson deceased, with the contents of a nuncupative will, made on Apr. 27, 1946, annexed.

At all material times the deceased was a chief officer employed by the Anglo-Saxon Petroleum Co., Ltd., in their marine department, he being a chief officer in their merchant fleet. In 1931 he married the defendant, now Katherine Coleclough, in Shanghai. On July 9, 1940, he made a will in which he appointed his then wife his sole executor and beneficiary. In 1941 he divorced his wife. She has since re-married. She put in no defence and has taken no part at all in these proceedings. On Jan. 10, 1946, the deceased arrived in London after a voyage from Suez and on Jan. 11, 1946, he went on furlough and remained on furlough in England until Apr. 16, 1946. He was then awaiting re-appointment to another ship. On Apr. 25, 1946, the deceased received instructions from his employers to proceed to Sunderland to join a ship on Apr. 30. On Apr. 27, while at his sister's house, he made a nuncupative will by saying in the presence of his mother and other witnesses: "If anything happens to me, I want everything to go to my mother". On Apr. 30, 1946, the deceased went to Sunderland to join his ship, and immediately thereafter proceeded to sea to the Far East. On Oct. 8, 1947, he died, while serving in another ship.

The same question arises in this case as in *In the Estate of Newland* (1), though the facts are different. The plaintiff has to satisfy me that at the time the deceased made this nuncupative will he was a seaman at sea. It is unnecessary for me again to review the authorities which I have reviewed in *Newland's* case. The facts which seem to me to be decisive in this case are that at all material times the deceased was a chief officer in the Anglo-Saxon Petroleum Company's fleet of merchant ships, that prior to the furlough he had been at sea in one of the company's ships, that at the end of the furlough he was awaiting re-appointment to another of the company's ships, and that, at the time he made this

nuncupative will, he had been ordered to join a ship for a specific voyage. I find that he made this nuncupative will in contemplation of sailing in that ship on that particular voyage, and I find that he was preparing for the voyage. In those circumstances, following the decision of *In the Goods of Hale* (2), I hold that he was a seaman at sea. There will, therefore, be a grant of letters of administration to the plaintiff of the estate of the deceased with the contents of the nuncupative will annexed.

Order accordingly.

Solicitors: *Bell, Brodrick & Gray*, agents for *Williamson, Stephenson & Hepton*, Hull.

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

HILLINGDON ESTATES CO. v. STONEFIELD ESTATES, LTD.

[CHANCERY DIVISION (Vaisey, J.), March 13, 14, 1952.]

Contract—Frustration—Sale of land—Compulsory purchase order relating to property made before completion.

Sale of Land—Contract—Frustration—Compulsory purchase order made before completion.

By a contract in writing, dated Jan. 13, 1938, the vendors agreed to sell and the purchasers to buy certain land for an estate in fee simple. The contract provided that the purchasers were entitled to take up the property on Jan. 31, 1939, and that they should in the conveyance enter into restrictive covenants to the effect that the land should not at any time be used for any purpose other than as a building estate to be developed in a particular manner, the number of "residential units" being not less than the maximum density provided for the area by the town planning authority. The completion of the transaction was delayed, inter alia, by the outbreak of war, and on Oct. 11, 1948, when the contract was still uncompleted, the M. County Council made a compulsory purchase order affecting the whole of the property. On July 14, 1949, notices to treat under the order were served on the vendors and on the purchasers. The purchasers claimed that, on or before the date of the service of the notices to treat, they were discharged from their contract to purchase the property.

HELD: the compulsory purchase order placed an obligation on the purchasers, who, subject to the payment of the purchase money under the contract of 1938, were to be regarded as the owners of the land, and did not affect the vendors, and, consequently, the making of the order did not preclude the carrying out of the contract, which was not, therefore, frustrated, but remained valid and enforceable.

AS TO FRUSTRATION, see HALSBURY, Hailsham Edn., Vol. 7, pp. 212-217, para. 296; and FOR CASES, see DIGEST, Replacement, Vol. 12, pp. 436, 437, Nos. 3331-3338.

Cases referred to:

- (1) *Cardiff Corpn. v. Cook*, [1923] 2 Ch. 115; 92 L.J.Ch. 177; 128 L.T. 530; 87 J.P. 90; Digest Supp.
- (2) *Haynes v. Haynes*, (1861), 1 Drew. & Sm. 426; 30 L.J.Ch. 578; 4 L.T. 199; 62 E.R. 442; 11 Digest 175, 526.
- (3) *Morgan v. Manser*, [1947] 2 All E.R. 666; [1948] 1 K.B. 184; 12 Digest, Replacement, 435, 3325.
- (4) *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest, Replacement, 436, 3333.

ACTION for a declaration that in the events which had happened the plaintiffs were discharged from their obligation to perform a contract for the purchase by them of certain land. The plaintiffs also claimed the return of a sum of money paid by them to the vendors as interest on the outstanding purchase money. The vendors counterclaimed for specific performance of the said contract, or, alternatively, damages.

Raymond Jennings, Q.C., and Hewins for the purchasers.

Scott Cairns, Q.C., and J. F. Bowyer for the vendors.

VAISEY, J.: This action arises out of a contract for the sale and purchase of certain land in the parish of South Ruislip in the county of Middlesex. The contract is in writing and is dated Jan. 13, 1938, and is made between the defendants, Stonefield Estates, Ltd., who are the vendors, of the one part, and the plaintiffs, Hillingdon Estates Co., who are the purchasers, of the other part. The plaintiffs are a company in which the liability is unlimited. The claim in the action by the purchasers is not for rescission of the contract, but for a declaration that they have been discharged from any further obligation to perform it, and I think that in that is involved the proposition that the contract has come to an end and that no party has any rights of any sort under its terms. The vendors (the defendants) dispute that contention and counterclaim for specific performance of the contract so far as the same remains to be performed.

Clause 1 of the agreement provides that the vendors are to sell and the purchasers are to purchase for £875 per acre the fee simple of and in, first, the land comprising some forty-one acres, which is called section A, and, secondly, another piece of land containing eighteen acres or thereabouts known as section C. Clause 2 of the contract provides for the payment by the purchasers to the vendors of £5,190 as a deposit, and they are to be entitled to take up the property—i.e., sections A and C—in three portions, the first half of section A on Jan. 31, 1938, the remainder of section A on July 31, 1938, and the whole of section C on Jan 31, 1939, on payment by the purchasers in each case of the appropriate part of the purchase money apportionable to the area of the land taken up, with interest at the rate of $4\frac{1}{2}$ per cent. per annum from Jan. 31, 1938. Clause 6 of the contract provides that the purchasers shall in the conveyance or transfer enter into certain restrictive covenants to the effect that the lands comprised in such conveyance or transfer should not at any time be used for any purpose other than as a building estate to be developed in a particular manner, the number of "residential units" as there described being not less than the maximum density provided for the area by the town planning authority. There are certain ancillary clauses, to which I need not refer in detail except to observe that cl. 13 provides that, notwithstanding the completion of the assurance of any part of the land—i.e., of sections A or C—the agreement should remain in force with regard to the conditions therein contained or deemed incorporated therein (that is to say, certain general conditions which had been previously referred to) and anything else remaining to be done thereunder and not provided for in the assurance.

The deposit was duly paid by the purchasers to the vendors, and the whole of section A was taken up in due course by the purchasers and assured to them by the vendors, and on those transactions the whole of the deposit of £5,190 was taken into account. No part of section C has been taken up by the purchasers or assured to the purchasers by the vendors, and the contract has not been performed in respect to section C except that the purchasers have paid to the vendors £3,677 ls. 10d. representing interest, less income tax, payable under cl. 2 of the agreement on the purchase price of section C (viz., £15,903 2s. 6d.), that interest having been calculated for the period from June 22, 1939 to Jan. 31, 1949.

In para. 5 of the statement of claim the purchasers say that on the true construction of the agreement and in the surrounding circumstances at the time

when the agreement was made the purchasers and vendors entered into the agreement on the footing that the purchasers would still be able to develop the said land (including section C) in accordance with the provisions of cl. 6 of the contract at the time when this land should be assured to the purchasers. In the events that happened, the matter was delayed for a very long time, no doubt in part consequent on the outbreak of war.

- The controversy has arisen because, on or about Oct. 11, 1948, the Middlesex County Council made a compulsory purchase order affecting, among other land, the whole of section C, and on or about Mar. 10, 1949, the order was confirmed by the appropriate authority, the Ministry of Education, subject, I understand, to immaterial modification. On or about Mar. 30, 1949, three weeks later, notice of the order was given by the Middlesex County Council to the purchasers and the vendors, and on or about July 14, 1949, notices to treat under the order and the relevant Acts were duly served on both parties by the county council. On those facts, in para. 11 of the statement of claim the purchasers allege that they were discharged, on or before the date of the service of the notices to treat, from liability to perform any of the agreements on their part contained in the written contract and became entitled to recover from the vendors the said sum of £3,667 ls. 10d. representing the interest, less tax, which had been paid and calculated on the purchase price of section C. The claim in the action is for a declaration that the purchasers had been so discharged. They further ask for repayment of the said sum in respect of interest and for costs and other relief. In their counterclaim the vendors allege that the purchasers accepted the vendors' title to the property, that the vendors are and have at all material times been ready and willing to implement their part of the contract in relation to section C, that, on Oct. 17, 1949, the vendors' solicitors called on the purchasers through their solicitors to complete the purchase within a reasonable time, but the purchasers' solicitors failed to reply to the letter, that the purchasers have not completed the purchase, and that, as a result the vendors are entitled to specific performance of the contract so far as the same remains to be performed, i.e., so far as it relates to the land described as section C. In the alternative, they claim damages for breach of contract, and other matters of incidental relief.

I regard this case as based, both according to the pleadings and having regard to the arguments, in fact on a plea of frustration. The doctrine of frustration is not an easy one, and there are rival theories as to the foundation on which it rests. Some high judicial authorities have supposed that it rests on an implied contract or on a term which must be deemed to be implicit in the contract as applied to some unforeseen, unpredictable, and unknown state of circumstances which has, in fact, arisen. The other view is that frustration depends on some such consideration as that the event which has happened has so completely destroyed the subject-matter and altered the circumstances that the contract can no longer be carried out or recognised in any shape or form and on that ground must be deemed (in equity, I suppose, for this, of course, is an executory contract) to be no longer enforceable, and, indeed, no longer in existence, so that it can be neither specifically performed by either party nor can any damages be recovered for any alleged breach of it.

Regarded as an action based on alleged frustration the case is a difficult one. It is remarkable that there is no authority either precisely in point or in the nature of an analogous case. If a compulsory purchase order—it matters not at what stage in the making of the order when the vital moment is said to arrive—relating to land subject to an uncompleted contract has the effect either of putting the vendors in the position that they are in breach of the contract and unable to perform it or of frustrating it, it is strange that such a matter has not been dealt with judicially hitherto, because, I should have thought, the situation must have arisen in a great number of cases, and in the large majority of those cases it must have been a most important point for consideration in the position

of the parties. The complete absence of authority does rather suggest to my mind that the doctrine of frustration does not operate normally in the case of contracts for the sale of land.

What is the effect of the compulsory purchase order on, first, the rights and position of the purchasers, and secondly, on the rights and position of the vendors? There is no doubt that the position of the vendors and that of the purchasers in an unperformed contract for the sale of land is radically different—different in quality and different in nature. I have always understood (and, indeed, it is a common-place) that when there is a contract by A to sell land to B at a certain price, B becomes the owner in equity of the land, subject, of course, to his obligation to perform his part of the contract by paying the purchase money. What is the position of A, the vendor? He has, it is true, the legal estate in the land, but for many purposes from the moment the contract is entered into he holds it as trustee for B, the purchaser. He has certain rights in the land remaining, it is true, but all those rights are conditioned and limited by the circumstance that they are referable to his right to recover and receive the purchase money. His interest when he has entered into a contract for sale is not an interest in land. It is an interest in personal estate, in a sum of money, and it seems to me that in a case such as this, when the date for completion is long past, the purchasers, subject to the payment of that purchase money, are to be regarded as the owners of the land, as I think they are. The effect of the notice to treat and the compulsory purchase process is merely to place an obligation on the person who is already the owner of the land in question. The compulsory purchase order does not affect the vendor. He has no interest in the matter save in respect of the purchase money which he is entitled to be paid.

It has been said by ROMER, J., in *Cardiff Corpn. v. Cook* (1) ([1923] 2 Ch. 121), quoting from KINDERSLEY, V.-C., in *Haynes v. Haynes* (2) (1 Drew. & Sm. 450):

“ . . . the notice to treat constitutes, as between the landowner and the company [the person giving the notice to treat] the relation of vendor and purchaser to a certain extent and for certain purposes . . . and that some of the consequences which flow from an actual contract also follow upon the notice to treat; such as that the particular lands [which are to be taken by the authority] and which the landowner must give up to the company after certain steps prescribed by the Act [the Land Clauses Consolidation Act, 1845] shall have been taken, are fixed, and that neither party can get rid of the obligation, the one to take and the other to give up the lands specified in the notice; and that such is the meaning to be attributed to those expressions, which may have dropped from learned judges, which seem to intimate that it is a contract; but that in no other sense and to no further extent does the notice constitute a contract, at least on the part of the landowner ”.

That deals with the simple position as between the authority serving the notice and the fee simple owner of the land, but when I try to apply that to the position, on the one hand, of the local authority, and, on the other, of the two parties who are still concerned with the land, I find it very difficult to say that it is the vendor who is the notional party to the notional contract. I should have thought that it is the owner of the land who is the notional party to the notional contract, and in the present case it appears to me that it is the purchasers who have been subject to this notice to treat and that the vendors are unconcerned with it. I agree that this compulsory purchase order very much altered the situation, but I cannot appreciate that it has altered it in such a fundamental and catastrophic manner as to justify the court in saying that the whole contract has been frustrated. I can see no objection to the contract being completed by conveyance after the notice to treat has been served, or, indeed, at any time. The land could have been conveyed on the purchase money being paid by the purchasers to the vendors. It would have to be conveyed, I think, subject to

the restrictive covenants, but how far anyone in the future will have the right to enforce those covenants, I do not know. It would also have to be made subject to the compulsory purchase, and that will put the purchaser in exactly the same position vis-à-vis the authority as he would have been if he had completed his contract within a reasonable time after the completion date. To say that the contract has been frustrated seems to me to go far beyond any authority to which my attention has been called, and does not accord with what I understand as frustration of a contract. There is no doubt that the whole of the compensation money under the compulsory purchase order will have to go to the purchasers, assuming, of course, that they complete. I think that the compulsory purchase order only affects the vendors in so far as they are given notice of it, and, if they choose to enforce the contract—i.e., the written contract of Jan. 13, 1938—they are under no obligation to do anything except to convey the property subject to, among other things, the compulsory purchase order.

No doubt these departmental interferences and interventions do make a very great difference to life in this country, but that does not mean that, whenever such interference or intervention arises, the parties are discharged from bargains solemnly entered into between them. I think that it is the duty of the parties in such a case as this to carry out their obligations, and I cannot see that there is in this case any reason for supposing that there is either an implied term of this contract that it should be frustrated in the event which has happened or that there has been such a destruction of the fundamental and underlying circumstances on which the contract is based as to justify my saying that the contract ceased to exist at the date when the notice to treat was served or at any other date in the process of the making and carrying into effect of the compulsory purchase order.

The nature of frustration has been very well defined by STREATFIELD, J., in *Morgan v. Manser* (3), where he collects together in a most convenient form the various pronouncements which have been made on this somewhat obscure subject. STREATFIELD, J., held that there was such a change of circumstances and of such a duration that the original contract, looked at as a whole, was invaded by the call-up of the defendant, who was a music hall artiste, and so fundamentally as to have been frustrated by that event: see [1947] 2 All E.R. 672. Applying those words to this case, I cannot hold that the contract here has been frustrated fundamentally or at all. The purchasers are no worse off than they would have been if they had completed their contract in a period rather less than twelve years from the time when they agreed to complete it. If they had completed the contract without the delay of twelve years, clearly the compulsory purchase order would have affected them without the least question. But, however that may be, I have to consider the matter as I find it, and, despite the long delay which has taken place, I think that the contract, so far from being frustrated, can and should be carried out.

For the best statement of the two views on which the doctrine of discharge from liability by frustration can be justified, I would refer to a passage in the opinion of VISCOUNT SIMON, L.C., in *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn., Ltd.* (4) ([1941] 2 All E.R. 171).

Counsel for the purchasers further submitted that the notice to treat is analogous to a contract between the Middlesex County Council and the vendors which obliged the vendors to convey the property to the county council. I think that that is entirely the wrong way in which to put it. I think that the duty of the vendors is to convey the property to the purchasers, subject to the notices to treat which were attached to the land, and of which the purchasers would have notice. Counsel argues that the existence of the notice to treat is an incumbrance and a condition which prevents the vendors from fulfilling their part of the bargain by conveying the property and giving a clean property to

the purchasers, but my own view is that it is not a condition of that kind. I think that it is a matter which concerns the purchasers and not the vendors.

Judgment for the vendors.

Solicitors: *W. F. Foster, Hedge & Clare* (for the purchasers); *Howard, Kennedy & Co.* (for the vendors).

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

W. v. W.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jen *Distinguished.* SLATER v. SLAT
March 11, 12, 1952.) [1953] 1 All E.R. 246.]

Nullity—Approbation of unconsummated marriage—Adoption of child by spouses.

The parties were married in 1941, but attempts by the husband to consummate the marriage were unsuccessful. In April, 1945, on the suggestion of the husband, the parties adopted a child under the provisions of the Adoption of Children Act, 1926. In November, 1946, the husband left the wife, and later he presented a petition for the nullity of the marriage on the ground that the wife was unable to consummate the marriage, or, alternatively, that she wilfully refused to do so. On the hearing of the petition,

HELD: in view of the fact that the adoption of the child affected not only the parties to the marriage, but also strangers thereto, and in the absence of evidence that at the time of the adoption the husband was unaware of his legal rights if the wife were incapable of consummating the marriage and the legal consequences of the adoption of the child and of proof that the husband initiated the adoption in the hope that the wife would overcome her repugnance to intercourse, there were circumstances proved which so plainly implied on the part of the husband a recognition of the existence of the marriage as to render it inequitable and contrary to public policy that he should be permitted to challenge it.

Observations of LORD WATSON in *G. v. M.* (1885) (10 App. Cas. 197), applied.

Dredge v. Dredge (otherwise *Harrison*) ([1947] 1 All E.R. 29) and *L. v. L.* ([1949] 1 All E.R. 141), distinguished.

Per Jenkins, L.J.: "The adoption of a child . . . is a solemn act which involves a representation to the court in the case of joint adopters that the joint adopters are husband and wife. On that representation . . . the court will make an order which transfers the adopted child from the legal protection of its natural parents to the legal protection of its statutory parents, as the adopters by force of the order in effect become . . . It seems to me difficult to imagine any act by two spouses which could more clearly affirm the existence and validity of their marriage."

EDITORIAL NOTE. The Adoption of Children Act, 1926 (with the exception of s. 5 (3) and (4) and s. 10) was repealed and replaced by the Adoption Act, 1950 (c. 26).

AS TO GROUNDS FOR DECREE OF NULLITY, see HALSBURY, *Hailsham Edn.*, Vol. 10, pp. 639-645, paras. 934-945; and FOR CASES, see DIGEST, Vol. 27, pp. 265-272, Nos. 2328-2407, and Digest Supps.

Cases referred to:

- (1) *Clifford v. Clifford*, [1948] 1 All E.R. 394; [1948] P. 187; [1948] L.J.R. 969; 2nd Digest Supp.
- (2) *G. v. M.*, (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest 351, 3339.
- (3) *Guest v. Shipley* (*falsely calling herself Guest*), (1820), 2 Hag. Con. 321; 161 E.R. 757; 27 Digest 325, 3036.

- (4) *L. v. L.*, [1949] 1 All E.R. 141; [1949] P. 211; [1949] L.J.R. 275; 2nd Digest Supp.
- (5) *Dredge v. Dredge* (otherwise *Harrison*), [1947] 1 All E.R. 29; 2nd Digest Supp.

APPEAL by the wife from an order of Mr. Commissioner GRAZEBROOK, K.C., dated Nov. 8, 1951, whereby he granted a decree nisi of nullity to the husband on the ground that, at the time of the marriage and ever since, the wife had been incapable of consummating the marriage, or, alternatively, that she had wilfully refused to do so. In her answer the wife denied that she had wilfully refused to consummate the marriage, said that it had been consummated, and also contended that the marriage was approbated by the parties jointly adopting a child on Apr. 11, 1945. The wife cross-petitioned for dissolution of the marriage on the ground of her husband's desertion. The commissioner found that the marriage had never been consummated and held that the joint adoption of the child had not the effect of approbating the marriage on the part of the husband.

Lawrence, Q.C., and *Fairweather* for the wife.

H. G. Garland and *Gabriel Cohen* for the husband.

SIR RAYMOND EVERSLED, M.R.: The present proceedings were begun in October, 1950, by way of a petition by the husband asking for a decree of nullity of his marriage. That was resisted by the wife, and, though we have not gone into the detail of the pleadings, she prayed in her answer for dissolution of the marriage on the ground of her husband's desertion. The question we have to decide in the present case is whether, assuming in the husband's favour that he can establish and has established incapacity on the part of the wife or its equivalent, he by his conduct has so approbated the marriage that on grounds of equity or public policy or both this court ought not now to entertain his petition.

The marriage took place in January, 1941, from which fact it will be observed that the petition was not presented for close on ten years after the marriage. By that I am not to be taken to be implying that the delay of itself can amount to approbation. Indeed, in *Clifford v. Clifford* (1) the view was expressly affirmed that it could not, but it is, nevertheless, a significant fact. It appears that at the time of the marriage both spouses were aware that the wife would probably not be able to bear children. A question was in issue between them whether she had also told her husband that there would be difficulty on her part in consummating the marriage. The first period of the marriage lasted from January, 1941, until the autumn of 1943. Though the husband was not particularly ardent sexually—and he was also clearly considerate—the attempts that were made prior to the autumn of 1943 to consummate the marriage admittedly were not successful. In that month the wife underwent an operation, first, for the removal of an ovarian cyst, and, secondly, for what is known as dilatation, intended to make penetration by the husband easier. The wife says that shortly after her return from hospital, namely, on Nov. 3, 1943 (a date which she precisely fixes), the marriage was consummated, and she says that sexual intercourse took place at times, though infrequently, thereafter. The husband's evidence (which was preferred by the commissioner) was that neither in November, 1943, nor at any later time was the marriage ever consummated, and, though the wife was to a degree acquiescent and helpful, on every occasion on which the attempt was made it was frustrated by a supervening repugnance or other reaction on her part. In 1943 the husband was in the Royal Air Force, and the parties lived together at various places during his service. At the end of 1944 the wife came into some money and purchased a bungalow at Carbis Bay, Cornwall, which thenceforth was the matrimonial home. The wife moved there immediately, and the husband went

into the officers' quarters at the station where he was serving, joining the wife on his leaves. At the beginning of 1946 the husband was released from his service and joined his wife in Cornwall. The cohabitation there was not happy. It was said by the wife that sexual intercourse took place during that period, but for the last time somewhere about the early summer of 1946. On Nov. 26, 1946, the husband left the wife. He joined the Royal Navy and has remained a serving officer ever since.

[HIS LORDSHIP referred to the evidence relating to the non-consummation of the marriage and continued:] I cannot satisfy myself that there are good grounds for this court impeaching the conclusion of the commissioner that this marriage was never consummated, and that the reason for it was an incapacity, at any rate quoad this particular husband, on the wife's part. It then becomes necessary to consider the main question: Has the husband disabled himself from seeking the relief that he does by action amounting to approbation (as it is said) of the marriage he now seeks to have avoided? In June, 1944—that is to say, seven months after the wife had had her operation and when she was still unable to complete the sexual act, according to the husband's evidence—a child was adopted pursuant to the provisions of the Adoption of Children Act, 1926. Unhappily that child died, and in April, 1945, a suggestion was made by the husband (and there is no doubt whatever that it was at his instigation and initiative that this step was taken) of the adoption of a second child. On April 11 a second child was adopted.

The principle or rule of law (if it may be so called) that in certain circumstances a spouse is disabled or barred from proceeding to avoid a marriage on the ground of his wife's incapacity or wilful refusal to consummate has been established by the House of Lords since *G. v. M.* (2). That there were previous cases in which a petitioner had been so disentitled appears from the argument reported. Reference had been made to *Guest v. Shipley* (3) as an example, but the suggestion was made in *G. v. M.* (2) that the question turned on what had come to be called "sincerity". The word was derived from a judgment of LORD STOWELL and it was argued that to obtain a decree there must be no other motive on the part of the petitioner than a desire to obtain redress for a grievance really entertained, and that, if it could be said that the real reason why a husband wanted to have the marriage avoided was that he would by that means no longer have to make financial provision for his wife, the existence in his mind of that mercenary motive resulted in a fatal absence of "sincerity" in his petition. The House of Lords disposed of that argument, and, in doing so, stated what was the real principle of approbation. The classic expression of that principle is found in the speech of the EARL OF SELBORNE, L.C., and again in the speeches of LORD WATSON and LORD BRAMWELL, and in *Clifford v. Clifford* (1), TUCKER, L.J., set out the relevant passages in LORD SELBORNE's speech and those in the speeches of LORD BRAMWELL and LORD WATSON. I hope I shall be forgiven for not setting them out once more. It will suffice if I confine myself first to these words from LORD SELBORNE, L.C.'s speech (10 App. Cas. 186):

" . . . I think I can perceive that the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of . . . "

The matter was put thus by LORD WATSON in a phrase which counsel for the wife adopted for the purposes of his argument (*ibid.*, 197):

" . . . there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence

and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect."

Has there been conduct here on the part of the husband of such a character that the court must say that he has approbated the marriage and has affirmed its existence and validity so that it is inequitable, and (if it be necessary to

A have both conditions, though I do not so decide) also contrary to public policy, that his petition should be granted?

I have come to the conclusion that in this case an affirmative answer must be given to that question, and I first attach very great weight to this adoption in 1945. A proceeding to adopt a child under the Adoption of Children Act, 1926, which was then in force, involved certain propositions and consequences.

B It involved that where two persons jointly adopted a child they must proceed on the footing that they were spouses. Where, indeed, a person claiming to be a married man or woman applied for an order for adoption under the Act, if he or she had a spouse, that spouse must consent. The Act further provided as a consequence of the adoption that the rights of the natural parent or parents as regards the child should be displaced, and that the adopted child should

C stand in relation to the adopters (if there be two) as if the latter had been the lawful father and mother of the child. Finally, it was provided that the fact that the child was adopted was to be entered in a special register. That was done in this case. I have in my hand the order made in April, 1945, on the joint application of the husband and wife, describing the spouses as husband and wife, jointly applying (as they could only do if they were husband and

D wife) to adopt a certain child, John, being the child of a woman named. The consent of that woman had either been obtained or dispensed with. So it was ordered that the applicants were authorised to adopt the infant and it was directed that the Registrar-General should make an entry recording this adoption in the adopted children register in accordance with the particulars set out in the schedule to the Act and the particulars in the schedule state the name

E of the adopted child (its Christian names only are given), the name, surname, and address of the adopters, and then the date of the birth and that of the adoption. That step seems to me to be very important and significant, affecting, as it does, not only the two persons who are the applicants, but also the child who was adopted and the mother of the child whose rights were displaced. The application was made on the footing that the applicants were parties to

F a valid marriage. In the course of the argument I put to counsel for the husband this extreme case. Supposing, in 1946, after admittedly the husband, according to his own story, had given up all hope of the consummation of the marriage, he had written to his wife and said: "A full marriage, a normal marriage, is impossible. We have to make the best of it, and in the circumstances it would be a help to us both to adopt a child, so let us do so", and then that they had

G adopted this child. In such circumstances, I think, it would be impossible to say that the act of the husband in initiating the application and in making it was not such an affirmation by him of the existence and validity of the marriage as would make it most inequitable and certainly contrary to public policy to permit him to turn round afterwards and say that there never was any valid marriage at all, but the whole basis on which he and his supposed wife

H had made the application was non-existent, and he asked to have the marriage avoided. There is this difference in the present case which I recognise—that, according to the evidence of the husband (which the commissioner accepted), at the time of the adoption he was still in the hope, and he was inspired by that hope in making the application, that the marriage would be eventually consummated. He says (though for my part I cannot help feeling doubt about this) that in the back of his mind when this second adoption was suggested by him was the hope that it would be a step helpful in achieving what he

ultimately hoped would be achieved, namely, a physically normal marriage. That, I think, differentiates the case from the one I have stated by way of supposition, but the husband seems to me never to have put into words the hope which he expressed in evidence and never to have done other than to assert that the marriage was subsisting and valid and to have gone on doing so at a time when the hope, if it remained at all, must have been of a very remote character. Taking all those things together—and I am not saying that the one act of adoption in 1945, highly significant though it be, would necessarily have sufficed; it is unnecessary for me to do so—I feel impelled to hold, contrary to the view of the commissioner, that the husband has so approbated the marriage as to render it inequitable and also contrary to public policy for him now to assert and rely on its voidability.

Our attention was directed to a case which came before PEARCE, J., in 1949—*L. v. L.* (4). That was a remarkable case in which the petitioner was the wife and the incapacity was on the husband's side. It appeared that the husband had taken steps, by consulting a doctor, to try to improve his condition, but without success. It also appeared that the wife had been artificially inseminated from her husband's seed, and at the time she presented her petition, though she did not then know it, she was pregnant as a result of the insemination. Briefly, the argument for the husband was that the act plus the consequence of the artificial insemination amounted to such approbation of the marriage on the wife's part that it would be wrong and unconscionable and against public policy for her now to be heard to say that the marriage should be avoided. PEARCE, J., referred to the classic utterances of LORD SELBORNE and LORD WATSON and to certain other decisions—for example, *Dredge v. Dredge* (5), and put the matter to himself in this form [1949] 1 All E.R. 145):

“Her letters and her evidence show that she never intended to approbate an abnormal marriage.”

The reference to the letters shows (and it is a feature distinguishing *L. v. L.* (4) very strikingly from the present case) that throughout the distressing period when the husband and wife were trying to get over this overwhelming difficulty the wife had written making it plain beyond peradventure that, for her, normal sexual intercourse was an essential condition to the marriage. “The only security for marriage”, she said, “is the reality of marriage; this must be striven for at any price”; and that point of view was expressed with equal clarity throughout, during and after this period of her artificial inseminations.

How different is that from the present case where, as I have pointed out, whatever may have been in the back of the husband's mind, there is according to the evidence, and particularly the letters, no hint on his part of his having taken that view, still less of his having expressed it to the wife or anyone else, and I add that on any view of it the sexual side of the marriage was obviously far less important to this husband than it is to some. In the case before PEARCE, J., there was, concurrently with the wife's act in submitting to artificial insemination other conduct on her part, namely, the consistent and clear expression to her husband of her insistence on normal physical relations which must obviously have for him affected and qualified the nature of, and the true interpretation to be given to, the act and consequence of the artificial insemination relied on as constituting approbation. Nevertheless, I am not, for myself, satisfied of the correctness of the formula which I have read from the judgment of PEARCE, J. It is not, in my judgment, a question of “intending to approbate an abnormal marriage”, if by that language it is meant that the question is whether—whatever may have been the conduct, the “overt acts”, on the part of the complaining spouse—he or she intended (subjectively) to affirm or acquiesce in an abnormal marriage. The question, in my view, in this case, as in all such cases, is: Has the husband or wife (as the case may be) by conduct or overt acts consistent only with such affirmation

approved the existence and validity of the particular marriage, whatever may be its particular attributes? I must not be taken to be saying that, on its particular facts, *L. v. L.* (4) was not correctly decided. It is unnecessary for me to express any opinion on that matter. Nor is it necessary for me to express any view on the question whether acquiescence in artificial insemination of a wife from the seed of a husband, without more, necessarily amounts to such an approbation by either spouse of the marriage between them as to constitute a bar to later proceedings by him or her for nullity on the ground of the other's incapacity or wilful refusal, or on the further question whether, if the answer to the preceding question be in the affirmative, the complaining spouse can, nevertheless, by the clear expression to the other of the necessary reservation on his or her part, protect himself or herself from the consequences that otherwise would flow from the act of artificial insemination, making it, as it were, an act on his or her part "without prejudice" to his or her other rights. In the present case, where there was no such expressed reservation on the husband's part, his conduct seems to me to have been consistent, and only consistent, with an approbation of the marriage by him of the most unequivocal character.

Dredge v. Dredge (5) I mention because it was referred to by counsel for the husband. That was a case in which the effect under the then legislation of a decree of nullity was to bastardise a child which had been conceived before the marriage. No question of that sort arises here, but counsel for the husband used it to show that the effect on the child of the two persons in question was not necessarily any bar to the granting of a decree of nullity if the grounds for such were shown. With that I agree. I have said, however, that this case is different from *L. v. L.* (4), and it is certainly different from *Dredge v. Dredge* (5), for the circumstance that the provisions of the Adoption of Children Act, 1926, have their effect on persons otherwise wholly unconnected with the marriage is, I think, a very important and significant circumstance.

There only remains this to be said. According to the formula which I have read from LORD SELBORNE's speech it is necessary that the complaining spouse who is said to have approved or affirmed the marriage should have known the facts and what his legal position was as a result of them. It is said by counsel for the husband that at the time when the adoption took place it was still not known as a certainty to the husband (according to his evidence) that the wife was incapable of consummation. I will assume that at that time there still lingered hope in his breast, though it must have been declining in strength, but it is not the adoption only; it is the adoption in the light of that which preceded and followed it that I think constituted affirmation. Certainly not so long after, it must have become plain to him that normal marital relations were impossible; and certainly the fact of their being difficult, if not impossible, never played any part whatever in anything he said in correspondence or otherwise as influencing his conduct. As regards his legal rights, there is no evidence before the court that he was unaware of what rights he would have if his wife was incapable of consummating the marriage, and at least in the absence of any such evidence it cannot, in my judgment, be assumed in his favour that he was ignorant of what the consequences would be if he could prove such incapacity. In all the circumstances of this case I think that the formula in LORD SELBORNE's speech has been satisfied and that the conduct of the husband, taken over the whole period, was consistent, and consistent only, with such affirmation of the marriage as now to make it inequitable (that is, unjust as between the two parties to the suit) and also contrary to public policy for this court to grant his prayer. The consequence will be that the judgment ought to be reversed and we must send the matter back to the court below in order that the question of dissolution of the marriage on the grounds of desertion may be pursued if the wife desires to pursue it, and it may be necessary for leave to be given for the husband to amend his pleadings.

Those are matters with which the judge will deal. I think that this decree nisi for nullity should be set aside.

JENKINS, L.J.: I agree. [His LORDSHIP said that the commissioner's decision on the question whether the marriage had been consummated should not be disturbed and continued:] The wife pleaded that the husband approbated the marriage by adopting, jointly with the wife, a boy born on Nov. 14, 1944, under an adoption order dated Apr. 11, 1945. The question is whether that adoption and the part the husband took in bringing it about amounted to an approbation of the marriage so as to prevent him now from relying on its non-consummation. The answer to that question depends on the application to the facts of this case of the principle stated in the House of Lords in *G. v. M.* (2). I have no desire to multiply citations, but I may, perhaps, be forgiven for referring again to the passage in the speech of LORD WATSON in which the principle is succinctly stated. It will be remembered that he says this (10 App. Cas. 197):

"I think that when those cases are dissected they do show the existence of this rule in the law of England, that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect."

Are the facts and circumstances proved concerning the adoption in this case facts and circumstances which so plainly imply on the part of the husband a recognition of the existence and validity of the marriage as to render it most inequitable and contrary to public policy that he should now be permitted to challenge it? In my view, that question admits of only one answer. The adoption of a child under the Adoption of Children Act, 1926, the relevant statute at the material time in this case, is a solemn act which involves a representation to the court in the case of joint adopters that the joint adopters are husband and wife. On that representation and on proper evidence as to the means, respectability, and responsibility of the spouses and the stability of their home the court will make an order which transfers the adopted child from the legal protection of its natural parents to the legal protection of its statutory parents, as the adopters by force of the order in effect become. There is a representation by them to the court expressly of the existence, and impliedly of the validity, of the marriage, and, acting on that representation, the court makes an order which irretrievably alters the status of the adopted child. More than that, the rights of the natural parents or parent of the adopted child are by force of the order put an end to, and the consent of the natural parents or parent is in ordinary circumstances a necessary preliminary to the order. Thus, the third parties affected by the order include, in addition to the child itself, its natural parents or parent, who, on the footing that the application for adoption is being made by a married couple, will in general have agreed to resign, and in any case will by virtue of the order have been caused to resign, to that married couple, all parental rights and duties with regard to the child. It seems to me difficult to imagine any act by two spouses which could more clearly affirm the existence and validity of their marriage. Unless, therefore, it can be said here that what was done as regards the adoption of this child was done, so far as the husband was concerned, without adequate knowledge of the facts and of the law (which is one of the conditions of approbation stated by LORD SELBORNE in *G. v. M.* (2)) it seems to me to be plain in the result that he must be taken to have approbated the marriage. A knowledge of the law must be imputed to him in the absence of evidence that he was ignorant of it. As regards knowledge of the facts, he knew full

well of the difficulty there was as to intercourse with his wife, and he knew full well at the time of the adoption in April, 1945, that the operation from which an improvement had been hoped and which had taken place some eighteen months previously, had failed to produce the desired result.

A Counsel for the husband argued that the marriage was even then in what might be called a probationary or trial stage. The husband, he suggests, was still hoping to make it a normal marriage and prevailed on the wife to agree to and to concur with him in carrying out the adoption in the hope that this end might be achieved. I need not pause to consider what effect, if any, a private understanding of this nature between the adopting spouses might, if proved, have had on the result, for there is nothing, so far as I can see, in the contemporary correspondence which suggests that the husband initiated this project of adoption with any such object in view. To judge by the letter of Feb. 21, 1945, his reason for recommending an adoption was simply to help his wife get over her grief and feelings of anxiety in regard to the unfortunate death of the previously adopted child. There was certainly no suggestion at all, so far as I can tell from the correspondence, by the husband to the wife that the adoption was being proposed by him on any other footing but that this was a valid and subsisting marriage. He never suggested to her at all that it was an experiment with a view to turning an invalid marriage into a valid one. In my view, the effect of a proceeding such as this adoption cannot be judged by reference to any intention the husband may have had locked in his own bosom. His acts must be judged by reference to their own nature and by reference to his declared intentions at the material time. Judged by D that standard, it seems to me that the adoption in the circumstances of the present case fell within the statement of the principle of approbation contained in LORD WATSON'S speech in *G. v. M.* (2). Accordingly, for the reasons given by my Lord, and for such reasons as I have been able to add to them, I agree that on this issue of approbation the appeal should be allowed, with the consequences that my Lord has indicated.

E HODSON, L.J., said that he had no doubt that the decision of the commissioner relating to the non-consummation of the marriage was right, and continued: With regard to the other matter, the commissioner, on the question whether or not this marriage had been approbated, referred to the state of mind of the husband in this way:

F "It is quite clear from the letters that he was the one to persuade the wife to adopt this second child, the first child who was adopted having died, because he said he desired his wife to overcome a sort of fear she had got or seemed to have got over the loss of the first child, and he said he was anxious that she should adopt this second child, and hopeful that it would help the married life, and particularly on the sexual side."

G I think that that passage in his judgment is based, not on any evidence that the husband had given, but rather on a misapprehension of the effect of the letter of Feb. 21, 1945, the second paragraph of which is:

H "I know you're afraid of having another child. That's one of the reasons why I'm anxious for you to have one, because only by so doing will you get over that fear, and also a lurking fear every time you hold someone else's baby. I care for you too much to want to see you living for the rest of your life in terror."

In its context, that passage clearly refers to the sorrow which had come into their lives—particularly, perhaps, into the life of the wife—by the loss of the child that had been adopted and to the husband's anxiety to allay her fears and her feeling that she in some way had been responsible for the death of the child, and had nothing to do with the prospects of sexual unity between

these people in the future. Even if the evidence had been such as to justify the commissioner in finding that such was the husband's state of mind, I agree with what has already been said by my Lords to the effect that the existence of such an intention, certainly an intention locked in his bosom and not declared, would not detract from the effect of his overt act, in concert with his wife, of adopting a child, and I think that that fact, namely, the adoption of the child in 1945, taken in its background in the circumstances of this case with full knowledge of the law and the facts—and I need not elaborate those two qualifications which are implicit in the doctrine relied on here—is sufficient to prevent the husband from obtaining a decree on the grounds stated in the speech of LORD SELBORNE in the case of *G. v. M.* (2). I agree, therefore, that the appeal should be allowed and the case sent back for re-hearing on the issues raised in the pleadings on the prayer for divorce. *Appeal allowed.*

Solicitors: *Scadding & Bodkin* (for the wife); *Bishop & Cooke* (for the husband).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. GORDON.

[HOUSE OF LORDS (Lord Normand, Lord Morton of Henryton, Lord Tucker and Lord Cohen), February 4, 5, 6, 7, March 26, 1952.]

Income Tax—Foreign possessions—“Income arising from possessions out of United Kingdom.”—Debts incurred in London and discharged in Ceylon—Income Tax Act, 1918 (c. 40), sched. D, Case V, r. 2.

The taxpayer was a partner in a firm in Ceylon, where he had an account with the N. Bank which had its head office in London. In 1940 he was in London, and, owing to the war, he was unable to return to Ceylon. Before Jan. 2, 1942, the taxpayer opened an account with the N. Bank in London, and on Mar. 4, 1942, he made an oral arrangement with the bank in London whereby the bank allowed him without security to overdraw his account in London, it being arranged that the bank would transfer portions of his overdraft to the Colombo branch. The Colombo branch debited the taxpayer's account with the equivalent in rupees of the said transfers, and when there was not sufficient to the credit of the Colombo account to meet these debits the taxpayer arranged to pay rupees into that account for that purpose.

HELD: the moneys received by the taxpayer in London were advances of capital and the debts in London were discharged in Ceylon, no income being transferred from Ceylon to London, and, therefore, the moneys received by the taxpayer in the United Kingdom were neither derived from remittances payable in the United Kingdom nor money or value so received on credit or on account in respect of such remittances brought or to be brought into the United Kingdom within the Income Tax Act, 1918, sched. D, Case V, r. 2, and, accordingly, they were not taxable.

Hall v. Marians (1935) (19 Tax Cas. 582), approved.

Trinidad Lake Asphalt Operating Co., Ltd. v. Trinidad & Tobago Income Tax Comrs. ([1945] 1 All E.R. 9), considered.

Per LORD COHEN: In order to succeed on the ground that the sums received by the taxpayer were from money or value arising from property not imported within r. 2 the Crown must establish that the money or value had been brought or was to be brought into the United Kingdom.

Decision of Court of Session (1950 S.C. 362), affirmed.

AS TO INCOME TAX UNDER SCHED. D, CASE V, see HALSBURY, Hailsham Edn., Vol. 17, pp. 195-202, paras. 400-418; and FOR CASES, see DIGEST, Vol. 28, pp. 79-81, Nos. 433-450.

Cases referred to:

- (1) *Trinidad Lake Asphalt Operating Co., Ltd. v. Trinidad & Tobago Income Tax Comrs.*, [1945] 1 All E.R. 9; [1945] A.C. 1; 114 L.J.P.C. 10; 171 L.T. 328; 2nd Digest Supp.
- (2) *Hall v. Mariani*, (1935), 19 Tax Cas. 582; Digest Supp.
- (3) *Kneen v. Martin*, [1935] 1 K.B. 499; 104 L.J.K.B. 361; 152 L.T. 337; 19 Tax Cas. 33; Digest Supp.
- (4) *Timpson's Executors v. Yerbury*, [1936] 1 All E.R. 186; [1936] 1 K.B. 645; 105 L.J.K.B. 749; 154 L.T. 283; 20 Tax Cas. 155; Digest Supp.
- (5) *Carter v. Sharon*, [1936] 1 All E.R. 720; 20 Tax Cas. 230; Digest Supp.
- (6) *Fellowes-Gordon v. Inland Revenue Comrs.*, (1935), 19 Tax Cas. 683; Digest Supp.
- (7) *Hall v. Mariani*, (1933), 18 Tax Cas. 148; Digest Supp.
- (8) *Re Harmony & Montague Tin & Copper Mining Co. Spargo's Case*, (1873), 8 Ch. App. 407; 42 L.J.Ch. 488; 28 L.T. 153; 9 Digest 92, 379.
- (9) *Gresham Life Assurance Society v. Bishop*, [1902] A.C. 287; 71 L.J.K.B. 618; 86 L.T. 693; 66 J.P. 755; 4 Tax Cas. 464; 28 Digest 77, 422.
- (10) *St. Aubyn (L. M.) v. A.-G. (No. 2)*, [1951] 2 All E.R. 473; [1952] A.C. 15.
- (11) *Re Micklethwait*, (1855), 11 Exch. 452; 25 L.J.Ex. 19; 156 E.R. 908; 21 Digest 110, 824.
- (12) *Tennant v. Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest 17, 87.

APPEAL by the Crown against an order of the First Division of the Court of Session (the Lord President (LORD COOPER), LORD CARMONT and LORD KEITH) dated June 1, 1950, made on a Case stated by the Special Commissioners of Income Tax.

The Special Commissioners discharged assessments to income tax made on the taxpayer under the Income Tax Act, 1918, sched. D, Case V, r. 2, holding that no income from possessions of the taxpayer outside the United Kingdom had been remitted to the taxpayer in the United Kingdom. The First Division upheld the Special Commissioners.

The respondent was at all material times senior partner in a firm carrying on business in Ceylon. He had a bank account with the Colombo branch of the National Bank of India (hereinafter referred to as "the bank"), which had its head office in London. Prior to the war he made periodic visits from Ceylon to England and in 1940 he was here on a visit. Owing to the war he was unable to return to Ceylon and had to reside in England until the termination of the war. He thus found himself in the position in the years now in question that, being a British subject, he was unable to satisfy the commissioners that he was not ordinarily resident in the United Kingdom: see r. 3 of the Rules Applicable to Case V. Some time prior to Jan. 2, 1942, the respondent opened an account with the head office of the bank, and between that date and Mar. 4, 1942, the account remained in credit. On or about that date the respondent made a verbal arrangement with the bank in London whereby they allowed him, without giving any security, to overdraw his account with the head office, and the head office arranged to transfer portions of his overdraft to the Colombo branch. The Colombo branch debited the respondent's account with the equivalent in rupees of the said transfers and the respondent arranged to pay rupees into the branch account to meet such debits. Originally no arrangement was made as to when such transfers of overdraft should be made, but in September, 1942, correspondence was exchanged between the London office of the bank and the respondent, the effect of which was to provide that whenever the figure reached £500 the overdraft should be transferred to Colombo.

The respondent first became overdrawn on Mar. 4, 1942. Thereafter operations on the banking account were made in accordance with the arrangements above

stated. Excerpts of the accounts in Colombo and London recorded three transactions from Colombo to London which, it was admitted, were chargeable under r. 2. They were as follows (the dates being from the excerpts of the London account and the amount given in sterling) :—Feb. 2, 1942, £1,428 12s. 8d.; May 23, 1942, £1,999 12s. 5d.; and Nov. 23, 1943, £600. The excerpts also recorded six transfers from London to Colombo, the amounts of which it is unnecessary to set out in full. They represented what the parties agreed were “ transfers of overdraft ”. A They differed only in this, that, as appeared from the excerpts from the Colombo account, three of them were made at a time when the balance to the credit of the Colombo account was not sufficient to wipe out the overdraft transferred. In those cases the debits appeared to have been met by payments in of rupees to the Colombo account. There was, however, sufficient to the credit of the Colombo account to meet the other three transfers at the dates when they were respectively B made. Interest was allowed by the bank on credit balances and was charged on debit balances of each of the accounts in Colombo and London. The Case Stated did not state whether or not interest was allowed and charged at the same rate in Colombo and in London.

Millard Tucker, Q.C., Sir Reginald Hills and I. H. Shearer (of the Scottish Bar) for the Crown. C

E. J. Keith, Q.C., D. Maxwell and Miss M. MacIntyre (all of the Scottish Bar) for the taxpayer.

The House took time for consideration.

Mar. 26. **LORD NORMAND:** My Lords, I have had the advantage of reading in print the opinion about to be delivered by my noble and learned friend, D **LORD COHEN.** I agree with it in omnibus and have nothing to add.

The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, I have had the advantage of reading in print the opinion which is about to be delivered by my noble and learned friend, **LORD COHEN.** Subject to the reservation which I am about to E mention, I entirely agree with that opinion. I desire, however, to reserve for a future occasion any consideration of the meaning and effect of the words

“ the actual sums annually received in the United Kingdom . . . from money or value arising from property not imported ”

which appear in r. 2 of the Rules Applicable to Case V, sched. D, to the Income Tax Act, 1918. Counsel for the appellants did not rely on these words as being F applicable to the present case, and, consequently, your Lordships did not have the advantage of hearing any argument as to their meaning. For this reason, I find myself unable either to agree or to disagree with the views expressed by my noble and learned friend as to the meaning of those somewhat obscure words. I agree with the motion proposed.

LORD TUCKER: My Lords, in this case I have had the advantage of reading in print the opinion which is to be delivered by my noble and learned friend, **LORD COHEN,** in which the relevant facts and the words of r. 2 of Case V of sched. D to the Income Tax Act, 1918, are fully set out, and I, therefore, need not repeat them. I am in complete agreement with the reasoning by which he has arrived at the conclusion that the Crown has failed to bring this case G within the first or fourth sources of income referred to in r. 2, viz., (i) remittances payable in the United Kingdom and, (ii) money or value so received on credit or on account in respect of any such remittances, property, money or value brought or to be brought into the United Kingdom. In my view, the transaction in the present case consisted of a loan or loans granted in London on the express terms that the debt or debts thereby created were to be repayable only in Ceylon where they have been in fact repaid. That the loans produced “ actual sums H

received in the United Kingdom" is not in dispute, but such sums were not derived from remittances payable in the United Kingdom nor were they derived from money or value received in the United Kingdom on credit or on account in respect of such remittances. There was no evidence that any moneys were ever remitted from Ceylon to London in connection with the loans, and, even if the Colombo branch did remit to head office in London, they would have been dealing with the bank's own moneys.

My Lords, I do not question the proposition that there may be remittances within the rule as a result of appropriate book entries without the transfer of bullion or negotiable instruments, but I share my noble friend's difficulty in following the reasoning of the judgment of the Privy Council in *Trinidad Lake Asphalt Operating Co., Ltd. v. Trinidad & Tobago Income Tax Comrs.* (1) in so far as the conclusion was reached that a settlement of cross accounts by appropriate book entries in Trinidad amounted to a transmission of money to a non-resident outside the colony. That there was a transmission to a non-resident which would seem to have been sufficient for the decision is, I think, clear, but how it was a transmission to New York where the non-resident resided I find difficulty in understanding, and I do not feel able to apply the reasoning in that case to the facts in the present case to the extent of holding that each time the debt incurred in London was transferred to Colombo and satisfied by the taxpayer in that place by money standing to his credit or subsequently paid in, it resulted in law in a remittance to him in the United Kingdom.

I only desire to add a few words with regard to the third source in r. 2, viz., money or value arising from property not imported. This does not seem to have figured prominently, if at all, in argument before the Special Commissioners or in the Court of Session, but it was to some extent relied on by the Crown in your Lordships' House. I do not think that the sums received by every loan in the United Kingdom can be said to have been received from money or value arising from property not imported. I find it difficult to ascertain of what the money or value consisted, and in any event the mere fact that it was contemplated that the loans would eventually be repaid out of the profits of a business conducted in Ceylon would not, in my opinion, make the source money or value arising from property not imported. I would prefer to reserve the question whether the "money or value arising from property not imported" must itself be brought into the United Kingdom. For these reasons I would dismiss this appeal.

LORD COHEN: My Lords, this appeal relates to additional assessments to income tax made on the respondent under Case V of sched. D to the Income Tax Act, 1918, to cover income alleged to be chargeable under r. 2 of the rules applicable to the said Case. The facts that are alleged to give rise to this liability are as follows. [His LORDSHIP stated the facts as set out above and continued:]

At this stage it will be convenient for me to set out the provisions of r. 2 as substituted by the Finance Act, 1940, s. 19 (2), on the construction of which the questions at issue between the parties depend. It provides:

"The tax in respect of income arising from possessions out of the United Kingdom, other than income to which r. 1 applies, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceding years as directed in Case I, without any deduction or abatement other than is therein allowed."

The three years average basis is not now applicable. It will be observed that to bring this rule into operation, the sums received in the United Kingdom must

be derived from one of the four specified sources, viz.: (a) remittances payable in the United Kingdom; (b) property imported; (c) money or value arising from property not imported; (d) money or value so received on credit or on account in respect of any such remittances, property, money or value brought or to be brought into the United Kingdom.

Before the Special Commissioners the dispute between the parties was whether the transactions to which I have referred amounted to an arrangement for the remittance of money to this country from Colombo. The commissioners considered they were bound by *Hall v. Marians* (2)—the facts in which case they regarded as indistinguishable from the facts in the case before them—to hold that no sums of income from possessions outside the United Kingdom had been remitted to the appellant in the United Kingdom. They, therefore, allowed the respondent's appeal and discharged the additional assessments. They stated the questions for the opinion of the court as follows: (1) Were the commissioners entitled to hold that no sums of income from possessions outside the United Kingdom were remitted to the respondent in the United Kingdom? (2) Whether on the facts stated the respondent was assessable under Case V, r. 2, of sched. D, to the extent that the sums in the Colombo account used to repay the bank consisted of income, and, if so, (3) whether there was a remittance within the said r. 2 (a) each time the respondent drew money in London, or (b) when the London drawings were repaid to the bank in Colombo. When the case came before the First Division of the Court of Session they reached the conclusion that question (1) should be answered in the affirmative, and question (2) in the negative, with the result that they affirmed the decision of the Special Commissioners, and question (3) did not arise. Before us the dispute was finally concentrated on the question whether the appellants could bring their claim within the first or fourth of the sources specified in r. 2. It was common ground that there had been no property imported which could bring the second source into consideration. At one time counsel for the appellants suggested that it might be said that there were sums received in the United Kingdom from "money or value arising from property not imported", but I think that he ultimately recognised that it was impossible to bring this case within the third source without grossly distorting the language used and, in particular, without placing on the word "from" a meaning which it could not properly bear. There might have been another difficulty in counsel's way had he persisted in this argument. To succeed on it, it would have been necessary for him to satisfy us that the "money or value arising from property not imported" need not itself be brought into the United Kingdom. It is plain from the wording of the rule that sums cannot be said to be received in the United Kingdom from the first, second or fourth sources unless the source was itself payable in, imported into, or brought or to be brought into the United Kingdom. It would be strange if the sums received in the United Kingdom from the third source were within the rule although the money or value was not imported or to be imported into the United Kingdom. It would be all the more strange since sums received in the United Kingdom from the fourth source—i.e., "money or value so received on credit or on account in respect of . . . such . . . money, or value" (i.e., the third source)—could not bring the rule into operation unless *such* money or value had been brought or was to be brought into the United Kingdom. I incline, therefore, to the view that to succeed under the rule in respect of sums received from the third source the Crown must establish that the money or value had been brought or was to be brought into the United Kingdom.

Before I deal with the question whether on the facts of this case it can be said that the sums received by the respondent in the United Kingdom were received from the first or fourth source indicated in the rule, I may usefully mention certain matters arising on the construction of r. 2 which, as counsel for the appellants pointed out, are clearly established by authority. Thus, (i) to

attract tax, remittances must be remittances of income not capital: see *Kneen v. Martin* (3); (ii) remittances may render the taxpayer liable to tax although the actual payment is not to the taxpayer, but to someone by his direction: see *Timpson's Executors v. Yerbury* (4); but, (iii) not if the cheque or other instrument or thing constituting the remittance has ceased to be the property of the taxpayer before it reaches this country: see *Carter v. Sharon* (5); (iv) the remittance may be a remittance of income notwithstanding that at the date of the remittance the account of the taxpayer abroad through which the remittance was passed is already overdrawn: see *Fellowes-Gordon v. Inland Revenue Comrs.* (6).

With these propositions in mind I turn to the argument that was addressed to us that the amounts in question in this appeal were received from remittances payable in the United Kingdom within the first source or from money or value received within the fourth source. As I have already said, both the commissioners and the First Division of the Court of Session regarded the case as concluded against the appellants by the decision of the Court of Appeal in England in *Hall v. Marians* (2). That case came before the commissioners and the court on two separate occasions: see *Hall v. Marians* (7) (18 Tax Cas. 148) and *Hall v. Marians* (2) (19 Tax Cas. 582). As the facts were the same on both occasions and only the contentions differed, it will be sufficient if I refer to the second case which, unlike the first, went to the Court of Appeal. I take the facts from the headnote:

"The respondent's wife, who lived with her husband in London, was entitled to a share of the profits of a business carried on in Colombo. Her share was paid into her current account with the Colombo branch of a bank which was registered in the United Kingdom and had its head office in London. On her instructions these profits were invested in Indian bonds. The respondent's wife had from time to time borrowed certain sums from the bank in London on the security of the bonds. On Apr. 1, 1930, she requested the bank in London to instruct its Colombo branch to sell sufficient securities to extinguish the loan. On the next day the bank informed her that the amount of her loan account (with interest) was being debited to the Colombo branch which was being instructed to realise securities to pay it off. The transfer was effected by cross entries in the books of the two offices, the entry in the London books being dated Apr. 3, 1930. A small credit balance in Colombo was thereupon converted into an overdraft on which interest was chargeable. A few weeks afterwards the overdraft and the interest accrued thereon were discharged in Colombo out of the proceeds of the sale of Indian bonds."

On those facts the Crown claimed income tax in respect of the amount of the overdraft transferred from the London office of the bank to the Colombo branch. The commissioners decided in favour of the taxpayer. FINLAY, J., allowed the appeal, but the Court of Appeal unanimously restored the decision of the commissioners.

As the Lord President (LORD COOPER) pointed out (1950 S.C. 362) in the court below, it is difficult to disentangle a single ratio decidendi from the judgments of the three members of the court. LORD HANWORTH, M.R., based his decision on the conclusion that there was clearly no actual remittance and, as he thought, nothing which amounted to a remittance in any form or in any value. ROMER, L.J., thought that there was a remittance, but that it was a remittance of capital and not income. MAUGHAM, L.J., agreed with ROMER, L.J., that, if it was a remittance, it was a remittance of capital, but, as I read his judgment, based his conclusion primarily on his acceptance of a contention advanced on behalf of the taxpayer and recorded in para. 9 (b) of the Case Stated as follows:

"That the loans owing to the National Bank of India in London had not been paid off by means of any remittances actual or constructive but that in

substance and in fact there had been a series of capital advances in London charged on Indian securities in Ceylon and that the loans had been converted into a debt payable in Colombo with different incidents from those which had attached when the debt was payable in London."

I respectfully agree with the reasoning of MAUGHAM, L.J. There is this difference between the facts of the two cases, that there is no evidence in the present case that there were different incidents attached to the debt in Colombo from those which attached to the debt when it was payable in London. I do not, however, think that this difference in the facts necessarily leads to a different conclusion. It merely removes one piece of evidence supporting the conclusion that the loans in London had not been paid off by remittances from Ceylon. There was this further distinction in fact between the two cases, that in *Marians'* case (2) the respondent's husband had hoped to discharge his wife's indebtedness in London (see para. 7 of the Case Stated (19 Tax Cas. 585)), whereas, in the present case it was never contemplated that the debt should be repaid except in Colombo. I do not, however, think this affects the matter. Counsel for the appellants relied on a passage in the judgment of ROMER, L.J., where he said (*ibid.*, 600):

"Had the bank in this country allowed her [Mrs. Marians] to draw the £440 on account or in advance or in respect of sums of money that they were expecting to receive in the future from the bank in Colombo, representing income from her foreign possessions, the matter would have been different, but, as I understand it, this money, the money that she was allowed to draw from the bank, was a loan from the bank in its strict sense, and that is found as a fact by the commissioners in para. 7 of the Stated Case."

Counsel read this passage as meaning that, if the stated hypothesis had been actual fact, ROMER, L.J., would have decided the case in the opposite way. ROMER, L.J., does not express a concluded opinion, but I think it is a fair inference that he would have done so. Even so, I do not think his observations help the appellants, since in the present case I am unable to trace any finding of fact that the bank in England ever made the loan on account of or in advance or in respect of money of the respondent representing income which the bank were expecting to receive in England from the branch in Colombo.

We have to decide this case on its facts, but I agree with the judges of the First Division that it is difficult to distinguish the case before us in any material respect from *Hall v. Marians* (2). Counsel for the appellants laid some stress on the fact that the accounts in Colombo and London were with the same bank in the case before us. So they were in *Hall v. Marians* (2). I do not think this fact can relieve the court of the burden of deciding whether or not there was a remittance of income to London. The solution of this question depends, in my opinion, on the effect of the agreement that the London overdraft should be transferred to Colombo. I agree with LORD KEITH that the only sensible meaning that can be given to that agreement is that the debt created in London was to be repaid in Colombo. If that be the correct meaning, it seems to me that when the debt was repaid, whether out of moneys standing to the credit of the Colombo account at the date the entries in the book were made or out of moneys subsequently paid into the Colombo account, the rupees applied in repayment became the property of the bank in Ceylon. There is no evidence whether they were remitted to London or not, but, assuming they were remitted, they had previously become the property of the bank and could not be said to be property of the respondent. The case would, therefore, fall within *Carter v. Sharon* (5) and not within *Timpson's Executors v. Yerbury* (4).

Counsel for the appellants says that this conclusion is inconsistent with the decision of the Privy Council in *Trinidad Lake Asphalt Operating Co., Ltd. v. Trinidad & Tobago Income Tax Comrs.* (1). In that case, the appellant company had been assessed under the Income Tax Ordinance, 1940, s. 30, in respect of

a dividend payable to the Barber Asphalt Corpn. of New Jersey, U.S.A. (hereinafter called "Barber"). Barber had no office or place of business in Trinidad and never exercised or carried on any trade or business there, but was the holder of almost all the shares in the appellant company. At the date of declaration of the dividend, Barber were indebted to the appellant company in an amount equal to the amount of the dividend, and in pursuance of an agreement between the parties, no money or cheque changed hands, but the matter was settled by appropriate entries in the books of the two companies. In these circumstances, the Crown claimed income tax from the appellant company under the Income Tax Ordinance, 1940, s. 30, which provided:

"Any resident agent, trustee, mortgagor or other person, who transmits rent, interest, or income derived from any other source within the colony, to a non-resident person, shall be deemed to be the agent of such non-resident person and shall be assessed and pay the tax accordingly."

One question that arose was whether to bring the section into operation the transmission to the non-resident person must be to him outside the limits of the colony. There was nothing in the language of the section to necessitate such a construction, but the board proceeded on the footing that "transmits" meant transmits to a non-resident outside the limits of the colony. LORD WRIGHT delivered the judgment of the board. He relied on *Spargo's Case* (8) as establishing that there may be payment by settlement of accounts without the necessity of money actually changing hands. He referred to some observations of LORD LINDLEY in *Gresham Life Assurance Society v. Bishop* (9) ([1902] A.C. 296) as further supporting the view that a settlement of accounts may be equivalent to a receipt of a sum of money. He said that since 1902 the transmission of funds had become still more divorced in the minds of business men and even of lawyers from the idea of any material embodiment. His conclusion may be summed up in the following passages ([1945] 1 All E.R. 13):

"In the present case, no one could say that the entries in the books of the two companies did not represent a genuine transaction and a receipt of money in the form in which money is transmitted and received as between business men . . . The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement. But what has happened is, if so intended, equivalent to a receipt of money, in LORD LINDLEY's words, and a receipt of anything by a person who is at a distance from the sender involves a transmission. Hence, in their Lordships' opinion, the transaction in the present case involved a transmission of 'revenue' within the meaning of s. 30 from the appellant to Barber, with the consequence that the appellant became liable as statutory agent for the amount of the tax."

Speaking for myself, I doubt if I should have come to the conclusion that there had been a transmission outside Trinidad. I should have inclined to the view that the parties had expressly agreed that there should be no transmission outside Trinidad, but that the debt should be discharged by payment by way of set-off in Trinidad. I might still have reached the same concrete result as LORD WRIGHT, for, as at present advised, I see no reason why, for the purpose of the section, the transmission to the non-resident need be outside the island. This point does not, however, arise for decision in the present case. Even if I were to accept the whole of LORD WRIGHT's reasoning, it would not, I think, decide the present case. Let me assume that in the *Trinidad* case (1) Barber had not been indebted to the appellant company and had had no place of business in the colony and had never exercised or carried on any trade or business there. Let me assume, further, that before the dividend was declared it had been agreed that payment of it should be made by a transfer by the appellant company to an account to be opened in the name of Barber with a bank in Trinidad. If this had been carried

out, there would, no doubt, have been a transmission by the appellant company to Barber, but I cannot imagine that any court would have held that that was a transmission outside the limits of the colony.

The hypothetical case I have put seems to me far nearer in its facts to the present case than the actual case which arose for decision in the Privy Council in 1945. True it is that in the present case the original indebtedness of the respondent to the bank was created by a loan in London, but the parties agreed that that loan should be discharged by payment in Ceylon. In these circumstances, to hold that there was a remittance to London in the present case would, I think, be to disregard the warnings given by the EARL OF HALSBURY, L.C., and LORD MACNAGHTEN in *Gresham Life Assurance Society v. Bishop* (9), to which the Lord President referred (1950 S.C. 359, 360), not to be led astray by an equivalent to a remittance or receipt or a constructive receipt.

Let me conclude with a citation from the speech of LORD SIMONDS in the very recent case of *St. Aubyn (L.M.) v. A.-G.* (No. 2) (10). LORD SIMONDS said ([1951] 2 All E.R. 485):

"LORD WENSLEYDALE's familiar words in *Re Micklethwait* (11) (11 Exch. 456), which were cited by LORD HALSBURY, L.C., in *Tennant v. Smith* (12) ([1892] A.C. 154), may again be repeated: 'It is a well-established rule, that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words'. LORD HALSBURY adds that in a taxing Act it is impossible to assume any intention or governing purpose in the Acts to do more than take such tax as the statute imposes: it must be seen whether the tax is expressly imposed. This is true doctrine which I must bear in mind as I listen to the constant refrain of learned counsel for the Crown that this or that is just the transaction at which this or that section is aimed. The question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits."

Applying this citation to the present case it is attractive to suggest that, as the respondent obtained and spent these loans in London and was, so far as the evidence goes, able to discharge them only from moneys in Ceylon, part at any rate of which was income, and as the loan was, in fact, discharged, the money he received in England must have been received at least in part from remittances of income from Ceylon. Attractive though this may be, it seems to me quite impossible to bring what happened within the compass of the rule. It is plain that the income receipts of the respondent were all received in Ceylon. It is plain that the moneys he received in London were advances of capital. There is no finding that those advances were made on credit or on account in respect of income in Ceylon which it was intended should be brought to London. On the contrary, the parties expressly agreed that the debt should be discharged in Ceylon, it was so discharged, and there is no evidence that the rupees which the bank received in Ceylon were ever remitted to London. For these reasons, which are in substance the same as those given by the Court of Session, I would dismiss the appeal. The case must be remitted to the Court of Session in order that any necessary adjustments may be made to give effect to the admissions made by counsel for the taxpayer as to the transfers of £1,428 12s. 8d., £1,999 12s. 5d. and £600 to which I have already referred.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (England), agent for *Solicitor of Inland Revenue* (Scotland); *Lawrence Jones & Co.*, agents for *J. C. Muir & Barr*, Glasgow, and *Warden, Bruce & Co.*, Edinburgh (for the taxpayer).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

JAMIESON v. JAMIESON.

[HOUSE OF LORDS (Lord Normand, Lord Merriman, Lord Reid and Lord Tucker), January 30, 31, March 20, 1952.]

Divorce—Cruelty—Mental cruelty—Evidence—Effect of Matrimonial Causes Act, 1937, on principles to be applied—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 176 (c), as substituted by the Matrimonial Causes Act, 1937 (c. 57), s. 2.

A

Where it is sought to prove cruelty by evidence of a course of conduct adopted by one spouse with the deliberate intention of wounding and humiliating the other spouse and making his or her life a burden and of a continuance in that conduct in the knowledge that it is severely affecting his or her mental or physical health the offence may be proved by evidence of a number of acts each of which is serious in itself, but it may be even more effectively proved by evidence of a long continued series of minor acts, none of which could be regarded as serious if taken in isolation. The intention need not be proved by direct evidence. It can be inferred from the whole facts and atmosphere disclosed by the evidence. The respondent's acts must be judged in relation to the surrounding circumstances, which include the physical or mental condition and the capacity for endurance or the peculiar susceptibility of the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health.

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Per curiam: There has been no change in the law of England regarding cruelty consequent on the passing of the Matrimonial Causes Act, 1937, and there is no difference between the law of Scotland and the law of England in relation to this matter.

Meacher v. Meacher ([1946] 2 All E.R. 307), criticised.

Decision of Court of Session (1951 S.C. 286), reversed.

AS TO CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654, paras. 954-962; and FOR CASES, see DIGEST, Vol. 27, pp. 281-293, Nos. 2513-2694.

E

Cases referred to:

- (1) *Aitchison v. Aitchison*, (1902), 10 S.L.T. 331.
- (2) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *affd.* H.L., [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest 291, 2661.
- (3) *M'Dougal v. MacDougall*, 1931 S.C. 102.
- (4) *Mackenzie v. Mackenzie*, [1895] A.C. 384; 22 R. (H.L.) 32; 27 Digest 322, 3008.
- (5) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.
- (6) *Weatherley v. Weatherley*, [1947] 1 All E.R. 563; [1947] A.C. 628; [1947] L.J.R. 869; 176 L.T. 434; 111 J.P. 220; 2nd Digest Supp.
- (7) *Dunlop v. Dunlop*, 1950 S.C. 227; 2nd Digest Supp.
- (8) *M'Donald v. M'Donald*, 1939 S.C. 173.
- (9) *Kelly v. Kelly*, (1869-70), L.R. 2 P. & D. 31, 59; 39 L.J.P. & M. 28; 22 L.T. 308; 27 Digest 284, 2555.
- (10) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 2nd Digest Supp.
- (11) *Hadden v. Hadden*, (1919), *The Times*, Dec. 5.
- (12) *Simpson v. Simpson*, [1951] 1 All E.R. 955; [1951] P. 320; 115 J.P. 286.
- (13) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 2nd Digest Supp.
- (14) *Meacher v. Meacher*, [1946] 2 All E.R. 307; [1946] P. 216; [1947] L.J.R. 16; 175 L.T. 405; 110 J.P. 355; 2nd Digest Supp.
- (15) *Cornall v. Cornall*, (1910), 74 J.P. 379; 27 Digest 557, 6123.

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H

- (16) *Popkin v. Popkin*, (1794), 1 Hag. Ecc. 765, n; 162 E.R. 745; 27 Digest 283, 2544.
- (17) *D'Aguilar v. D'Aguilar*, (1794), 1 Hag. Ecc. 773; 162 E.R. 748; 27 Digest 406, 4064.
- (18) *Bray v. Bray*, (1828), 1 Hag. Ecc. 163; 162 E.R. 543; 27 Digest 291, 2662.
- (19) *Cooper v. Cooper*, [1950] W.N. 200.
- (20) *Wilson v. Wilson*, (1849), 6 Moo. P.C.C. 484; 13 E.R. 771; 27 Digest 340, 3199. A
- (21) *Lauder v. Lauder*, [1949] 1 All E.R. 76; [1949] P. 277; 2nd Digest Supp.
- (22) *Mytton v. Mytton*, (1886), 11 P.D. 141; 57 L.T. 92; 50 J.P. 488; 27 Digest 285, 2561.
- (23) *Bethune v. Bethune*, [1891] P. 205; 60 L.J.P. 18; 63 L.T. 259; 27 Digest 288, 2618.
- (24) *Moss v. Moss*, [1916] P. 155; 85 L.J.P. 182; 114 L.T. 1147; 27 Digest 345, 3261. B
- (25) *Jeapes v. Jeapes*, (1903), 89 L.T. 74; 27 Digest 284, 2557.
- (26) *Duffy v. Duffy*, 1947 S.C. 54; 2nd Digest Supp.

APPEAL by the wife from an order of the First Division of the Court of Session (the Lord President (LORD COOPER) and LORD CARMONT, LORD KEITH dissentiente) dated Jan. 9, 1951, and reported 1951 S.C. 286, adhering to an interlocutor of the lord ordinary (LORD BLADES) dated July 19, 1950, whereby he sustained a plea by the husband that the wife's averments in an action for divorce on the ground of cruelty were irrelevant and dismissed the action. The husband pleaded that the wife's averments were irrelevant and that the action should be dismissed. This plea was sustained by the lord ordinary. C

In the course of his judgment the Lord President referred to "the marked contrast between the language and the phraseology" of the Matrimonial Causes Act, 1937, and the Divorce (Scotland) Act, 1938, in dealing with divorce on the ground of cruelty, and said (1951 S.C. 292): D

"Whether it be that the Scottish character is of tougher fibre or of blunter susceptibilities, or that the Calvinist tradition still finds expression in a deeper sanctity of the marriage tie and its obligations, the fact remains that more than one decree on the ground of 'cruelty' has recently been pronounced in England which would not have been granted in Scotland. I conceive it to be the duty of the Scottish courts to continue to apply Scottish law and practice in the same spirit as in the past, and I do not feel called upon to examine narrowly the English decisions which were pressed upon us, for these were pronounced by a foreign court on the construction of a differently worded statute and against a different background of common law, practice and tradition." E

The First Division held that the facts averred did not constitute such cruelty as was required to support an application for divorce, and dismissed the action as irrelevant. F

W. Ross M'Lean, Q.C., and *W. R. Grieve* (both of the Scottish Bar) for the wife.
Shewan, Q.C., and *D. C. Anderson* (both of the Scottish Bar) for the husband.
 The House took time for consideration. G

Mar. 20. The following opinions were read. H

LORD NORMAND: My Lords, the circumstances which have led to this appeal are set out in the opinion which will be delivered by my noble and learned friend, LORD REID. We have to consider whether the averments of the pursuer and appellant are relevant to infer such cruelty towards her as would justify, according to the law and practice existing at the passing of the Divorce (Scotland) Act, 1938, the granting of a decree of separation a mensa et thoro, and, therefore, of a decree of divorce a vinculo since the passing of that Act.

A The action is based on what is conveniently called mental cruelty. Physical
violence is not averred, but there are averments of conduct by the respondent
causing injury to his wife's health and persisted in after he was aware of its
injurious effects. There is also an averment that a continuance of life with the
respondent would be seriously injurious to the appellant's health. Mental
cruelty was well recognised as a ground for an action of separation long before
the passing of the Act of 1938. Thus, in *Aitchison v. Aitchison* (1) LORD Low
held that conduct of a defender, if it was improper and unjustifiable and if it
caused injury to the pursuer's health, was a good ground of action, although no
physical violence was averred. He distinguished the well-known case of *Russell*
v. *Russell* (2) because in that case there was no evidence of injury to the plaintiff's
health. The Lord President found it necessary, in view of some of the arguments
addressed to the First Division, to vindicate the jurisdiction of the court to
entertain the plea of relevance and to dismiss actions of this sort on consideration
of the averments. There ought to be no doubt whatever that, if the defender
in such an action as this moves the court to sustain a plea to relevance, the court
is bound to entertain the plea and to examine the averments no less strictly than
in any other action, nor that, if it comes to the opinion that the averments do
not satisfy the test of relevance, its duty is to sustain the plea and dismiss the
action. The dismissal of an action when the averments do not satisfy the test of
relevance not only saves the parties unnecessary expense but, as the Lord
President pointed out, avoids, in a divorce case, the exacerbation of the parties'
feelings and the destruction of any chance of reconciliation which are often
inseparable from the ventilation in evidence of their charges and counter-charges
and mutual suspicions. The test of relevance is the same for all actions; there
is not one standard for actions of divorce and another standard for other actions.
Counsel for the respondent submitted at the hearing of the appeal that, if the
pursuer's averments do not necessarily lead to a conclusion in her favour, the case
is not relevant, and he cited in support of that proposition the opinion of LORD
HUNTER: *M'Dougal v. MacDougall* (3) (1931 S.C. 114). LORD HUNTER's opinion
is entitled to weight, nevertheless I think that the test was not accurately
formulated by him. The true proposition is that an action will not be dismissed,
as irrelevant unless it must necessarily fail even if all the pursuer's averments
are proved. The onus is on the defender who moves to have the action dismissed
and there is no onus on the pursuer to show that, if he proves his averments, he is
bound to succeed. In the present case, however, the basis of the judgments both
of the lord ordinary and of the learned judges of the majority in the First
Division is that, if all the pursuer's averments were proved, she would be bound
to fail.

There was some difference of opinion between the Lord President and LORD
CARMONT on the question whether a defender's conduct is to be judged by
reference to its probable effect on the health of a pursuer of normal susceptibilities
or whether it is relevant for a pursuer to aver that the conduct alleged did in
fact cause him or her mental suffering and consequent injury to health. Neither
of the learned judges proposed a dogmatic answer and for my part I am respect-
fully inclined to accept the Lord President's view that "the conduct alleged
must be judged *up to a point* by reference to the victim's capacity for endurance
in so far as that capacity is or ought to be known to the other spouse". There is
the high authority of LORD WATSON in *Mackenzie v. Mackenzie* (4) ([1895] A.C.
405) for the proposition that much depends in each case on its circumstances and,
in particular, on the victim's capacity for endurance. That leaves it open to
find, after evidence, that the pursuer was the victim of his or her own abnormal
hypersensitiveness and not of cruelty inflicted by the defender. But the cases
in which such a decision would be possible without evidence must be exceedingly
rare, and this case is certainly not one of them. The Lord President, I think,
reaches the crux of the case when he says that "where the cruelty is of the type

conveniently described as mental cruelty, the guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim". There is room for differences of opinion about what kinds of case may be covered by the words "unwarrantably indifferent". I do not propose to go into that because I wish to avoid the discussion of hypothetical cases and because I am of opinion that actual intention to hurt may have in a doubtful case a decisive importance and that such an intention has been averred here. Actual intention to hurt is a circumstance of peculiar importance because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference. My noble and learned friends have discussed the averments in the opinions which they will deliver and which I have had the advantage of reading, and they have shown that the appellant has averred a case of actual intention to hurt, wilfully persisted in after the injury to the appellant's health was apparent to the respondent. These averments are, in my opinion, relevant, and they are, I think, supported by sufficiently specific instances of the respondent's alleged cruelty. I, therefore, agree that the action should go to proof.

My Lords, I think that it does not do justice to the averments to take up each alleged incident one by one and hold that it is trivial or that it is not hurtful or cruel and then to say that cumulatively they do not amount to anything grave, weighty or serious. The relationship of marriage is not just the sum of a number of incidents, and in this case it has been overlooked that all the incidents averred are said to have been inspired by the respondent's intention to impose his will on his wife without consideration of her feelings or health. Moreover, it is impossible in the bald averments of a condescendence to convey the effects of the conduct of one spouse on the feelings, and through the feelings on the health, of the other spouse. What on paper may seem little more than a series of pin-pricks may present a very different aspect when it has been developed in evidence, though the evidence does not exceed by a single word the bounds set by the record. These considerations do not derogate from the jurisdiction of the court, but they do impose special caution in the application of the test of relevance to actions founded on mental cruelty. The observations of noble lords in *Watt (or Thomas) v. Thomas* (5) on the value to be attached in an action of divorce for cruelty to the opinion of the lord ordinary who saw and heard the witnesses, especially the parties, though they are directed to the caution which a court of appeal should observe in reversing the lord ordinary's decision after proof, carry also a warning on the caution to be observed in dismissing an action without proof and on consideration of the averments alone.

The Lord President has suggested that under the Matrimonial Causes Act, 1937, the courts in England have, for the purposes of divorce, adopted in principle a less exacting standard of cruelty than was required for the purposes of separation, whereas the Scottish courts have, in compliance with the express provision of the Divorce (Scotland) Act, 1938, adhered to the principles already established in actions of separation. It would be a misfortune if that were so. Certainly before 1937 the courts of England and Scotland followed the same principles in granting and refusing judicial separation for cruelty. The law they both administered was derived from the ecclesiastical courts, and decisions in Scottish cases and in English cases were cited indifferently in both countries as, indeed, they still are. The position is entirely different from that in the law of divorce for desertion, and I regret an unguarded sentence of mine in *Weatherley v. Weatherley* (6) ([1947] 1 All E.R. 566), if it has led to confusion through being thought to apply beyond divorce for desertion, which was the subject-matter of that case.

When divorce on the ground of cruelty was introduced, a difference was made between the language of s. 176 (c) of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 2 of the Matrimonial Causes Act, 1937 (now

s. 1 (1) (c) of the Act of 1950) and the language of the Divorce (Scotland) Act, 1938, s. 1 (1) (c). The Scottish Act expressly prescribed that the cruelty that shall justify divorce shall be the same cruelty as would justify, according to the law and practice existing at the passing of the Act, the granting of a decree of separation. The English Act had made no reference to existing law or practice. It humbly appears to me that the reason for this difference is not very abstruse.

A In England before 1937 cruelty played a part, if a subordinate part, as a ground of action in divorce when the husband was the defendant, and, as I understand, the cruelty was the same in kind and degree as the cruelty that would justify a decree of separation in England or in Scotland. In Scotland cruelty had no place as a ground or partial ground of action in divorce, but it had a place as a defence in actions of adherence, and, consequently, in actions of divorce for desertion. But there was a controversy whether a less degree of misconduct would serve as a defence in an action of divorce for desertion than was required as the foundation of a decree of separation. The question was discussed in *Mackenzie v. Mackenzie* (4) and opinions on it were reserved. Accordingly, it was appropriate that the Scottish Act should define the kind and degree of cruelty to be required as the ground of an action for divorce. It was not necessary C to do this in the English Act since cruelty was already recognised as a partial ground of action in divorce procedure, and it was cruelty of the same kind and degree as was necessary for separation. If that is the explanation of the difference of language between the two Acts, that difference ought not to have led to any divergence in principle between the law of Scotland and the law of England as regards the kind or degree of cruelty necessary for divorce. It is not necessary D in this appeal to consider whether there has been in English cases a departure from principles firmly established as part of the law of cruelty before 1937. There may be a difference between the views of individual judges on the value of the facts proved as justifying a finding of cruelty, but that is not a difference of principle. Uniformity of judgment in assessing the value of facts is an ideal which is never attained, even in the courts of a single country. It has sometimes E been said in England that the Scottish courts have been too easy and liberal in granting divorce, and sometimes the same has been said in Scotland of the English courts. Allowance in judging of the significance of language or conduct used by one spouse to another must be made for national, local and social habits, but I would find it difficult to sustain an argument that a country, which since the Reformation has allowed divorce for adultery to either spouse and to both spouses and has since 1573 allowed divorce for desertion to either spouse, has F consistently followed a tradition more favourable to the sanctity of the marriage tie than a country which permitted no action for divorce in its courts till the year 1857.

On another aspect of the Act of 1938 I respectfully and emphatically agree with the Lord President. The Act does not in any way restrain the development G of the law of cruelty as the foundation of actions of separation or of divorce. I wish to add that nothing that I have said should be understood as casting doubt on the decision in *Dunlop v. Dunlop* (7). I think that *M'Donald v. M'Donald* (8) was rightly decided and I agree with the reasoning of the Lord Justice-Clerk in that case. I have had the advantage of reading the opinion about to be delivered by my noble and learned friend LORD MERRIMAN, and I respectfully agree with H his observations on the identity of principles of the law of divorce for cruelty in England and Scotland. I agree with the dissenting judgment of LORD KEITH and I would allow the appeal.

LORD MERRIMAN: My Lords, while I wish to make it plain that I cast no doubt on the jurisdiction of the court to entertain in a consistorial cause the plea of relevance, I agree with LORD KEITH that it is desirable to bear in mind, particularly in connection with a charge of cruelty, how much depends on the general picture of the married life of the parties which it is so difficult to appreciate

without a proof. Nowhere has the advantage, particularly in this class of case, of seeing and hearing the witnesses been stated more emphatically than in the opinions of LORD THANKERTON and LORD MACMILLAN in *Watt (or Thomas) v. Thomas* (5). It is true that their observations were directed to limiting the right of an appellate tribunal to interfere with the findings of a trial judge who has had that advantage. Nevertheless, the application of these observations to the question before your Lordships may be tested by supposing that the clear and accurate summary of the averments made by the lord ordinary was expressed, after proof, in the same words, mutatis mutandis, as a finding of the facts on which a decree of divorce had been pronounced, and that there was sufficient evidence to support those findings. Let it also be supposed that your Lordships were hearing an appeal from a reversal of the lord ordinary by the Inner House, and that their judgment was founded on the version of those facts given by the Lord President, beginning with the words (1951 S.C. 294): "Considerable space is devoted to the sexual relations of the spouses" down to the words (*ibid.*, 295) "so preyed upon her mind that she attempted to commit suicide by putting a gas tube in her mouth." On these suppositions I think that the judgment would be open to criticism in the following respects. First, it is by no means clear in what sense the question of sexual relations was abandoned. It appears only to have been abandoned as a substantive charge, but not as a basic factor on which much of the subsequent unhappiness between the parties was founded. Secondly, if, as I doubt, it can truly be said that the shortage of house-keeping money was "the main count", it was so because it is said that "on many occasions" the pursuer, with growing children, requested more money than she had had when she was first married, and the husband "always refused to give it to her and in doing so told her that he hated the sight of her." This, and the further statement that the husband had been "frequently rude and threatening to the wife in the presence of the children and had greatly humiliated her", appears in the Lord President's judgment (1951 S.C. 295) as

"a few allegations of harsh language, some of the incidents being associated with the pursuer's demands for money, and one threat of violence alleged to have been made 'in the winter of 1949'—to throw the pursuer downstairs."

This, which the Lord President describes as an "isolated incident" but which appears to be part of the allegation of humiliation by frequent rudeness and threats in the presence of the children, he finds it impossible to construe as indicative of ferocity or serious malignity of purpose. This statement renders all the more serious the omission in his judgment of any trace of the averment that the husband intended to impose his will on the wife, and, although the Lord President refers to the husband's conduct being said to have caused the pursuer "great grief" and to have been "a considerable strain on her nerves", so that in 1944 she consulted a doctor who is still treating her, he does not refer to the averment that the husband had persisted in what is alleged to be his callous conduct although he was aware not merely that it was causing her grief and putting a considerable strain on her nerves, but that it had caused a serious breakdown in her health. On this version of the facts your Lordships' House would, in my opinion, be justified in holding that a reversal of the trial judge on the ground that it was "a case of lack of accommodation, failure of due consideration, selfish neglect and rudeness of language" and nothing more, would conflict with the principles laid down in *Watt (or Thomas) v. Thomas* (5) because a court which had not had the advantage of seeing and hearing the witnesses had substituted its own findings of the facts for those of the trial judge.

I fully agree with your Lordships that the averment of an intention on the part of the husband to impose his will on the pursuer, and the averment of persistence in his callous conduct, although aware of its effect on his wife's health, both of which are plainly made, are important averments in this case.

In saying this, however, I must not be taken to suggest that either in England or in Scotland it is essential to impute to the wrongdoer a wilful intention to injure the aggrieved spouse in order to establish a charge of cruelty. In *Mackenzie v. Mackenzie* (4) LORD WATSON said ([1895] A.C. 409):

"I do not impute to the appellant that his conduct, cruel and reprehensible though it was in my estimation, was dictated by a wilful intention to injure the respondent."

Likewise in *Kelly v. Kelly* (9), to which I shall recur later, because it is the leading case in England on the subject of cruelty without physical violence, LORD PENZANCE in his judgment in the full court said (L.R. 2 P. & D. 72):

"He says that he does not desire to injure her, and it has never been asserted that he does."

So, also, in *Squire v. Squire* (10) TUCKER, L.J., said ([1948] 2 All E.R. 54) that in his view the law on this point could not be more clearly expressed than in the brief statement quoted (*ibid.*, 53), from the judgment of SHEARMAN, J., in *Hadden v. Hadden* (11):

"I do not question he had no intention of being cruel but his intentional acts amounted to cruelty."

During the argument, however, the question arose whether the averments of the husband's intention to impose his will on the wife and of persistence in his callous conduct although aware of its effect on her health could legitimately be supported at the proof merely by invoking the presumption that a person intends the natural and probable consequences of his acts. I deprecate the exclusion in advance of any particular method of proving an averment. I make this reservation because I am unable to agree with the Lord President's view that this presumption leads to the conclusion that if injury to health occurs "any" conduct, however meritorious, which brings about that result would be cruelty. I have expressed my own views on this matter recently in *Simpson v. Simpson* (12) and I do not propose to repeat them, but I may, perhaps, be allowed to quote one sentence ([1951] 1 All E.R. 962):

"Without going through the careful examination of the doctrine in *Squire v. Squire* (10) with which I respectfully agree, I venture to suggest that in this jurisdiction, at any rate, we may continue to use the time-honoured maxim, provided always that we remember that it does not express an irrebuttable presumption of law and that it is only to be applied in connection with conduct which can fairly be described as ill-treatment."

I coupled with these views an observation of LORD GREENE, M.R., in *Buchler v. Buchler* (13) ([1947] 1 All E.R. 325). In relation to the kindred topic of desertion by expulsion of a wife from the matrimonial home, he said that conduct which did not amount to a justification for withdrawing from cohabitation could not be made so by a wife announcing her intention of leaving her husband if he did not change his conduct. He added (*ibid.*):

"This is not, in my opinion, affected by the doctrine that a person must be taken to intend the probable consequences of his acts, for, if the acts are not such as to justify the wife in treating herself as expelled from the matrimonial home, no inference can be drawn from those acts of an intention to expel her."

I do not regard the instances of the patriotic volunteer or of the gallant ship's captain given by the Lord President (1951 S.C. 292, 293) as legitimate illustrations of the doctrine. However, I would not necessarily exclude LORD CARMONT's illustration of the cat (*ibid.*, 298); for if a spouse insisted on introducing one into the home in spite of the knowledge that the other spouse was one of those persons who are made positively ill by the presence of a cat, that familiar pet could not then properly be described as "harmless".

I must now turn to the suggestion of the Lord President that by reason of what he terms "the marked contrast" in the wording of the English and Scottish Acts of 1937 and 1938 there has been a change in the legal conception of cruelty in England. The Lord President expressly concurred with observations to the same effect in the Inner House in *Dunlop v. Dunlop* (7) which appear to have been prompted by the decision of the Court of Appeal in *Meacher v. Meacher* (14). It would be idle to deny that this case has raised, in England as well as in Scotland, the doubts to which allusion is made in the judgments under appeal. For instance, in his dissenting opinion in *Watt (or Thomas) v. Thomas* (5) VISCOUNT SIMON, in support of the view that in the Scottish Act the words "has been guilty of cruelty" make it difficult to introduce as a necessary condition of divorce that further cruelty must be apprehended, though this was necessary if the remedy of separation was being sought, said ([1947] 1 All E.R. 585):

"In England, at any rate, it has been held by the Court of Appeal that under the Matrimonial Causes Act, 1937 (where, however, the words differ from those used in the Scottish Act) a decree of dissolution on the ground of cruelty is based on past behaviour, and that there is no condition that the decree should be withheld 'unless there is also a reasonable fear that further acts of cruelty will be committed' (*Meacher v. Meacher* (14))."

LORD THANKERTON (*ibid.*, 586) and LORD MACMILLAN (*ibid.*, 590) expressly reserved their opinions. I am so fully in agreement with what my noble and learned friend, LORD NORMAND, has said on this matter that I should not have found it necessary to add anything were it not that it may be thought advisable to consider whether the divergence supposed to be represented by these two cases is not, in truth, more apparent than real. I need not pursue what my noble friend has said about the reason for the wording of the Scottish Act. I shall try to show that in this country we do not recognise two degrees of cruelty, although, as the Court of Appeal in *Russell v. Russell* (2) itself decided, conduct which is expressly held not to be cruelty may, nevertheless, be an answer to a suit for restitution of conjugal rights. Suffice it to say that when Parliament, in the Act of 1938, defined the cruelty on which divorce first became permissible in Scotland, it was, in fact, following a precedent set by s. 27 of the Matrimonial Causes Act, 1857, whereby divorce for cruelty was first allowed in England. It is true that the Act of 1857 made it necessary to couple adultery with the charge of cruelty, but it was expressly provided, as in the Scottish Act of 1938, that the cruelty must be such as, without adultery, would have entitled the wife to divorce a mensa et thoro. Elsewhere in the Act of 1857 the word "cruelty" occurs by itself (s. 16), and in s. 31, making cruelty a discretionary bar to divorce, the words are "has been guilty of . . . cruelty". So far as I am aware, however, no distinction has ever been drawn between those phrases in relation to the Act of 1857. But it does not end there. By the Matrimonial Causes Act, 1866, s. 2, if either spouse in a suit instituted for dissolution of marriage opposed the relief sought on the ground, inter alia, of "cruelty", the court might give the respondent the same relief to which he or she would have been entitled if he or she had filed a petition seeking such relief. This section was replaced in substantially the same terms by s. 180 of the Supreme Court of Judicature (Consolidation) Act, 1925. Likewise, in the proviso to s. 176 of that Act, preserving the right of a wife to present a petition on any ground on which she might have done so before the Matrimonial Causes Act, 1923, enabled her to obtain a divorce on the ground of adultery alone, it is provided that on any petition presented by a wife for divorce on the ground of the "adultery and cruelty" of her husband the parties shall be competent and compellable witnesses with regard to "the cruelty". Again, when by the Summary Jurisdiction (Married Women) Act, 1895, magistrates were enabled to make an order in favour of a wife on the ground of "persistent cruelty" SIR SAMUEL EVANS, P., in *Cornall v. Cornall*

(15), said (74 J.P. 380) that cruelty in s. 4 of that Act meant the same thing as cruelty had always meant in the Divorce Court, but with the addition of the element of persistence. This, as has been repeated by the Divisional Court of the Probate Division more than once in recent weeks, precludes the making of an order on a single act, however, grave, but has no other effect on the meaning of "cruelty". Finally, by s. 5 of the Matrimonial Causes Act, 1937, itself, the decree of judicial separation is dealt with by the substitution of two new sub-sections for the corresponding sub-sections of s. 185 of the Judicature Act. The first of these enables a petition to be presented for judicial separation on any grounds on which a petition for divorce might have been presented . . . or on any grounds on which a decree for divorce a mensa et thoro might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857. In relation to cruelty that would mean, if s. 176 (c) of the Judicature Act, as substituted by the Matrimonial Causes Act, 1937, s. 2, has really altered the law as regards divorce, that two different standards of cruelty as regards judicial separation are set up in the same sentence of the same sub-section, one based wholly on past behaviour and the other on the need for protection for the future.

I must confess that until I read the argument in *Meacher v. Meacher* (14) which went the length of submitting that *even if it were correct* (the italics are mine) that the practice of the ecclesiastical courts and subsequently of the Divorce Court in granting judicial separation on the ground of cruelty was based wholly on the necessity for future protection, that was not the case under s. 2 of the Matrimonial Causes Act, 1937, which makes no reference to the likelihood of the cruelty continuing or to further cruelty at all, I had never seen or heard the suggestion that the words "has treated the petitioner with cruelty" in that Act had made any difference to the legal conception of cruelty. Nor do I understand why it should be so, merely because cruelty is now by itself a ground for divorce, whereas formerly it had to be coupled with adultery. What that conception is was settled by *Russell v. Russell* (2), a case which, as appears from the judgments under appeal as well as from other Scottish decisions to which we have been referred, is evidently regarded as a leading case in Scotland as well as in England. But it is important to bear in mind that in determining, to use LORD HERSCHELL'S words in *Russell v. Russell* (2) ([1897] A.C. 445),

" . . . what elements were treated as essential to the constitution of the saevitia, or cruelty, which entitled to a divorce ",

LORD HERSCHELL was careful to point out (*ibid.*, 449) that judges had not infrequently, when speaking of acts as "cruel", used that word in its popular sense, and not as indicating that the acts were cruel in the legal acceptance of the term, that is to say, such as would entitle to a divorce, and he quoted pronouncements both of LORD STOWELL [in *Popkin v. Popkin* (16) and *D'Aguilar v. D'Aguilar* (17)] and of SIR JOHN NICHOLL [in *Bray v. Bray* (18).] in that sense to illustrate the risk of confusion arising from the use of the words "cruelty" and "cruel" in the popular sense. Therefore, when the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements—first, the ill-treatment complained of, and, secondly, the resultant danger or the apprehension thereof. Thus, it is inaccurate, and liable to lead to confusion, if the word "cruelty" is used as descriptive only of the conduct complained of, apart from its effect on the victim.

There seem to me to be some traces of this confusion in *Meacher v. Meacher* (14). For example, such phrases as ([1946] 2 All E.R. 308) "unless . . . such assaults are likely to continue", "unless there is a reasonable fear that further acts of cruelty will be committed" are used to illustrate the rejection of the proposition that the court intervenes "only to protect the parties from what

they expect to happen", as if all these phrases necessarily expressed the same idea. But where, as in that case, a wife has withdrawn from cohabitation because a series of violent assaults has caused danger to limb and health, bodily and mental (for she had not only suffered bodily injuries but had had a nervous breakdown) the expectation of a renewal at least of the apprehension of danger to bodily or mental health, if she were called on to resume cohabitation, is not necessarily the same thing as the likelihood of the continuance of the actual assaults or even as the fear that further "acts of cruelty" will be committed. I say "if she were called on to resume cohabitation" because that test is common to both countries: see for example LORD PENZANCE in *Kelly v. Kelly* (9) (L.R. 2 P. & D. 32), and *M'Donald v. M'Donald* (8). In my opinion, it is indisputable that the twofold test was laid down in *Russell v. Russell* (2) because the majority, both in the Court of Appeal and in your Lordships' House, were satisfied that protection of the aggrieved spouse lay at the root of the matter. But protection from what? Not necessarily from a repetition of the whole course of ill-treatment, or even the same kind or degree of ill-treatment. To use a homely metaphor, the camel needs protection from the last straw which is to break its back, or even from the penultimate straw which threatens to do so, and not only from being laden afresh with another whole bale of straw. That is why it may be confusing to speak of repeating "the cruelty". This is well illustrated by a recent case of *Cooper v. Cooper* (19), decided in your Lordships' House on Mar. 29, 1950. VISCOUNT JOWITT, L.C., in an opinion with which the other noble Lords concurred, said ([1950] W.N. 201):

"The more serious the original offence, the less grave need be the subsequent matters to constitute cruelty, for the subsequent acts must be looked at in the light of the earlier history from which they derive their significance . . ."

He added that, if authority were needed for such an obvious proposition, it was to be found in *Wilson v. Wilson* (20). Both of these were cases in which, after the wife had left the matrimonial home because of earlier ill-treatment, cohabitation had been resumed. I would add that there have been many other decisions in the intervening century to the same effect, not only in cases where cohabitation has been resumed, but also where it has been continued until what may be called the imposition of the "last straw".

If I may say so respectfully, the Court of Appeal in *Meacher v. Meacher* (14) was bound to set aside a decision refusing a decree on the grounds, first, that the parties having separated, there was no likelihood of further cruelty, and, secondly, that the court would not intervene on behalf of a wife who could have put a stop to the cruelty by complying with the husband's unreasonable prohibition of visits to her sister. These reasons were manifestly unsound and conflicted in both respects with *Kelly v. Kelly* (9) and *Mackenzie v. Mackenzie* (4). Moreover, there being ample evidence of conduct causing danger to limb or health and of the need for protection if cohabitation were to be resumed, the court was fully justified in drawing its own conclusion that cruelty was proved. But if it was also intended to decide that by reason of the wording of s. 176 (c) of the Judicature Act, as substituted by the Matrimonial Causes Act, 1937, s. 2, it is no longer necessary, in a case where a spouse has withdrawn from cohabitation because of ill-treatment, to consider whether, if he or she were obliged to resume cohabitation, there would not at the least be a reasonable apprehension of danger to life, limb or health, bodily or mental, I feel bound to express my opinion that this is not the law of England. As regards *Dunlop v. Dunlop* (7) on the other hand, I would only say that it is possible to share the scepticism expressed by LORD JAMIESON (1950 S.C. 243) about the certainty, or the permanence, of the drunkard's somewhat rapid reformation without doubting that an English court, if it were fully satisfied that an aggrieved spouse could resume cohabitation without danger to life, limb or health, bodily or mental, or even

a reasonable apprehension of such danger, would be bound in principle to arrive at the same conclusion.

Having already referred in passing to *Squire v. Squire* (10), it only remains to say a word about *Lauder v. Lauder* (21), the other decision of the Court of Appeal which, as we were given to understand, was thought by the majority below to represent an extension of the legal conception of cruelty. Here, again, let me
 A say that I am not suggesting for a moment that this or any other English case is binding in Scotland, but, whether the decision itself was right or wrong, at least it can be said that there was no intention to make a departure from established principle. The case was determined in light of the decisions in *Kelly v. Kelly* (9),
Mytton v. Mytton (22), *Bethune v. Bethune* (23) and *Moss v. Moss* (24). *Meacher v. Meacher* (14) was not even mentioned in the argument. Also, it was expressly
 B insisted that the case was one in which it was pre-eminently necessary to bear in mind the principles laid down in *Russell v. Russell* (2), but it was said ([1949] 1 All E.R. 79) that in applying those principles it was impossible to doubt that if there had been evidence that the wife's conduct had caused any injury to mental health, or a reasonable apprehension of such injury, the decision in the Court of Appeal and in the House of Lords must have been the other way. This
 C distinction had already been drawn by LORD LOW in *Aitchison v. Aitchison* (1) (10 S.L.T. 332) and by SIR FRANCIS JEUNE, P., in *Jeapes v. Jeapes* (25). Moreover, in *Duffy v. Duffy* (26), LORD JAMIESON referred without disapproval to LORD LOW's judgment in *Aitchison v. Aitchison* (1).

To conclude, I also agree emphatically that the Act of 1938 does not in any way restrain the development of the law of cruelty as the foundation of actions
 D of separation or of divorce. To refer once more to *Kelly v. Kelly* (9), the same thing was said (L.R. 2 P. & D. 61) in relation to English law in the judgment of CHANNELL, B., and HANNEN, J., in a passage which was quoted and followed by LORD LOW (10 S.L.T. 332) in *Aitchison v. Aitchison* (1). Like my noble friend LORD NORMAND, I agree with the dissenting judgment of LORD KEITH and would allow the appeal.

E LORD REID: My Lords, the appellant in this case is the pursuer in an action for divorce on the ground of cruelty. The respondent pleaded that, the pursuer's averments being irrelevant, the action should be dismissed. This plea was sustained by the lord ordinary by interlocutor of July 19, 1950. The appellant reclaimed against that interlocutor on Jan. 9, 1951, but the First
 F Division by a majority (the Lord President and LORD CARMONT, LORD KEITH dissenting) adhered to the interlocutor of the lord ordinary. This is an appeal against that interlocutor.

The appellant's averments are extensive and I shall attempt to summarise them. The parties were married on Mar. 20, 1936, and they lived together until the appellant left the respondent in February, 1950, about four months after she had raised this action. There were three children of the marriage, born
 G between 1939 and 1945, of whom two survive. The appellant's specific averments are prefaced by this general averment: "Initially the marriage was quite happy, but gradually it became apparent that the defender intended to impose his will upon the pursuer." There are averments regarding the sexual relations of the parties, but these were not relied on by counsel for the appellant except as part
 H of the history of the marriage and throwing light on the relationship of the parties. It is then averred that the appellant's housekeeping allowance was completely inadequate and that on frequent occasions she had to ask the respondent for extra money to meet necessary expenses.

"On such occasions the defender has always refused to give it to her, and in so doing has frequently told the pursuer that he hated the sight of her and shut the door of his bedroom in her face so that the subject could be pursued no further."

It is then averred that

"The defender has also been frequently rude and threatening to his wife in the presence of the children and greatly humiliated her. On one recent occasion in the winter of 1949 the defender in the presence of the children threatened to throw the pursuer down the stairs of their house."

It is not suggested that this latter averment is intended to shew that the pursuer was in any danger from physical violence. Counsel for the appellant presented it rather as an example of the rude, threatening, and humiliating conduct of the respondent averred in the preceding sentence. It is a feature of this case that there is no allegation either of physical violence or of any serious apprehension of violence. Then there are averments that the respondent has failed to entertain the appellant in any way, or to discuss business or financial affairs with her, or to share his life with her in any way, and that he ignored the appellant in the house. The appellant then avers that the respondent's conduct has undermined her mental and physical health which rapidly deteriorated during the last twelve months of their married life and that she was on the verge of a complete breakdown. It is averred that in 1947 she attempted to commit suicide, and that a continuance of life with her husband

"would be seriously injurious to her life, health and peace of mind, and she is afraid to continue to live with him. The pursuer believes and avers that the defender is fully aware of the cruelty he has inflicted on the pursuer, but at no time has he attempted to be considerate towards his wife or make her life with him happy or even bearable."

I read these averments as alleging a deliberate course of conduct intended to wound and humiliate the appellant and persisted in by the respondent although it was obvious that this was seriously affecting the appellant's mental and physical health. It is true that the appellant's case does not appear to have been presented in this light to the First Division. The argument there presented appears to have been that any conduct by one spouse which injures the health of the other is cruelty whatever may have been the intention of the defender. I am not surprised that the First Division rejected this argument. But there can hardly be a more grave matrimonial offence than to set out on a course of conduct with the deliberate intention of wounding and humiliating the other spouse and making his or her life a burden and then to continue in that course of conduct in the knowledge that it is seriously affecting his or her mental and physical health. Such conduct may consist of a number of acts each of which is serious in itself, but it may well be even more effective if it consists of a long continued series of minor acts no one of which could be regarded as serious if taken in isolation. Once it is established that physical violence is not a necessary ingredient of cruelty—and I think that that has long been recognised by the law of Scotland—then I can see no justification in principle for requiring that the deliberate acts of the defender must be of a certain character, and I know of no authority which requires me to make any such distinction.

If a case is to be remitted for proof it is very undesirable to say anything which may embarrass the future conduct of the case. I do not think that it is necessary for the decision of this appeal to make a detailed examination of the authorities either in Scotland or in England, and I, therefore, refrain from doing so. But to avoid misunderstanding there are some observations of a general character which I think it necessary to make. What I have said is only intended to apply when a deliberate intention such as I have described was the cause of the defender's conduct. Such an intention need not be proved by direct evidence. It may be inferred from the whole facts and atmosphere disclosed by the proof. I do not doubt that there are many cases where cruelty can be established without it being necessary to be satisfied by evidence that the defender had such an intention, but I do not intend to decide anything about such cases. If the

defender did not, in fact, intend to ill-treat the pursuer, I desire to reserve my opinion whether or to what extent it is necessary or proper to impute an intention which did not exist by invoking a legal presumption that everyone must be supposed to intend or foresee the natural and probable consequences of his acts, and I also wish to reserve my opinion on the question whether or in what circumstances it can be enough in such cases to prove that a series of comparatively minor incidents has caused injury to the health of the pursuer if the defender was not guilty of deliberately ill-treating the pursuer.

In view of certain observations of the Lord President I think that I must express my opinion on the question whether there is any difference between the law of Scotland and the law of England as to what the law regards as cruelty. I take the question in two stages. Down to 1937 I can find no difference in principle as to what is cruelty for the purpose of separation *a mensa et thoro*. English cases were copiously cited by Scottish judges and Scottish text writers of authority, and citation of Scottish cases in England was by no means infrequent. It would be somewhat strange if it were otherwise looking to the similar origin of the law in the two countries. That is not to say that there were not differences from time to time in the way in which established principles were applied, but that is a feature of a developing system of law, and, indeed, human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions. In 1937 cruelty became a ground for divorce in England, and in 1938 it became a ground for divorce in Scotland. The two enactments are in different terms and questions have arisen out of this difference, but I do not recollect that anyone has suggested that either enactment altered the established principles by which it must be determined what is sufficient and what is not sufficient to justify a finding of cruelty, and I see nothing in any enactment to require the Scottish courts to depart from established principles, or, indeed, to authorise them to do so. Equally, I see nothing to prevent the Scottish courts from developing the application of those principles in the same way as development takes place in other branches of the common law.

Finally, I do not think that the decision of your Lordships in this case should be taken as casting any doubt on the value of the Scottish procedure of disposing of suitable cases on relevancy without inquiry into the facts, or on the applicability of that procedure to consistorial cases. If it can be shewn that, even if the pursuer succeeds in proving all that he avers, still his case must fail, it appears to me to be highly advantageous that time and money should not be spent on fruitless inquiry into the facts, and this appears to me to be no less advantageous in consistorial cases. But there is this difference between these cases and others. In many of these cases the whole history of the marriage and the demeanour of the witnesses may be specially important when it comes to assessing the bearing of particular facts, and, therefore, before a pursuer's averments are held to be irrelevant, it must be clear that, even if the proof discloses an atmosphere wholly favourable to the pursuer, the pursuer's case would still fail. But if that is clear, as it may be even where cruelty is alleged, then I think that it is proper to dispose of the case on relevancy. I agree that this appeal should be allowed.

LORD TUCKER: My Lords, judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits and experience has shown the wisdom of this course. It is, in my view, equally undesirable—if not impossible—by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred. Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending

spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health (to borrow from the language of LORD KEITH) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies. For this reason I agree with LORD KEITH that it is, generally speaking, not possible to compartment acts for the purposes of relevance as being gross so as to constitute cruelty or less gross so as not to constitute cruelty, though there may be extreme cases where the acts in themselves are so trivial as to justify dismissal of an action for lack of relevance without proof. It is with regard to the sufficiency of the facts and matters relied on as amounting in the aggregate to cruelty that I think consistorial causes are so different from many other types of action, though I agree with counsel for the respondent that it would be wrong to say that no such suit could ever fail for lack of relevance. In the present instance I think that the averments of knowledge, intention, and persistence remove this case from the area of doubt in which it might otherwise have lain in the absence of such averments.

I agree for the reasons which have been stated by my noble and learned friend, LORD MERRIMAN, that there has been no change in the law of England with regard to cruelty consequent on the passing of the Matrimonial Causes Act, 1937, and, this being so, I can find no difference between the law of Scotland and England in this respect. I also agree with his observations on *Meacher v. Meacher* (14). For these reasons I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Burton & Ramsden*, agents for *Balfour & Manson*, Edinburgh (for the wife); *Reid Sharman & Co.*, agents for *Steedman, Ramage & Co.*, Edinburgh (for the husband).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

CROMPTON (INSPECTOR OF TAXES) *v.* REYNOLDS AND GIBSON. INLAND REVENUE COMMISSIONERS *v.* SAME.

[HOUSE OF LORDS (Lord Normand, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Cohen), February 11, 12, March 26, 1952.]

Income Tax—Profits—Book debt—Profit on collection—Book debt included among assets acquired from predecessor—Purchase of debt at discount—Election to be treated as having set up new trade—Ultimate payment of debt in full—Income Tax Act, 1918 (c. 40), sched. D, Case I.

One of the assets of a partnership firm of cotton brokers as originally constituted was a debt owing by a customer which had been incurred in the course of their trade as cotton brokers. In 1938 a change took place in the constitution of the firm, and the firm which was then formed carried on the business, purchased the assets, and took over the liabilities of the previously existing firm, but elected, under the proviso to r. 11 (1) of the Rules Applicable to Cases I and II of sched. D (as substituted by the Finance Act, 1926, s. 32 (1)) to be treated for tax purposes as having set up a new trade. The assets taken over by the new firm included the book debt which was acquired at a written-down figure, but which later was collected in full, a profit of £50,000 being thereby made by the new firm. It was found as a fact that the new firm did not trade in book debts.

Held: although the debt was a trading debt in the hands of the old firm, its acquisition by the new firm and its subsequent collection was not a transaction within the scope of the cotton broking business carried on by that firm, but produced an accretion of value analogous to the profit made by the sale of a fixed asset, and, therefore, the profit which accrued was not assessable to tax under Case I of sched. D.

Harry Hall, Ltd. v. Barron (1949) (30 Tax Cas. 451), overruled.
Decision of COURT OF APPEAL ([1950] 2 All E.R. 502), affirmed.

FOR THE RULES APPLICABLE TO CASES I AND II OF SCHED. D. TO THE INCOME TAX ACT, 1918, r. 11 (1), AS AMENDED BY THE FINANCE ACT, 1926, s. 32, AND THE FINANCE ACT, 1930, s. 16, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 164.

A Case referred to:

(1) *Hall (Harry), Ltd. v. Barron*, (1949), 30 Tax Cas. 451; 2nd Digest Supp.

APPEALS by the Crown from orders of the Court of Appeal (SIR RAYMOND EVERSHED, M.R., SINGLETON and JENKINS, L.J.J.), dated July 14, 1950, and reported [1950] 2 All E.R. 502, allowing appeals by the taxpayers from orders of ROXBURGH, J., made on Apr. 3, 1950, whereby he dismissed appeals by the

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taxpayers on Cases stated by the Special Commissioners confirming assessments to income tax and profits tax in respect of annual profits or gains from the trade of cotton brokers carried on by the taxpayers. The question at issue in respect of both the assessments was the same and the appeals throughout were heard together.

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In 1930 a partnership firm of cotton brokers, called Reynolds & Gibson, were the creditors of Combined Egyptian Mills, Ltd. for £200,000 for cotton supplied to them. This partnership firm, firm No. 1, had doubts about the recoverability of the debt, and made reserves against it, amounting to £50,000 in all. These reserves were duly allowed as deductions for income tax purposes in the appropriate years. On a change of partners, firm No. 2 took over the debt which was subsequently reduced to £174,600, but the reserve against that amount remained

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at £50,000. On Oct. 1, 1938, a further change of partners occurred, and firm No. 3 came into existence and took over the assets and liabilities of firm No. 2 on its succession to that firm and paid for the book debt in question a sum less by £50,000 than its face value. All the partners of firms No. 2 and No. 3 elected, under the proviso to r. 11 (1) of the Rules Applicable to Cases I and II of sched. D, that the firm should be treated, for income tax purposes, as though a new

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trade had been set up. In the years ended Sept. 30, 1939, 1940, 1941, 1942, 1943, and 1944, firm No. 3 received from the debtor company in reduction of the debt sums totalling £84,114 13s. 10d., and in the years ended Sept. 30, 1942, 1943, 1944 and 1945, firm No. 3 re-credited to profit and loss account reserve sums totalling £40,000. There was a further change in the constitution of the firm, but firms No. 3 and No. 4 fell to be treated for income tax purposes as one and the same firm since on the occasion of that succession recourse was not had to the proviso to r. 11 (1) of the Rules Applicable to Cases I and II of sched. D. The position at the date of firm No. 4's succession was that the debt stood at £90,485 6s. 2d., with a reserve against it of £10,000, and, in taking over the assets and liabilities of firm No. 3, firm No. 4 paid for this particular asset £10,000 less than its face value. At a subsequent date firm No. 4 received payment

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of the debt in full. The debt of £174,600 having thus been discharged completely, its acquisition by firm No. 3 from firm No. 2 at the price of £124,600 resulted in a profit of £50,000 of which £40,000 was received by firm No. 3 and £10,000 by firm No. 4. The Special Commissioners found (in para. 7 of the Case) that neither firm No. 3 nor firm No. 4 traded in book debts. They found also (in para. 11 of the Case) that in the hands of firm No. 1 and firm No. 2 the debt in question

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was not a capital asset but an ordinary trading debt, and that the debt did not change its quality from revenue to capital when it was taken over by firms Nos. 3 and 4. They, therefore, confirmed the assessment on firm No. 4. On appeal by the taxpayers, firm No. 4, ROXBURGH, J., held that the debt in question did change in quality from revenue to capital on its acquisition by firm No. 3, but that it represented circulating capital, so that the profit on its collection properly fell for inclusion in the profits of firm No. 4, and he, therefore, confirmed the determination of the Special Commissioners. The Court of Appeal held that

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the profit accrued, not in the course of carrying on a trade, but from the purchase of a capital asset which subsequently appreciated in value, and was, therefore, not assessable to income tax under Case I of sched. D.

Grant, Q.C., and Sir Reginald Hills for the Crown.

Cyril King, Q.C., and Borneman for the taxpayers.

The House took time for consideration.

Mar. 26. The following opinions were delivered.

LORD NORMAND: My Lords, this is an appeal from orders of the Court of Appeal allowing appeals by the respondent from orders of ROXBURGH, J., whereby two appeals by the respondent on Cases separately stated by the Commissioners for the Special Purposes of the Income Tax Acts were dismissed.

The respondent is a partnership trading under the firm name of Reynolds & Gibson and the appeal relates to two separate assessments made on the partnership (a) for the year ended Apr. 5, 1949, in respect of income tax under the provisions of Case I, sched. D, to the Income Tax Act, 1918, and (b) for the chargeable accounting period ended Dec. 31, 1946, in respect of profits tax, under the provisions of the Finance Act, 1937, as amended by the Finance Acts, 1942 and 1946. The appeals in respect of both of these assessments were heard before the Special Commissioners on the same date, and have since been heard together in the High Court and the Court of Appeal. At the hearing before the Special Commissioners it was agreed by the parties that the question at issue was the same in both appeals, and it is stated by the Special Commissioners in the Case stated by them in relation to the profits tax appeal, that the questions at issue, the facts, and the contentions of the parties are identical with those in the income tax appeal. The sole question raised in each of the appeals is whether a sum of £50,000 falls to be included in each of the assessments. For the complete statement of the facts I refer to the Case Stated and to the judgment of JENKINS, L.J., who has narrated them and elucidated them by valuable explanations and comments. I, therefore, content myself with a short summary.

Four successive firms have for a long time carried on business as cotton brokers in Liverpool, all of them under the name Reynolds & Gibson. The respondent is the fourth of these firms. On the formation of each new firm the assets and liabilities of its predecessor were valued for the purpose of fixing the amount of the consideration to be paid by the new firm to the old and were taken over at the figure so fixed. On the formation of firm No. 3 on Oct. 1, 1938, the proviso to s. 32 (1) of the Finance Act, 1926, the terms of which I shall recite later, was invoked by the partners of firms Nos. 2 and 3. The proviso was not invoked on the formation of No. 2 firm nor on the formation of No. 4 firm. As a consequence No. 3 firm fell to be treated for income tax purposes as if a new trade had been set up by it, but No. 1 firm and No. 2 firm fell to be treated for the purpose of income tax as one firm carrying on the same trade, and so also No. 3 firm and No. 4 firm fell to be treated as one firm carrying on the same trade. About the year 1920, No. 1 firm, in the course of its business, supplied cotton to Combined Egyptian Mills, Ltd., and in 1930 a debt of £200,000 for cotton so supplied was owing to No. 1 firm. When firm No. 3 was formed this debt had been reduced to £174,600 against which a reserve of £50,000 had been created. The debt was thus valued at £124,600 at that time and that was the consideration paid by No. 3 firm for the right to collect the debt and retain the sums collected. Between Oct. 1, 1938, and Dec. 24, 1946, the whole sum of £174,600 was repaid and the whole debt extinguished partly by repayments to No. 3 firm and partly by a final payment to No. 4 firm. There is an important finding (in para. 7) by the Special Commissioners that "neither firm No. 3 nor firm No. 4 traded in book debts." After stating the facts the Special Commissioners in the Stated Case set out the contentions of the parties and proceed (in para. 11) to give their decision, which it will be well to quote:

A “ We, the commissioners, gave our decision as follows: ‘ In September, 1938, firm No. 3 took over from firm No. 2, for £124,600, the debt of £174,600 due from Combined Egyptian Mills. Eventually the full sum of £174,600 was realised, £84,114 13s. 10d. being received by firm No. 3 and £90,485 6s. 2d. by firm No. 4. For income tax purposes firm No. 3 fell to be treated as having set up a new trade, and we accept that it did not trade in book debts. Nevertheless, in the hands of firms Nos. 1 and 2 the debt in question was in no sense a capital asset, but simply an ordinary trading debt, and, on the facts of this case, we are unable to see that when it was taken over by firms Nos. 3 and 4, successively, its “ quality ” was changed from revenue to capital, as contended on behalf of the appellant firm. In our opinion, it remained a debt on revenue account, collectible in the ordinary course of trade and its collection was incidental to the trade. If the full £174,600 had been received by firm No. 3, we should have felt no doubt that its profit of £50,000 over the amount which it had paid for the debt would have been a profit on revenue account. But the final £90,485 6s. 2d. was received by firm No. 4 (the present appellant firm) and the Crown admits that, if all the members of firms Nos. 3 and 4 had given the requisite notice under the proviso to s. 32 (1) of the Finance Act, 1926, firm No. 4 would fall to be treated as having set up a new trade, with the result that its profit on realisation would have been only £10,000 (being the excess of the amount received over the amount at which it took over the debt from firm No. 3). It is admitted, however, that no such notice was given, and we accept the contention of the Crown that, in these circumstances, for income tax purposes this change of partnership must be ignored, with the result that the above profit of £50,000 must be brought into the income tax assessment of firm No. 4.’ ”

E At this stage it is convenient to turn to the statutory provisions dealing with successions to trades and businesses. By s. 32 of the Finance Act, 1926, an amendment was made to the income tax provisions dealing with successions to trades and businesses in relation to the computation of profits. Previously the general position was that, under r. 11 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918 (subject to exceptions not material), on a succession taking place in the ownership of a business, the business was treated for the purpose of the computation of profits as a continuing business and as though there had been no change in ownership. Section 32 of the Finance Act, 1926, repealed the old r. 11 and replaced it by a new r. 11 of which para. (1) dealt with changes in ownership due to changes in partnerships or the creation of a partnership. By para. (2) all successions other than those dealt with in para. (1) are directed to have effect for the purpose of computing profits as though on the change in ownership a business had ceased and a new business had been set up. Paragraph (1) of the new r. 11 so enacted in s. 32 of the Finance Act, 1926, and the proviso thereto are as follows:—

H “ If at any time after Apr. 5, 1928, a change occurs in a partnership of persons engaged in any trade, profession or vocation, by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the persons who until that time were engaged in the trade, profession or vocation continue to be engaged therein, or a person who until that time was engaged in any trade, profession or vocation on his own account continues to be engaged in it, but as a partner in a partnership, the tax payable by the person or persons who carry on the trade, profession or vocation after that time shall, notwithstanding the change, be computed according to the profits or gains of the trade, profession or vocation during the period prescribed by the Income Tax Acts: Provided that, where all the persons who were engaged in the trade, profession or vocation both

immediately before and immediately after the change require, by notice signed by all of them or, in the case of a deceased person, by his legal representatives, and sent to the surveyor within *twelve* months after the change took place, that the tax payable for all years of assessment shall be computed as if the trade, profession or vocation had been discontinued at the date of the change, and a new trade, profession or vocation had been then set up or commenced, and that the tax so computed for any year shall be charged on and paid by such of them as would have been charged if such discontinuance and setting up or commencement had actually taken place, the tax shall be computed, charged, collected and paid accordingly."

"Twelve" was substituted for "three" in the above proviso by s. 16 of the Finance Act, 1930.

In the High Court, ROXBURGH, J., in his judgment dismissing the appeal, expressed some doubt about what the Special Commissioners' findings of fact included, but he came to the conclusion that para. 7 of the findings together with the findings in para. 11 amounted to a finding of fact that, although firms Nos. 3 and 4 did not trade in book debts generally, it was a part of their trade to acquire and collect this particular book debt of £174,600. He did not, however, share the view of the Special Commissioners that when the debt had been acquired by firm No. 3 it remained a debt on revenue account. He held that it was a capital asset, purchased out of capital, but that it was circulating capital. He also said that to hold that it was a fixed capital asset would be inconsistent with *Harry Hall, Ltd. v. Barron* (1). In the Court of Appeal SIR RAYMOND EVERSHED, M.R., said that he was impressed with the argument for the Crown that it was a question of fact whether the debt was a capital or a revenue item in the hands of firm No. 3 and firm No. 4, and that there was much to be said for the view that the Special Commissioners had intended to find that the debt was treated as a revenue item and retained its original revenue character. But he deferred to the views of the other members of the court and did not dissent. SINGLETON, L.J., and JENKINS, L.J., both agreed that there was no finding of fact concluding the case in favour of the Crown, that the debt in the hands of firms Nos. 3 and 4 was not part of their circulating capital, and that it was not acquired for or employed in the trade carried on by them. JENKINS, L.J., was further of opinion that the Special Commissioners had failed to address themselves adequately to the question whether a debt that had been a trading debt owed to firm No. 1 or firm No. 2 became a trading debt owing to firm No. 3 notwithstanding that firm No. 3 by virtue of the invocation of the proviso above cited was to be considered as having set up a new trade as opposed to merely continuing the trade of its predecessor. He said that the true question was whether the acquisition of the debt was an operation in the course of firm No. 3's trade, and he held that it was not.

My Lords, I agree that, unless the acquisition of the debt was in course of the business carried on by firm No. 3, the profit which arose on the full discharge of the debt cannot be regarded as a profit of the business carried on by firms No. 3 and No. 4. The Crown's argument was that the Special Commissioners had by a finding of fact, not open to review, concluded that the acquisition of the debt was a transaction within the scope of the business carried on by firm No. 3. We have, therefore, to consider para. 7 of the Case and along with it para. 11 or the relevant part of it. Paragraph 7 is unqualified in its terms:

"Neither firm No. 3 nor firm No. 4 traded in book debts."

I think that that means that trading in book debts was never part of the business of either firm. If the Special Commissioners meant to say only that the two firms were not financial firms though they did on this occasion trade in this particular debt, I can see no reason why they should not have said so in plain language in this paragraph. Instead, they use language which, on the face of it, seems to exclude any trading in book debts from the business of the firms.

From para. 7 I go on to para. 11, and I can discover no finding in it that firms No. 3 or No. 4 entered into an isolated transaction of the nature of trade in acquiring the debt. What the Special Commissioners say is that in the hands of firms Nos. 1 and 2 the debt in question was in no sense a capital asset, but simply an ordinary trading debt, and that, on the facts, they were unable to see that when it was taken over by firms Nos. 3 and 4 successively its "quality" was changed from revenue to capital. This is not a finding that firms Nos. 3 and 4 embarked pro hac vice on a business of trading in book debts. The finding in para. 11 is, in my view, a finding in law that this trade debt, when it was acquired by firms No. 3 and No. 4 did not alter its quality from revenue to capital "on the facts of this case". The Special Commissioners do not specify the facts on which they relied. One salient fact is that all the partners of firms Nos. 2 and 3 had given notice in terms of the proviso to s. 32, with the legal consequence that the trade carried on by firms Nos. 1 and 2 must be taken to have been discontinued and a new trade by firm No. 3 to have been set up when firm No. 3 succeeded to firm No. 2. Another salient fact is that the debt had been incurred in trading operations completed at least eight years before the new trade of firm No. 3 began. Then, not less important is the absence of any finding that the debt was acquired in order to further in any way the trade of cotton broking about to be begun by firm No. 3. The acquisition of the debt was in no way a transaction within the scope of the cotton broking business carried on by firm No. 3, but a transaction precedent to the commencement of that business. The collection of the debt by firms Nos. 3 and 4 was likewise not a transaction in the course of their cotton broking. To say, as the commissioners did, that it was incidental to the trade is merely a consequence of the previous finding in law that the debt retained its "quality" as a trading debt. If a debt is a trading debt of a firm its collection is necessarily an incident of that firm's trade. The finding in law ignores the consequences which result from giving notice in terms of the proviso, and is, therefore, erroneous. The right which No. 3 firm acquired was a right to receive a sum of money from the debtor of its predecessor and the origin of the debt represented by that sum became immaterial as soon as the right to collect it passed to a firm which was about to commence a new trade. So, too, the collection of the sum from the debtor was the exercise of the right which firms Nos. 3 and 4 had acquired by expending a part of their capital on the purchase of a non-trading debt, and it was in no way an exercise of the trade of cotton brokers. If firm No. 3 had ceased to carry on business as cotton brokers it would still have collected the debt precisely as it did collect it, and, as was said by JENKINS, L.J., precisely the same profit could have arisen to any purchaser of the debt whether a cotton broker or not. No exertions of trading were employed in the collection and the profit was not a profit of the business carried on by firms Nos. 3 and 4 as cotton brokers—and, I repeat for the sake of completeness, these firms did not carry on a trade in book debts. The fact that entries were made in the books of these firms recording reductions of the reserve made against the debt and the receipt of sums in payment does not affect the matter. These entries are not inconsistent with the acquisition of the debt as an asset outside the scope of the trade carried on by the firms.

My Lords, no assistance is to be obtained by the Crown from the contention that the debt was not a fixed asset, but part of the circulating capital of firms Nos. 3 and 4. Such a contention merely clouds the simple issue whether the acquisition and collection of the debt were within the scope of the trade carried on by the two firms, so that the surplus collected over the price paid for the right to collect was a fruit or profit of that trade. I agree with JENKINS, L.J., on this point, and, indeed, I most respectfully agree with his whole judgment, which unanswerably develops the reasons for the conclusion that the profit of £50,000 is an accretion of value analogous to the profit made by the sale of a fixed asset and not a profit accruing in the course of any trade at all.

I cannot distinguish *Harry Hall, Ltd. v. Barron* (1) from the present case. It is true that in that case there were express findings that the appellant company acquired from the old company more than one trading debt arising from business completed by it, whereas here we are told only of one such debt. But there was a finding in *Harry Hall, Ltd.* (1) that the appellant company's business was not that of a dealer in book debts, just as there is here. The reasoning which excludes from the computation of trading profits for the purposes of taxation one book debt acquired by a new company which does not deal in book debts will equally apply where several or many such debts are so acquired. I, therefore, think that the decision in *Harry Hall, Ltd.* (1), rests on the same mistake of law as the decision of the Special Commissioners in this case and that it should be disapproved so that it may not hereafter appear as a case which may be distinguished from the present case and become a source of future error. I would dismiss both appeals with costs.

LORD MORTON OF HENRYTON: My Lords, I have had the advantage of reading in print the opinion which has just been delivered by my noble and learned friend on the Woolsack. I agree so entirely with his reasoning and his conclusions that I find it unnecessary to add any observation of my own. I agree that both appeals should be dismissed with costs.

LORD REID: My Lords, on Sept. 30, 1938, one partner of the firm of Reynolds & Gibson retired and a new partner was taken into partnership. On the occasion of this change a notice was given in terms of the proviso to the new r. 11 (1) of the Rules Applicable to Cases I and II of sched. D which had been substituted for the old rule by s. 32 (1) of the Finance Act, 1932. It is common ground that by reason of this notice the new firm must be treated as if it had commenced a new business on Oct. 1, 1938. There had been previous changes in the firm and there were also subsequent changes, but these are immaterial in this case because the statutory notice was not given in respect of these changes. The Case refers to firms Nos. 1, 2, 3 and 4. The change in respect of which the notice was given was the change from firm No. 2 to firm No. 3, and I shall refer to firms Nos. 1 and 2 as the old firm and to firms Nos. 3 and 4 as the new firm.

In 1938 Combined Egyptian Mills, Ltd. owed to the old firm a debt of £174,600. About 1920 the old firm had sold cotton to this company for a sum of £200,000 and of that sum £174,600 was still owing in 1938. This debt had been treated by the old firm as a bad debt to the extent of £50,000, and when the new firm took over the old firm's assets at a valuation this debt was valued at £124,600 and was assigned to the new firm for that price. In 1946 the debt was paid in full to the new firm who thus made a profit of £50,000. The question is whether that profit is assessable to income tax under Case I of sched. D. The Rule Applicable to Case I provides that tax shall be computed on the full amount of the balance of the profits or gains of the respondents' trade. The trade of the new firm, like that of the old, was that of cotton brokers. There is a finding in the Case that the new firm did not trade in book debts, and there is no suggestion that they conducted any other trade than that of cotton brokers. So, if the profit of £50,000 is taxable under Case I, it can only be because it was a profit earned by the new firm in carrying on that trade. Accordingly, the task of the Special Commissioners was to determine whether the scope of the trade of cotton brokers as carried on by the new firm was wide enough to include the acquisition, holding, and collection of this debt. But, unfortunately, the commissioners did not address themselves directly to that question. *Harry Hall, Ltd. v. Barron* (1) had been decided shortly before this case was heard by the commissioners and they appear to have had that case in mind in reaching their decision. I find it very difficult to discover the precise meaning of the crucial findings in the Case stated by the commissioners, and to determine to what extent they are findings of fact and to what extent findings of law. I do not think that I should here

examine these findings again in detail, but, giving them the best consideration I can, I have come to the conclusion that the commissioners misdirected themselves in two respects. In the first place, they appear to have attached decisive importance to the nature of the debt in the hands of the old firm, and, secondly, they appear to have thought it sufficient that the collection of the debt by the new firm was incidental to the trade of the new firm without deciding whether the acquisition and collection of the debt by the new firm were or were not in themselves trading operations or part of the trade of the new firm. The commissioners truly state that the debt was a trading debt in the hands of the old firm. It arose from a sale of cotton by them in the course of their ordinary business, and, if it had been paid to them, the money received would have been the fruit of their trading. But, on being assigned to the new firm or to anyone else, it could not remain a trading debt in that sense: the money could not then be the fruit of any trading in cotton by the assignee. It could only be a trading debt in the hands of the assignee if the acquisition of the debt by him was a trading operation on his part. I think that the commissioners assumed that a trading debt in the hands of one cotton broker would remain a trading debt in the hands of a successor in the business unless something more than the assignment had happened to change its character, and this was a natural assumption on their part in view of the decision in *Harry Hall, Ltd. v. Barron* (1). But I agree with your Lordships in thinking that this decision must be overruled.

I venture to think that some unnecessary difficulty has been introduced into this case by the respondents' original contention that the debt was part of the fixed assets of the new firm and was never part of its circulating capital. If circulating capital means no more than capital expended in the course of a firm's trade or capital represented by a trading asset, then to inquire whether this debt or the money spent to acquire it was circulating capital or fixed capital is only to inquire in a circuitous way whether the acquisition of this debt by the new firm was a trading operation or not. But, if the term "circulating capital" is used in any other sense, then to inquire whether this debt or the money spent to acquire it was circulating capital or not is likely to be misleading because it may divert attention from the real issue. In the same way I doubt whether it is helpful to put the question whether the debt was a capital or a revenue asset. If by a revenue asset is meant something of which the proceeds on realisation must be treated as a trading receipt (anything else being a capital asset), then one comes back to the same question whether the acquisition and realisation of the asset are or are not trading operations. But if the terms "capital asset" and "revenue asset" are used in any other sense, again the use of these terms may be misleading.

If, as I think, the commissioners never decided the vital question in this case, then one must examine the facts which have been found to see whether there is any evidence on which the commissioners could now decide in favour of the appellants. If there is, the Case must be sent back to them, but, if there is not, there is no reason to send the Case back. If, on the other hand, I am wrong in my interpretation of the commissioners' findings and they did decide the right question in favour of the appellants, then the question is whether there is anything in the Case to support this decision. So, on either view one must examine the facts found in the Case. The commissioners have found that the new firm did not trade in book debts. If one gives to this finding its natural meaning, it is fatal to the appellants' case, because the debt with which this case is concerned was a book debt and the respondents can only be liable to income tax if their dealings with it were trading operations. But, reading this finding with the findings in para. 11 of the Case, I doubt whether the commissioners intended this finding to apply to debts which the new firm took over from the old firm. The new firm took over all the old firm's assets. The Case does not disclose whether those assets included any other trading debts, but it is probable that there were

others and for the purpose of this argument I am willing to assume that there were. But this debt was in a special position. It had been outstanding for a long time and special arrangements had been made with regard to it. Even if there were other book debts I do not think that the mere fact that they were taken over and collected would assist the appellants' argument. The real question is whether there is anything in the Case to indicate that the new firm's dealings with this debt could properly be regarded as a trading operation. The Case does not state that the new firm did anything more than take over the old firm's rights, receive payments to account and become parties to bills of exchange for the balances outstanding from time to time, and finally receive payment of the full sum due. This was no more than any other assignee of the old firm's rights would have done. It had nothing to do with buying or selling cotton, and if that is all that the new firm did I do not see how it had any connection with the business of a cotton broker. I do not think that it is at all impossible that a new firm should take over and deal with an old firm's book debts as a trading operation, but in order to establish that I think that something more would have to be proved than the mere fact that they took over the debts and received the sums due, and in this case there is really nothing more than that. I, therefore, agree that these appeals must be dismissed.

LORD TUCKER: My Lords, I concur.

LORD COHEN: My Lords, I concur.

Appeals dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Lightbounds, Jones & Co.* (for the taxpayers).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

DUNDEE GENERAL HOSPITALS BOARD OF MANAGEMENT v. WALKER AND ANOTHER.

[HOUSE OF LORDS (Lord Normand, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Cohen), February 18, 19, 20, March 26, 1952.]

Executor and Administrator—Discretion—Legacy conditional on being satisfied that hospital not taken over by State—Test of validity of executors' decision.

Will—Legacy—Condition—Executors to be satisfied that hospital not taken over by State—Validity of executors' decision.

By his will, dated Mar. 11, 1946, a testator, who died on Apr. 16, 1947, gave a legacy of £10,000 "to the Dundee Royal Infirmary . . . provided always, however, that the said £10,000 shall be payable as aforesaid only if my trustees shall in their sole and absolute discretion be satisfied that at my death the said infirmary has not been taken over wholly or partly by or otherwise placed under the control of the State or of a local authority or of a body directly or indirectly responsible to the State and/or a local authority". The Dundee Royal Infirmary was a voluntary hospital within the National Health Service (Scotland) Act, 1947. On Mar. 21, 1946, the National Health Service Bill for England received its first reading, and on Nov. 6, 1946, it received the Royal Assent. The Scottish Bill received its first reading on Nov. 26, 1946, and the Royal Assent on May 21, 1947 (five weeks after the testator's death). Section 9 (8) of the Scottish Act provided that where any property was at any time between Mar. 21, 1946, and July 5, 1948, held or used by such persons and for such purposes as would result (but for anything done after Mar. 21, 1946) in the transfer thereof to the Secretary of State or to a board of management, it should be treated for the purposes of the Act as if it had continued to be so held or used until the appointed day. The trustees took the opinion of counsel who advised,

having regard particularly to s. 9 (8) which, in his view, in effect applied a government nexus retrospectively from Mar. 21, 1946, to all property of the Dundee Royal Infirmary, that the trustees were entitled to resolve that, as they were satisfied that the proviso qualifying the bequest was applicable, the bequest to the infirmary could not take effect. On Mar. 1, 1948, the trustees decided not to pay the legacy because, in view of s. 9 (8), they were not satisfied that at the testator's death the infirmary had not been placed under the control of the State. The board of management in whom the infirmary was vested did not allege mala fides.

HELD: the only reasonable interpretation of the words used by the testator was that he intended his trustees to be the sole judges of all the matters which they had to consider in carrying out the duty which he had put on them; assuming reasonableness on the part of the trustees to be the test of the validity of their decision, they were entitled to take into consideration the retrospective effect of s. 9 (8), and the conclusion which they had reached with regard to the effect at the date of the testator's death of s. 9 (8) was such as a reasonable man could have reached; and, therefore, having reached that conclusion, they were bound to withhold payment of the legacy.

Quaere, whether the proper test of the validity of the trustees' decision was not their honesty rather than the reasonableness of the course which they had adopted.

Decision of Court of Session (1950 S.C. 406), affirmed.

EDITORIAL NOTE. In England, the National Health Service Act, 1946, s. 9 (7), establishes a nexus during the period from Mar. 21, 1946, to the appointed day in terms similar to those contained in the National Health Service (Scotland) Act, 1947, s. 9 (8).

Cases referred to:

- (1) *Re Wilkes's (Beloved) Charity*, (1851), 3 Mac. & G. 440; 20 L.J.Ch. 588; 17 L.T.O.S. 101; 42 E.R. 330; 43 Digest 875, 3197.
- (2) *Low's Trustees*, (1871), 8 Sc. L.R. 638.
- (3) *Cunningham v. Skinner*, (1902), 4 F. (Ct. of Sess.) 1124.

APPEAL by the Board of Management for the Dundee General Hospitals from an order of the First Division of the Court of Session (the Lord President (LORD COOPER), LORD CARMONT and LORD RUSSELL, LORD KEITH dissentiente) dated May 26, 1950, reported 1950 S.C. 406, reversing the interlocutor of the lord ordinary (LORD GUTHRIE). The First Division rejected the claim of the Board of Management that they were entitled to receive payment of a legacy conditionally bequeathed to the Dundee Royal Infirmary under the will of Thomas Norman Jarvis Bell, deceased.

R. P. Morison, Q.C., and *W. Grant, Q.C.* (both of the Scottish Bar), for the appellants.

Dean of Faculty (J. Cameron, Q.C.) and *W. I. R. Fraser* (both of the Scottish Bar), for the respondents, the trustees of the will.

The House took time for consideration.

Mar. 26. The following opinions were read.

LORD NORMAND: My Lords, in this appeal the question to be decided is whether the appellants, who have been sisted as pursuers in place of the original pursuers, the now dissolved corporation of the Dundee Royal Infirmary, are entitled to payment of a legacy conditionally bequeathed to the corporation by the late Mr. Bell. The First Division of the Court of Session, LORD KEITH dissenting, have held, reversing the interlocutor of the lord ordinary pronounced after proof, that the appellants' claim failed, and they have sustained the respondents' plea to relevance and dismissed the action.

The testator appointed three trustees of whom one prædeceased him. The respondents are the surviving and acting trustees. One of them is a chartered accountant in Dundee and a member of the firm which acted as treasurers of the Dundee Royal Infirmary for about forty years down to July 5, 1948, the appointed day under the National Health Service (Scotland) Act, 1947, when the Royal Infirmary was taken over by the present appellants. The other is a nephew of the testator. By the sixth purpose of his will, the testator directed his trustees as soon after his death "as may be convenient to them . . ." to pay the following legacies, viz.:

A

"(c) £10,000 to the Dundee Royal Infirmary, where £1,050 shall be appropriated for endowing a bed in the said infirmary, and the balance shall be available for the general purposes of the infirmary; provided always, however, that the said £10,000 shall be payable as aforesaid only if my trustees shall in their sole and absolute discretion be satisfied that at my death the said infirmary has not been taken over wholly or partly by or otherwise placed under the control of the State or of a local authority or of a body directly or indirectly responsible to the State and/or a local authority."

B

The will is dated Mar. 11, 1946, and the testator died on Apr. 16, 1947.

C

In 1946 the project of nationalising, to use a convenient term, the voluntary hospitals (and the Dundee Royal Infirmary was a "voluntary hospital" both in the popular sense and as defined in the National Health Service (Scotland) Act, 1947), was a topic prominently before the public notice. On Mar. 21, 1946, the National Health Service Bill for England received its first reading, and on Nov. 6, 1946, it received the Royal Assent. It was understood that the general pattern of the legislation would be the same for Scotland as for England, and the publication of the Scottish Bill confirmed this understanding. The Scottish Bill received its first reading on Nov. 26, 1946, and the Royal Assent on May 21, 1947, just five weeks after the testator's death. It is now admitted by the appellants that, though the respondents, as early as Apr. 22, 1947, at their first meeting after the testator's death, came to a tentative view adverse to the payment of the legacy, they did not come to a final decision till a meeting held on Mar. 1, 1948, after the Scottish Act had received the Royal Assent and after taking the opinion of counsel on their duty as trustees.

D

E

The trustees' solicitors, on Apr. 24, 1947, intimated their tentative decision and, as they were instructed, put it on the ground that the trustees

F

"are not satisfied that the infirmary can now be considered free from State control."

Counsel, in his opinion of Feb. 26, 1948, referred to the National Health Service (Scotland) Act, 1947, s. 9 (8), which enacts:

"Where any property was, at any time between Mar. 21, 1946, and the appointed day, held or used by such persons and for such purposes as would result, but for anything done after the said date, in the transfer of the property to the Secretary of State or to a board of management under the foregoing provisions of this Part of this Act, and that property ceases to be so held or used before the appointed day, it shall nevertheless be treated for the purposes of those provisions as if it had continued to be so held or used until the appointed day, unless it is proved by a person whose interest in that property would be transferred to the Secretary of State or to a board of management under those provisions, that the fact that it was not so held or used immediately before the appointed day was due to something done or occurring in the ordinary course of business, or was in no way connected with the said provisions."

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Counsel observed that this provision came into operation on Mar. 21, 1948, but in effect applied a government nexus retrospectively from Mar. 21, 1946, onwards

on all property belonging to the Royal Infirmary. He concluded by advising the respondents that they were

"entitled formally to resolve that as they were satisfied that the proviso [qualifying the bequest] is applicable the bequest to the infirmary could not take effect."

A As has been said, it was after considering this opinion that the respondents came to a final determination to refuse to pay the legacy. They intimated their decision by a letter of their solicitors dated Mar. 1, 1948, and the ground given is that "they are satisfied that the proviso contained in cl. 6 (c) of Mr. Bell's will is applicable". Those words are somewhat cryptic, but I think that they were intended to convey, and did convey, that the respondents were not satisfied that at the testator's death the infirmary had not been placed under the control of the State. It would be a mistake, however, to suppose that the respondents had not, before taking counsel's opinion, been alive to the possible effect on their duty as trustees of cl. 9 (8) of the Bill, afterwards s. 9 (8) of the Act. Mr. Thomas, one of the respondents, depones that that clause was present in his mind at his first consideration of the bequest and that he was fully aware of it before counsel drew attention to it. When the respondents reached their final decision he depones that s. 9 (8) was one of the things which caused him to have doubt whether the Royal Infirmary had been placed under the control of the State at the testator's death. His co-trustee was influenced more by counsel's opinion than by anything else, and in the respondents' pleadings counsel's opinion takes the first place among several grounds for the decision to refuse to pay the legacy.

D My Lords, it is necessary to notice the unusual and, so far as my experience goes, the unique terms of the condition by which the bequest is qualified. This is not a case in which the trustees were given a discretionary power to pay or not to pay a legacy. The bequest was payable only if the trustees should in their sole and absolute discretion be satisfied that at the testator's death the infirmary had not been (to read short) taken over by or otherwise placed under the control of the State. The trustees, as a condition of refusing payment, had not to be satisfied positively that the infirmary had been taken over by or placed under control of the State. They were under no duty to come to a decision, whether of fact or of law, that the infirmary had been taken over or placed under control or that it had not. The right to receive the legacy was contingent on the trustees' state of mind, the absence of a state of doubt. Now, it is not alleged that the trustees were untruthful or guilty of any mala fides, and so the appellants have to accept that the trustees were unquestionably in a state of doubt, not about the taking over, but about the control of the infirmary. The appellants must, therefore, show good reasons in law for ignoring the trustees' actual state of doubt. But the peculiar terms of the proviso have another effect. If a state of doubt was brought about by one circumstance which cannot successfully be assailed, it does not matter that the doubt was increased or confirmed by other circumstances which the trustees might not be entitled, under the terms of the proviso, to take into account. That is a consideration of importance in the case, because besides relying on s. 9 (8) and its retrospective effect as justifying a doubt whether the infirmary had not been "placed under the control of the State", the respondents put forward in evidence certain other matters which also had influenced them. Of some of these notice had been given on record, but of others no notice had been given. There has consequently been a difference of opinion in the courts below whether some of these matters were competently before the court and whether, since the trustees had no duty to disclose any reasons for their decision, they might, if it suited them, bring forward in evidence reasons of which no previous notice had been given. I think myself that it would be misleading to give some reasons on record and to reserve others for disclosure only in the witness box. It is not, however, necessary to pursue this question or to go into any reason but that connected with s. 9 (8), because all the other

reasons argued to us are weaker, and if the appellants succeed in their attack on the reason based on s. 9 (8), the other reasons also will fall before their assault. On the other hand, if the appellants fail on s. 9 (8), it will be unnecessary to consider any of the other reasons. At this stage one other comment naturally arises. It was said for the appellants that the courts have greater liberty to examine and correct a decision committed by a testator to his trustees, if they choose to give reasons, than if they do not. In my opinion, that is erroneous. A The principles on which the courts must proceed are the same whether the reasons for the trustees' decision are disclosed or not, but, of course, it becomes easier to examine a decision if the reasons for it have been disclosed. LORD TRURO's judgment in *Re Wilkes's (Beloved) Charity* (1) ought not to be construed as going beyond that.

On what grounds, then, do the appellants attack the decision of the trustees to refuse payment and ask that the doubt which the trustees felt should be disregarded, and the legacy paid as if the condition attached to it had been performed? First, it was said that the trustees had exceeded the limit of the powers committed to them. This was the ground on which the lord ordinary proceeded. "The trustees failed", he said, "to consider the situation as it was at the testator's death". This view did not commend itself to any of the learned judges of the First Division, and I think that it is a misunderstanding of the evidence which makes it clear that the testator's death was the date to which the respondents addressed themselves. Then it was also said that it was not committed to the trustees to give a meaning to the words "placed under the control of" and that by misunderstanding these words they had gone beyond the limits of what had been committed to them. It was submitted that the words "or otherwise placed under the control" were only exegetical of the prior words "taken over by", and that, by interpreting them in a much looser sense, the trustees had given themselves a latitude beyond that assigned to them by the testator. I cannot agree. It appears to me clear that a taking over, which is an event which could result only from a particular operation of statute or from specific agreement, is contrasted with a much less definite condition of things, assumption of control, which may begin at a period difficult to fix and which may progress imperceptibly before becoming so complete as to divest the existing governing body of all control. And it is precisely because the testator appreciated that there might be an infiltration of control of this kind, difficult to define, and, perhaps, difficult to prove by evidence, that he committed to his trustees the duty of withholding the bequest unless they were satisfied that no such infiltration had occurred. He used the words "sole and absolute discretion" because he wished to make manifest his intention that the trustees' failure to be satisfied should be final and conclusive and not subject to correction by a court of law which might take a different view from the trustees either on the meaning of "control" or on the assessment of the surrounding circumstances as evidence of control. It is material here to remember that one of the trustees, by his association with the infirmity, was in full possession of the facts, if any, which would be indicative of control. It was objected that on this view the testator had committed to his trustees the construction, both of his will and incidentally of the meaning and effect of the statute. I would not deny that, but no case was cited to us nor do I know of any which would compel me to treat as invalid the condition as I have construed it. The only relevant authority cited was *Low's Trustees* (2) when Lord President INGLIS, giving the leading judgment in the First Division, refused to entertain a question of law presented to the court in a Special Case, because it was a question which the testator had lawfully committed to his trustees. I see no reason to doubt the Lord President's judgment. If these two matters of law were committed to the trustees, it cannot be urged against their decision that it is invalid because it is founded on a misunderstanding or an error of law in respect of them. If it was committed to

the trustees to construe the word "control" or incidentally the terms of the Act, it was necessarily committed to them to construe wrongly as well as to construe correctly.

But then it was said that there is a limit of error which, if exceeded, will be corrected by a court of law.] Counsel for the appellants submitted that the test was whether any reasonable man fairly considering the matter could have arrived at the result at which the trustees arrived. He then argued that the trustees had committed two errors, each of which was in this sense excessive. First, he said, it was an error to treat the infirmity as affected at the testator's death by the nexus over its property created by a statute which had not then been passed; and, secondly, it was an error to entertain a doubt whether the effect of the nexus over the infirmity property had not placed the infirmity under the control of the State. I will assume that the trustees committed these two errors (for, in truth, as I shall explain later, I doubt if it is within my province to consider whether or how far they were wrong in their doubts or decisions). But the question, then, is whether these errors were so extravagant that no reasonable man could have fallen into them. On this I have no doubt whatever. It cannot be said that it was extravagantly unreasonable to apply a retrospective provision in considering the position of the infirmity at any time within the retrospective period, for the effect of making a provision retrospective is the same as a statutory declaration that at any time within the retrospective period the provision should be deemed to have been in force. Nor do I think it extravagantly unreasonable to doubt whether a nexus affecting the entire property of the infirmity and intended pro tanto to prevent the evasion of the expropriation sections of the Act might not have placed the infirmity to some extent under the control of the State.

These considerations suffice to dispose of the appeal. On the last issue discussed I have assumed that the appellants' major premise is well founded and that such an error committed by the trustees in arriving at their decision as a court of law would hold to be extravagant would in itself suffice to invalidate the decision. I think that the premise is open to doubt. Error, either of fact or of law, is no more than evidence of unreasonableness or of bad faith. Here, bad faith is not in issue. We are concerned only with unreasonableness, but there is other evidence in the case that the trustees addressed themselves to their duty carefully, seriously and impartially, and with a real desire to perform their duty to the best of their ability. One most important fact is that they took the advice of counsel and were guided by it and acted on it. That is itself powerful evidence against unreasonableness. I am not prepared to accept the view that the supposed unreasonableness of their decision or of the ground on which they reached it must outweigh more direct and satisfying evidence that they behaved as reasonable men would.

My second doubt is more fundamental. I desire to reserve the question whether the trustees' decision to withhold payment because they were in doubt whether the infirmity had not been placed under the control of the State was, under the terms of this bequest, open to question on any ground save that it was dishonest, or that it involved a trespass beyond the limits of what was committed to them by the testator. What we have to ascertain is, after all: What did the testator intend? His intention must be inferred from the language of his will, and not guessed at. But it is one thing to say that the trustees must honestly discharge their trust and keep within the bounds of the powers and duties entrusted to them, and quite another to say that they must not fall into errors which other persons, including a court of law, might consider unreasonable. One may usefully reflect that reasonable people often differ about what is reasonable, and it may be that the testator inserted the words "in their sole and absolute discretion" in order to exclude from the purview of the courts the kind of questions which have occupied so large a part of the time given to this appeal. The analogy which

the Lord President found helpful, between the duty of the trustees under this will and the duty of a Scottish arbiter acting under a contract, may not be complete, but I am not satisfied that it is misleading. LORD KEITH's criticism that the trustees' duty was fiduciary, with the implication that an arbiter's duty is not, does not appeal to me. A fiduciary duty is one which must be discharged with a good conscience and, regardless of personal interests and prejudices, for the benefit of another, and the arbiter's duty is no less fiduciary than that of trustees.

Before parting with the case there are two points of procedure with which I must deal. LORD CARMONT was of opinion that the action was incompetent because it did not conclude for reduction of the trustee's minute in which their final decision was recorded. The Dean of Faculty declined to support this opinion. I think that it is not necessary for beneficiaries suing for payment of a legacy to reduce the minute in which the decision of the trustees to withhold payment is recorded, and I do not know of any advantage which a reductive conclusion would secure. Then the Lord President took the view that, though a proof had been taken in which the whole facts had been investigated, the respondents were not entitled to a decree of absolvitor, and accordingly the defenders' plea to relevance was sustained and the action was dismissed. Counsel for the appellants was not able to explain the reasons for this, and I think that the respondents were entitled to be assoilzied. In the fullest sense the decision between the parties is *res judicata* and I cannot conceive that the appellants ought to be entitled to raise another action on the same grounds and concluding for payment of the legacy. *Cunningham v. Skinner* (3) shows the confusion and injustice that may result from dismissing an action when the defender is entitled to a decree of absolvitor. But no motion has been made on behalf of the respondents except to dismiss the appeal. I would, therefore, dismiss the appeal with costs.

LORD MORTON OF HENRYTON: My Lords, I concur in the motion proposed by my noble and learned friend on the Woolsack, but as there has been a considerable difference of opinion in the Court of Session I shall state my reasons briefly in my own words.

By cl. 6 (c) of his will, the testator Thomas Norman Jarvis Bell directed his trustees, as soon after his death as might be convenient for them and free of all government duties, but without interest, to pay (*inter alia*) a legacy of £10,000

"to the Dundee Royal Infirmary . . . provided always, however, that the said £10,000 shall be payable as aforesaid only if my trustees shall in their sole and absolute discretion be satisfied that at my death the said infirmary has not been taken over wholly or partly by or otherwise placed under the control of the State or of a local authority or of a body directly or indirectly responsible to the State and/or a local authority."

My Lords, I read this bequest as a gift of a legacy on a condition. If, but only if, the trustees are in their sole and absolute discretion satisfied as to the existence of a particular state of facts at the death of the testator, the legacy is payable; if the trustees are not so satisfied, the legacy is not payable. It is, I think, plain that the trustees were entitled to consider the matter for a reasonable time, but when they came to give it their final consideration it would be their duty to cast their minds back to the state of affairs at the death of the testator. The trustees gave this matter their final consideration on Mar. 1, 1948, and it is not suggested that they delayed their decision to an unreasonable extent. On that date the trustees, through their solicitors, said, in effect, "We are not satisfied that at the testator's death the infirmary had not been taken over wholly or partly by or otherwise placed under the control of the State or of a local authority or of a body directly or indirectly responsible to the State and/or

a local authority". Thus, the only event on which, according to the terms of the will, the legacy was payable has not happened. Notwithstanding the words "in their sole and absolute discretion", I do not regard the trustees as having a discretionary power under this will, in the ordinary sense of that phrase. The case differs from one in which, for instance, trustees are given a discretion to pay or not to pay certain sums by way of maintenance of a particular beneficiary.

A The duty of the trustees was simply to apply their minds honestly to a consideration of the question whether a certain event had or had not happened at the date of the testator's death. If they were satisfied that this event had happened, or if they were not satisfied that it had not happened, they were bound to withhold the legacy. On the other hand, if they were satisfied that this event had not happened, they were bound to pay the legacy. In neither case did it lie within their discretion to pay or to withhold the legacy. In my view the effect of the words "in their sole and absolute discretion" was simply to emphasise the testator's wish that the matter should rest entirely on the satisfaction or non-satisfaction of the trustees, and that the trustees, and not the court, were to decide as to the existence or non-existence of the given state of facts. The trustees named by the testator, two of whom survived him, were (i) his brother-in-law, (ii) a close friend who was also the treasurer of the infirmary, and (iii) his nephew, and I think the will shows that he relied on their judgment and good sense.

My Lords, if this is the true construction of the clause, it is necessary to consider on what grounds the appellants can claim this legacy. They do not allege that the trustees acted dishonestly and I can see no evidence that the trustees did not apply their minds to the proper question. Counsel for the appellants submits that the appellants can succeed if they prove that no reasonable man, fairly considering the facts, could have taken the view which the trustees took. I am prepared to assume that the burden of proof resting on the appellants is no heavier than this, though I think that it may well be heavier, having regard to the wording of this very unusual clause. On that assumption, I think it is impossible to say that the appellants have discharged this burden. The trustees have given their reasons, whether or not they were bound to do so, and I only find it necessary to refer to one of them. They took the view that the National Health Service (Scotland) Act, 1947, s. 9 (8), which came into operation on May 21, 1947, in effect applied a "government nexus" retrospectively from Mar. 21, 1946, onwards, on all property belonging to the Royal Infirmary and that for this reason the infirmary had, at the death of the testator, been placed under the control of the State. I am not sure if I should have taken the same view, but I am quite unable to say that it is a view which could not be taken by any reasonable man, and it was confirmed by learned counsel whose opinion was sought by the trustees. For these reasons I agree that the appellants' claim to this legacy must fail.

G LORD REID: My Lords, the testator's legacy of £10,000 to the Dundee Royal Infirmary was bequeathed subject to the condition that it was only to be payable if his trustees, the respondents,

"shall in their sole and absolute discretion be satisfied that at my death the said infirmary has not been taken over wholly or partly by or otherwise placed under the control of the State or of a local authority or of a body directly or indirectly responsible to the State and/or a local authority."

H It is for the court to determine the meaning of this condition. If the respondents are right its meaning is simple: the testator directed his trustees to consider the whole matter and to decide whether or not they were satisfied that none of the events referred to had occurred before the testator's death. The determination of every question which the trustees might find it necessary to determine before deciding whether or not they were so satisfied as well as this final decision

was to be in the sole and absolute discretion of the trustees, i.e., they and they alone were to be the judges of all these matters.

I find it more difficult to state in simple form the contention of the appellants, but I think that it comes to this. The testator intended that his trustees should be judges of fact but not judges of law; before reaching their final decision the trustees would not only have to find out the facts; they would also have to consider what the testator meant by "taken over" or "placed under the control"; and, if they did not come to a final conclusion until some time after the testator's death, they might also have to consider whether or how far it was proper for them to have regard to things that had happened after the date of death. These are questions of law, and if it could be shown that the trustees took a wrong view on any of these questions, and so misdirected themselves in law, then it is said that their decision cannot stand.

It was argued that the testator entrusted a power to his trustees and that it must always be for the court to determine the limits of any power. If the trustees, on a mistaken view of the limits of the power, acted beyond its limits, then their action is of no effect. It was said that in this case the power was to decide whether the infirmary had been placed under the control of the State or any other authority mentioned; to decide anything else would be to go beyond the limits of the power; and, if the trustees took a wrong view of the meaning of control in this context, they did decide something beyond the limits of the power entrusted to them. I do not think that the duty which the testator placed on his trustees in this matter can properly be described as a power, but, apart from that, this argument appears to me to beg the question, because it assumes that the testator did not confer a "power" on his trustees to determine what the testator meant by control. The argument could only have any validity if it were beyond the power of a testator under Scots law to make his trustees the judges of such a question. I can see no reason in principle why a testator should not be entitled to do this, and I know of no authority against it. The only authority at all near the present case which was cited is *Low's Trustees* (2). There a Special Case was presented to have it determined whether certain sums realised from working a quarry and from the sale of thinnings of plantations belonged to the life renter of the residue of the testator's estate or should be retained by the trustees and accumulated for the benefit of the fiar. The testator had made his trustees the sole and only competent judges of what was to be included in the residue and what formed part of the annual profits. By reason of this provision the First Division held that they could not entertain the case. Lord President INGLIS said (8 Sc. L.R. 638):

"... we must satisfy ourselves that it was the intention of the testator here to prevent any such legal proceedings being taken by his trustees or the beneficiaries. As to the competency of a testator making such a provision, I really cannot entertain much doubt. If a testator were to lay down in his will that there was to be no litigation about his succession whatever, I should have great doubt about the validity of such a provision. But where a testator, merely provides that there shall be no going to law upon certain special points, and arranges so clearly for their determination as here, the case is very different, and the provisions must receive effect."

I am content to accept that statement of the law, and, therefore, the question is one of construction: Has the testator so provided in this case?

In my opinion, the only reasonable interpretation of the words used by the testator is that he intended his trustees to be the sole judges of all the matters which they had to consider in carrying out the duty which he put on them. That is the natural meaning of the clause, and, even if it is capable of being otherwise construed, I can see nothing either in the context or in any other relevant circumstances to make one think that he had any other intention. If it were for the court to determine the meaning of control in this context then very little would

be left for the trustees to determine and the words "in their sole and absolute discretion" would not be at all appropriate. I am satisfied that these words show that the testator did not intend that there should be anything in the nature of an appeal from the decision of his trustees. But by making his trustees the sole judges of a question a testator does not entirely exclude recourse to the court by persons aggrieved by the trustees' decision. If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene, but nothing of that kind is alleged in this case. The appellants' case here is that, although the respondents acted with deliberation and in good faith, their decision was unreasonable in the sense that no reasonable man could have failed to be satisfied that the infirmary had not been placed under the control of the State before the testator's death. In this case, the respondents have not objected to that being taken as a proper test and I shall consider the facts on that view, but I wish to reserve my opinion whether that is the proper test in cases of this kind.

The testator died on Apr. 16, 1947. The respondents first considered the condition attached to the legacy on Apr. 22 when they came to the provisional decision that, having regard to the provisions of the National Health Service (Scotland) Bill, they were not satisfied that the infirmary could then be considered as free from State control. This was intimated to the infirmary and correspondence followed. Then in February, 1948, the respondents took the opinion of counsel. In their memorial they put the whole matter before counsel, and stated that notwithstanding what had been said on the other side they were still not satisfied. They asked whether they should resist the demand made to pay over the legacy. Counsel advised that the decision to refuse to pay the bequest was, in his opinion, justified on the terms of the National Health Service (Scotland) Act, 1947, and, in particular, he referred to s. 9 (8) of the Act as in effect applying a government nexus retrospectively from Mar. 21, 1946, onwards on all property belonging to the infirmary. He stated with regard to the words "placed under the control of the State" that they appeared to him apt to cover just such a situation as was created by s. 9 (8). The respondents accepted this advice, and intimated their final decision on Mar. 1, 1948.

Section 9 (8) of the Act is in the following terms:

"Where any property was, at any time between Mar. 21, 1946, and the appointed day, held or used by such persons and for such purposes as would result, but for anything done after the said date, in the transfer of the property to the Secretary of State or to a board of management under the foregoing provisions of this Part of this Act, and that property ceases to be so held or used before the appointed day, it shall nevertheless be treated for the purposes of those provisions as if it had continued to be so held or used until the appointed day, unless it is proved by a person whose interest in that property would be transferred to the Secretary of State or to a board of management under those provisions, that the fact that it was not so held or used immediately before the appointed day was due to something done or occurring in the ordinary course of business, or was in no way connected with the said provisions."

The reason why the sub-section is retrospective to Mar. 21, 1946, is that the Bill for England was published on that day. Apparently it contained a similar provision and it still contained that provision when it became law in November, 1946. The Scottish Bill containing that provision was published on Nov. 26, 1946. In those circumstances, at the date of the testator's death no prudent governing body of a voluntary hospital in Scotland could neglect this retrospective provision in the Scottish Bill in dealing with their property. They could not safely alienate it unless they were satisfied that if any question were

raised later they would be able to prove affirmatively that the alienation had been in the ordinary course of business or was in no way connected with the provisions of the Bill. [What the respondents had to consider was whether they were satisfied that this did not amount to placing the infirmary under the control of the State. They were advised by counsel that in his opinion it did. So, if the appellants are to succeed, they must be able to say that any reasonable man in the position of the respondents would have been satisfied that counsel was wrong. That appears to me to be a hopeless contention.] The respondents also relied on other grounds, but, if they had one ground on which they could reasonably not be satisfied, that is sufficient, and I need not consider those other grounds. I have had an opportunity of reading the speech of my noble and learned friend, LORD NORMAND, and I agree with it. I agree that this appeal should be dismissed.

LORD TUCKER: My Lords, the testator, by his will dated Mar. 11, 1946, left a legacy of £10,000 to the Dundee Royal Infirmary, but added a proviso in these words:

“provided always . . . that the said £10,000 shall be payable as aforesaid only if my trustees shall in their . . . absolute discretion be satisfied that at my death the said infirmary has not been taken over wholly or partly by or otherwise placed under the control of the State or of a local authority or of a body directly or indirectly responsible to the State and/or a local authority.”

It is important to notice that before the legacy could be paid the trustees had to be satisfied of a negative, i.e., that certain results had not been brought about. In other words, if they were left in doubt whether or not any one of these results had occurred the legacy would not be payable. The contingency on which the payment depended was the state of mind of the trustees, not the existence in fact or in law of some objective state of control. Although the word discretion is used, this is not a case of the exercise of a discretion in the true sense of the word, as, for instance, when trustees are given a discretion to pay or not to pay money to a beneficiary or a discretion as to the amount of any such payment. I do not, therefore, derive much assistance from authorities dealing with the exercise by trustees of discretionary powers such as these. The proviso in this case is, in my view, designed to put the trustees in much the same position as an arbitrator under an arbitration clause in a contract. The words “in their sole and absolute discretion” in their present context mean, I think, that the trustees are to be the sole judges of matters which in the present instance may involve mixed questions of fact and law and that their decision both as to the relevance of the matters to be considered and as to the resulting conclusion is to be final. It is, I feel, to be regretted that a provision so clearly intended to avoid expensive litigation should have resulted in a journey to your Lordships’ House. No case has been cited in argument to show that the courts in Scotland will not give effect to such a clause as this. On the contrary, *Low’s Trustees* (2) tends to support its validity. It is, no doubt, true that the court has power in a case like this, if the trustees have perversely failed or refused to consider the question committed to them, or have determined a matter which was never left to them, or have acted in bad faith, but no such considerations exist in the present case.

The testator died on Apr. 16, 1947. On that date the National Health Service (Scotland) Bill was before Parliament, and had received its first reading. It received the Royal Assent on May 21, 1947, and came into force on the appointed day, July 5, 1948. The trustees’ final decision as to non-payment of the legacy was not reached until Mar. 1, 1948. On that date the trustees had to consider the position as it had been on Apr. 16, 1947, but they were entitled to take into consideration any matters which had come to their knowledge in the interval

in so far as they affected the position as at Apr. 16, 1947. One of these matters—and, in my view, on the evidence clearly the decisive factor—was s. 9 (8) of the Act which had by then become law with retrospective effect to Mar. 21, 1946, with the result that on that date the funds and property of the infirmary were to a certain extent “frozen”. They had taken counsel’s opinion on this sub-section and had been advised that it had resulted in “control” within the meaning of the will. My Lords, I hold the view that nothing short of dishonesty on the part of the trustees in arriving at their decision would avail the appellants in this case, but I will assume that unreasonableness would suffice. Even so, I find it quite impossible to say that there was not material which could reasonably raise a doubt in the minds of the trustees whether or not the infirmary had as at Apr. 16, 1947, been placed under some degree of State control by the retrospective operation of this sub-section. On this view of the case, I find it unnecessary to consider any of the other matters relied on by the trustees. As I consider the doubts arising from this section would alone justify the non-payment of the legacy, it is not material to investigate whether that which had already been made doubtful had become more doubtful in the minds of the trustees by the consideration of matters which might appear to me—as distinct from the trustees—to be irrelevant. I would, accordingly, dismiss the appeal.

LORD COHEN: My Lords, counsel for the appellants urged, and the Dean of Faculty did not dispute, that it was for the court to construe the language of the testator’s will in order to ascertain the ambit of the discretion or duty conferred or imposed on the trustees of the will. Applying this principle, counsel argued that it was for the court to determine what was meant by the words “otherwise placed under the control” and that the trustees’ discretion or duty, whichever it might be, played no part in this field at all. The Dean of Faculty contended that this was giving inadequate effect to the words “in their sole and absolute discretion” and that the duty of the trustees was to ascertain the relevant facts as at the date of the testator’s death and then decide as a matter in their discretion whether those facts established to their satisfaction that the infirmary was not under the control of the State or of a local authority or of a body directly or indirectly responsible to the State and/or a local authority. I agree with the Dean of Faculty. The expression “under the control of” is not a technical expression, and I do not think it is limited to legal control. It would cover de facto control. For instance, to adopt the language of the Companies Act, 1948, s. 200 (9) (a), if the governors of the infirmary were “accustomed to act” in accordance with the “directions or instructions” of the Minister of Health, the trustees would, I think, plainly be entitled not to be satisfied that the infirmary was free from what may loosely be called “public control”. The question whether or not de facto control exists seems to me to be essentially a question which the testator might wish to leave to the unfettered discretion of his trustees, especially as one of them was the treasurer of the hospital, and, in my opinion, he has used language apt for this purpose.

Counsel for the appellants argued that the court would invalidate the decision of trustees on a matter in their discretion if (i) they acted in bad faith, or (ii) they exceeded the bounds of their discretion, or (iii) if the discretion has been exercised unreasonably. The Dean of Faculty did not dispute that the court might interfere on the first or second grounds. He argued that the third ground should be stated as follows: “if trustees in purported exercise of their discretion acted in a manner that no reasonable trustee acting within the bounds of the duty laid on him by the testator could possibly act.” There is much to be said for this statement of the principle, but I do not find it necessary to decide whether counsel or the Dean of Faculty is right, since I am satisfied that on either statement of the principle the appeal must fail. Counsel did not suggest that the trustees had acted in bad faith. He did, however, argue that they had exceeded the bounds of their discretion by not confining themselves to the position as

at the date of the testator's death. If by that he meant that the point of time to which they directed their attention in deciding whether the infirmary was under public control was not the date of the testator's death, I agree with my noble and learned friend, LORD NORMAND, that on a true reading of the evidence it makes it clear that the date of the testator's death was the date to which the trustees addressed themselves. I think, however, counsel's real complaint was that in reaching their conclusion the trustees had taken into account events which occurred after the testator's death, viz. (i) an arrangement reached in May, 1946, with the Department of Health for advances which contained conditions restrictive of the freedom of action of the governors of the infirmary and retroactive to a date antecedent to the death of the testator; (ii) discussions subsequent to the testator's death with regard to the re-allocation of patients among hospitals in the area after the National Health Service should come into operation; (iii) correspondence as to the nurses' home which led to the department referring back to the infirmary plans for alterations in order that alterations required by the department involving an additional expenditure of over £3,000 might be made therein. I will assume without deciding that all these were irrelevant matters, but I do not think this helps counsel. The legacy was only to be payable if the trustees entertained no doubts on the control question. Even if all the above matters are excluded, I am unable to say that there was no evidence on which the trustees might reasonably entertain doubts thereon. At the testator's death, the Scottish Bill had been before Parliament for over five months. It contained a clause (cl. 9 (8)) with retroactive effect which has already been read to your Lordships, and which might well raise doubts in the trustees' minds as to whether at the date of the testator's death the infirmary was free from the control of the Department of Health. These doubts would be reinforced by the fact that a similar clause had been included in the English Act which had already been passed by Parliament.

Having regard to the nature of the discretion conferred on the trustees, it seems to me impossible to hold that they had exceeded the bounds placed by the testator on the exercise of that discretion. It seems to me still more impossible to say that they acted unreasonably. As I have already said, I think the provisions of cl. 9 (8) might give rise to reasonable doubts, but the trustees did not act on their own unaided judgment. They consulted counsel, and their final decision was in accordance with his advice. Reading the evidence as a whole, I think their conduct throughout was eminently reasonable. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Beveridge & Co.*, agents for *Alex Morison & Co.*, Edinburgh, and *J. & H. Pattullo & Donald*, Dundee (for the appellants); *Martin & Co.*, agents for *Dundas & Wilson*, Edinburgh, and *Shiell & Small*, Dundee (for the respondents).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

B. AND B. VIENNESE FASHIONS v. LOSANE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.),
February 26, 1952.]

Control of Goods—Sale of controlled goods—Omission to furnish invoice containing specified particulars—Contract rendered illegal—Utility Mark and Apparel and Textiles (General Provisions) Order, 1947 (S.R. & O., 1947, No. 2642), art. 10 (1).

By the Utility Mark and Apparel and Textiles (General Provisions) Order, 1947 art. 10 (1): "A manufacturer of controlled goods shall in relation to the supply in pursuance of a contract of sale of any such goods, being utility goods manufactured by him, to a person other than a retail customer furnish to that person . . . an invoice containing the particulars hereinafter specified." By art. 18 (2): "'manufacture' includes making up . . . and goods shall be deemed to be manufactured by . . . (b) any person who in the course of his business was a party to a contract of work and labour (with or without the provision of materials) providing for the carrying out of a process in the manufacture of those goods . . ." In purported performance of a contract for the sale of non-utility ladies' jackets the plaintiff employed outworkers to make, and delivered to the defendant (a person other than a retail customer), utility jackets which the defendant had ordered to be made up for him, and he failed to deliver to the defendant an invoice as required by art. 10 (1). In an action for the price of the goods,

HELD: (i) the plaintiff was a "manufacturer" within the meaning of art. 10 (1) of the order since he had been a party to a contract of work and labour for the manufacture of utility goods; art. 10 (1) contained a positive obligation to furnish the invoice specified; as the result of the failure to supply the invoice the contract became tainted with illegality; and, therefore, the plaintiff could not recover.

Anderson, Ltd. v. Daniel ([1924] 1 K.B. 138), applied.

EDITORIAL NOTE. The Utility Mark and Apparel and Textiles (General Provisions) Order, 1947, was revoked as from March 17, 1952, by the Utility Goods (Revocation) Order, 1952 (S.I., 1952, No. 489), but it is submitted that this decision applies whenever an order provides for the furnishing of documents or invoices in relation to the sale or supply of goods. For instance, the Domestic and Ornamental Pottery (Manufacture, Marking and Supply) Order, 1950 (S.I., 1950, No. 1130) and the Women's and Maids' Nylon Stockings (Marking and Supply) Order, 1952 (S.I., 1952, No. 402) require the furnishing of documents or invoices in relation to the supply of the goods to which they relate, and the Price Controlled Goods (Invoices) Order, 1943 (S.R. & O., 1943, No. 604), which has much the same provisions as art. 10 of the Utility Mark and Apparel and Textiles (General Provisions) Order, 1947, requires the furnishing of an invoice in relation to the sale of any price controlled goods otherwise than to a retail customer.

AS TO EFFECT ON CONTRACTS OF THE IMPOSITION OF A STATUTORY PENALTY, see HALSBURY, Hailsham Edn., Vol. 7, p. 165, para. 236; and FOR CASES, see DIGEST, Replacement Vol. 12, pp. 304-306, Nos. 2337-2356.

Case referred to:

(1) *Anderson, Ltd. v. Daniel*, [1924] 1 K.B. 138 ; 93 L.J.K.B. 97; 130 L.T. 418; 88 J.P. 53; Digest Supp.

APPEAL by defendant and cross-appeal by plaintiff from an order made by His Honour JUDGE BLAGDEN at Westminster County Court, on Dec. 13, 1951.

The plaintiff claimed £68 10s. 11d. the price of goods sold and delivered. The defendant contended that the contract was for the sale of non-utility jackets, but that the plaintiff delivered utility goods without an invoice as required by

the Utility Mark and Apparel and Textiles (General Provisions) Order, 1947, made under the Defence (General) Regulations, 1939. The county court judge gave judgment for the plaintiff, but without costs, on the ground that the illegal performance of the valid contract did not disentitle the plaintiff to sue for the price of the goods. The defendant appealed, and the plaintiff cross-appealed against that part of the order depriving him of costs.

J. Jackson for the defendant.

Tibber for the plaintiff.

SIR RAYMOND EVERSHED, M.R.: This action was brought by B. & B. Viennese Fashions, which is the trade name of a Mr. Alexander, whom I shall call the plaintiff, for the recovery of £68 10s. 11d. in respect of the supply of certain goods. That sum was made up by reference to two separate parcels or lots (i) certain articles, the price of which was £13 10s. 11d., and (ii) ten ladies' jackets, for which the price was £55. The judge gave judgment for the plaintiff for both sums, and there is no appeal before us in respect of the smaller sum of £13 10s. 11d. The judge, however, deprived the plaintiff of costs in respect of both items, he taking the view, not unnaturally as will appear, that the performance of the plaintiff, both in court and in regard to the subject-matter of the larger claim, was in certain respects of a reprehensible character.

The difficulties in the case have not been eased by the form of the pleading. The particulars of claim, quite properly, specify generally that the cause of action was for the recovery of £68 10s. 11d., the price of goods sold and delivered between certain dates. The defence to that claim was (putting it briefly, and confining myself now to the £55), that the contract in respect of which the ten jackets were delivered was a contract for the sale of ten non-utility jackets and that the jackets delivered were utility jackets, but that the plaintiff, in breach of certain regulations, had disguised the nature of those goods, which rendered the sale unenforceable as being tainted by illegality. By way of reply the plaintiff said the contract was for the sale of utility jackets, and utility jackets were delivered. The judge came to the conclusion that the bargain was for the sale of non-utility jackets. He also came to the conclusion that while the goods were in the hands of the plaintiff's firm the utility labels originally attached to the goods had been unlawfully removed. It was not in dispute that no invoice had been delivered or furnished to the defendant pursuant to art. 10 (1) of the Utility Mark and Apparel and Textiles (General Provisions) Order, 1947 (S.R. & O., 1947, No. 2642), which, as the defendant has contended, was applicable to this case on the footing that the goods were utility goods. It is not in dispute that that order was duly made under the Defence (General) Regulations, 1939, and is applicable to utility goods of the kind here in question. The defendant accepted these goods as delivered, but he said that he did so innocently, supposing that they were non-utility. He proceeded to dispose of them in the ordinary way of business to customers from whom he received a price, but he now says that he is excused from paying the price which the plaintiff claims because of the taint of illegality. It may be that the conduct of none of the parties concerned in this transaction is wholly laudable, but we are concerned on this appeal with the single question: Was there here such a breach of the regulations affecting these goods that, in the interests of public policy, the plaintiff is disabled from enforcing his contract?

These goods were made originally as utility goods. The judge accepted the evidence of the actual person who made them, a Mr. Shine. He, apparently, only manufactured utility goods, and, according to his evidence, he applied the appropriate labels to the goods when they were manufactured. Two articles of the order I have mentioned have been in question here. The first is art. 2, the first paragraph of which provides:

"No person shall remove or deface the utility mark . . ."

or certain other marks, from any utility goods. It is, therefore, beyond doubt that, if the plaintiff removed or defaced these utility marks he committed a breach of the regulations. The provision which is more important as matters have turned out is art. 10 (1), which provides:

A "A manufacturer of controlled goods shall in relation to the supply in pursuance of a contract of sale of any such goods, being utility goods manufactured by him, to a person other than a retail customer furnish to that person, not later than seven days after the supply of the goods, an invoice containing the particulars hereinafter specified".

I need not read what is "hereinafter specified," for it is not in dispute here that no such invoice was delivered by the plaintiff to the defendant. It is, perhaps, convenient to say that the obvious purpose of that provision is to identify, in the way in which it sets out to achieve, the source and character of the utility goods, so as to see that goods sold as such comply with the requirements affecting such goods.

B The first question which arises on art. 10 (1), is whether the plaintiff in any case was a "manufacturer of controlled goods". The actual making, the physical operation of making the goods, was performed by Mr. Shine, but the evidence of the plaintiff in the course of cross-examination included these statements:

C "I am a manufacturer. I buy from other firms. I employ outworkers. These people [Mr. Shine and others] were outworkers and supplied own material remnants left over. This is what is called 'making up'. I take or choose materials and order garments to be made up: 'Here is what I want, make me so many jackets.'"

D Unfortunately the judge has not in terms come to a conclusion of fact on this matter, although he has indicated by his notes in the course of the evidence that he thought that the plaintiff was a manufacturer within the paragraph, and I agree with him. The definition to which it is necessary to refer appears in art. 18 (2)

E "'manufacture' includes making up . . . and goods shall be deemed to be manufactured by . . . (b) any person who in the course of his business was a party to a contract of work and labour (with or without the provision of materials) providing for the carrying out of a process in the manufacture of those goods . . . 'manufacturer' shall be construed accordingly".

F On the evidence I have read from the cross-examination of the plaintiff, it seems to me that he was a "person who in the course of his business was a party to a contract of work and labour", namely, a contract with Mr. Shine, which provided "for the carrying out of a process in the manufacture of those goods". Mr. Shine was engaged, as the plaintiff says, as an outworker to make as many jackets as the plaintiff ordered and specified.

G Counsel for the plaintiff has said that the words which follow in the paragraph:

" . . . so, however, that a reference to any person as having actually manufactured any goods shall be construed as a reference only to a person of the description specified in sub-para. (a) hereof . . . "

H take this case out of the ambit of the definition. I cannot agree with that contention. We are not here concerned with a reference to any person as having actually manufactured the goods. For the reasons which I have indicated, I think that the plaintiff was a manufacturer within the definition of art. 18 (2), and, therefore, is "a manufacturer of controlled goods" within art. 10 (1).

Does what immediately follows in art. 10 (1) apply? Such a manufacturer, says the paragraph

" . . . shall in relation to the supply in pursuance of a contract of sale of any such goods, being utility goods manufactured by him, to a person other than a retail customer furnish to that person . . . "

an invoice of the kind mentioned. It is said by counsel for the plaintiff that the words "any such goods, being utility goods manufactured by him" qualify the phrase "in pursuance of a contract of sale", and that, since on the judge's findings it was a contract of sale of non-utility goods, art. 10 (1) has no application. I do not agree. I think the natural reading of this phrase compels the reader to relate the words "any such goods, being utility goods manufactured by him" back to the phrase "in relation to the supply". Unless it were so, as JENKINS, L.J., pointed out, the words "in relation to the supply" would be left (as it were) in the air. The effect, therefore, in my judgment, is that, if the plaintiff, being, as I hold, a manufacturer, proceeded to supply in pursuance of a contract of sale utility goods manufactured by him to a person other than a retail customer—all of which he did, for the defendant was not a retail customer—then he was obliged to furnish to that person, within the time specified, an invoice containing the requisite particulars. That he failed to do.

What then is the result? In my judgment, *Anderson, Ltd. v. Daniel* (1) provides the answer to that question. That was a case concerned with the supply under a contract for sale of certain articles which fell within the Fertilisers and Feeding Stuffs Act, 1906, s. 1 (1), which says:

"Every person who sells for use as a fertiliser of the soil any article which . . . has been imported from abroad, shall give to the purchaser an invoice stating . . . what are the respective percentages (if any)"

of certain chemical substances contained in the article. It appeared that the plaintiffs in that action had sold some stuff known as salvage, which was the sweepings of the holds of ships bringing from abroad cargoes of, among other things, sodium nitrate, and it was, therefore, not in issue that the subject-matter of that sale of salvage was an article within the language of s. 1 (1) of that Act of 1906. The plaintiffs had failed to supply any such invoice as was required. It was argued that commercially speaking it was impracticable to do so, because the chemical composition of these sweepings could only be ascertained as a result of an elaborate analysis which would make nonsense of the commerce between buyers and sellers of salvage. This court came to the conclusion that the words of the Act were compelling in their effect and that there was a duty imposed by the statute in the clearest terms (and subject to a penalty in case of breach) to provide such an invoice, that the object of that provision was to protect the public, and that failure to comply with the section was an illegality which tainted the contract and prevented the plaintiff suing on it.

In my judgment, that is the effect of art. 10 (1) of the order of 1947. It contains a positive obligation that a supply of utility goods under a contract of sale must be followed within the requisite dates by the invoice specified. Regulation 92 of the Defence (General) Regulations, 1939 (which is applicable to the case) imposes a penalty for failure to comply with these requirements. The plaintiff having failed so to do, he cannot escape the result that his sale is tainted with the illegality consisting of a breach of the regulations, and, therefore, it cannot be enforced by him.

It was alternatively suggested that, since, on the judge's findings, the plaintiff had committed the further offence of defacing the utility mark, he was for that reason also disabled from enforcing his contract. I find it unnecessary to express any final conclusion on that. Counsel for the plaintiff has argued that there was no, or no sufficient, evidence to support the finding that the defacement had been done by the plaintiff's agent. As at present advised, I think there was sufficient evidence, but I do not find it necessary to express any view whether, assuming that against the plaintiff, his breach of that paragraph vitiates his right to sue for the purchase price of the articles so defaced which he supplied to the defendant and which the defendant accepted.

In the result, I have come to a different conclusion from that of the judge. According to him, the present case was to be distinguished from *Anderson, Ltd. v. Daniel* (1), and he gave illustrations to show that the conclusion which I reach would lead to remarkable results. I do not find that difficulty. I think the question turns on the meaning and effect of art. 10 (1) of the order of 1947, and, if its effect is to make it illegal to supply utility goods save on the terms or under the condition that the requirement in regard to such a sale for delivery of an invoice are observed, then I think that, as happened in *Anderson, Ltd. v. Daniel* (1), the breach by the plaintiff of that obligation so tainted the contract as to disable him from suing for the purchase price. The result of that view is that the defendant must be entitled to succeed as to the £55. With regard to the £13 10s. 11d., no appeal has been brought against the finding of the learned judge in favour of the plaintiff, but the question will then arise as to how the costs of the hearing below fall to be dealt with. There was a cross-appeal against the learned judge's refusal to allow any costs to the plaintiff as regards any part of his claim in the court below and I must say that in the circumstances I find it impossible to say that the judge was not, in all the circumstances of this case, entitled in his discretion to say that the plaintiff should not be entitled to any costs. The cross-appeal, therefore, must fail.

JENKINS, L.J.: I agree. On the evidence it is reasonably plain that the plaintiff was, in relation to the garments here in question, a manufacturer within the meaning of art. 18 of the order of 1947. I think that under art. 10 (1) a manufacturer is obliged, when, in pursuance of a contract of sale of any controlled goods, he supplies to any person other than a retail customer utility goods manufactured by him, to furnish an invoice within the time and containing the particulars prescribed by the regulation. It follows that the plaintiff, in supplying to the defendant firm in purported pursuance of the contract of sale, utility goods which were not accompanied or followed in due time by the prescribed invoice, committed a breach of art. 10 (1). The judge held in effect that this was immaterial because the contract in itself had nothing illegal about it. He held that on the evidence it was a contract for the sale of certain non-utility garments, and, being such a contract, it could only be properly performed by delivery of garments of that description. The judge's reasoning from that point in effect proceeded thus: In this state of things it matters not that the plaintiff chose, in breach of the contract, to deliver utility goods and in so doing to commit a breach of art. 10 (1). This conduct of the plaintiff involved a breach of contract, but the breach was waived and the goods were accepted by the defendant firm, and there is no reason for disentitling the plaintiff firm from recovering the purchase money. With this reasoning I find myself unable to agree.

It is plain from *Anderson, Ltd. v. Daniel* (1) that illegality in the performance of a contract may avoid it although the contract was not illegal ab initio. That being so, one has to consider whether the mode in which the contract was performed, or purported to be performed, in this case sufficed to turn it into an illegal contract. I find myself constrained to hold that this was the result. If the judge's reasoning was right, the most remarkable consequences would ensue. The contract, having been made as a contract for non-utility garments, the plaintiff having purported to perform that contract by delivering utility garments and having broken the regulation in the matter of the invoice, and the defendant firm having waived the breach and accepted the utility garments, there would result a transaction which was on the face of it illegal as having infringed art. 10 (1), but was, nevertheless, enforceable as a lawful transaction merely because the contract was in origin expressed to be a contract for the sale of non-utility garments. The plaintiff chose, in purported performance of the contract, to deliver utility garments without an invoice. As a performance of the contract, that was clearly an illegal performance in view of the provisions of art. 10 (1). The defendant firm accepted the goods so delivered and disposed of them. In

my judgment, that course of events must taint the whole contract with illegality, just as much as if it had been in origin a contract for the sale of utility garments. To hold otherwise would produce this absurdity. The plaintiff comes to the court and claims payment for goods sold and delivered. To make out that claim he must show delivery of the goods, and the delivery he relies on is the delivery of utility garments without an invoice. Thus, the plaintiff must either admit that he is seeking to recover on an illegal contract or else he must set up his own breach of contract and say that this delivery of utility garments without an invoice, although illegal, was not a delivery in pursuance of the contract at all, with the surprising consequences that, notwithstanding the breach of contract, the illegality, the plaintiff is entitled to recover the contract price. It seems to me that this is an absurd result. In my view, notwithstanding that the contract provided for the sale of non-utility goods, the delivery of what were in fact utility goods without an invoice did so taint the contract in its performance with illegality as to disentitle the plaintiff from recovering the price of the goods. I agree that the appeal should be allowed.

HODSON, L.J.: I am of the same opinion. The judge rightly held that the plaintiff was a manufacturer within the meaning of art. 10 (1) as defined by art. 18 of the order of 1947, and, having arrived at that conclusion, he was bound to find that, no invoice having been provided by the manufacturer, art. 10 (1) had been broken. He then, faced with the decision of this court in *Anderson, Ltd. v. Daniel* (1), sought to distinguish that case, and I think it was there that he fell into error. In *Anderson, Ltd. v. Daniel* (1) **BANKES, L.J.**, in dealing with the statutory penalty imposed for supplying fertilisers without an invoice, said ([1924] 1 K.B. 114):

"Here the penalty is imposed wholly for the protection of the public, and the purchaser is entitled to take the objection that as the vendors have failed to give the required invoice the contract of sale is illegal and they cannot sue for the price... So here I say that a vendor of fertilisers must comply with the provisions as to invoice in order to take advantage of the contract of sale. From that point of view it is unnecessary to consider whether the contract was illegal *ab initio*".

The matter is summarised by **SCRUTTON, L.J.**, where he says (*ibid.*, 147):

"When the policy of the Act in question is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions, and a penalty is imposed on the person omitting those formalities or conditions, the contract and its performance without those formalities or conditions is illegal, and cannot be sued upon by the person liable to the penalties".

In my opinion this case is parallel with *Anderson, Ltd. v. Daniel* (1), and, therefore, the appeal must be allowed.

Appeal allowed. Cross-appeal dismissed.

Solicitors: *M. A. Jacobs & Sons* (for the defendant); *Samuel Tonkin & Co.* (for the plaintiff).

(Reported by **F. GUTTMAN, ESQ., Barrister-at-Law.**)

WALLIS v. WALLIS (QUEEN'S PROCTOR SHOWING CAUSE).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), March 6, 14, 1952.]
Legal Aid—Costs—Queen's Proctor's intervention—Certificate granted for divorce suit—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 5 (2).

By the Legal Aid (General) Regulations, 1950, reg. 5 (2), a certificate entitling an assisted person to legal aid "shall not relate to more than one action, cause or matter". Where the Queen's Proctor intervenes in a divorce suit after a decree nisi has been pronounced, the suit and the intervention are not "one action, cause or matter" within the regulation, and, therefore, the petitioner is not entitled to contest the intervention under a certificate granted to him for prosecuting the suit.

FOR THE LEGAL AID (GENERAL) REGULATIONS, 1950, reg. 5 (2), see HALSBURY'S STATUTORY INSTRUMENTS, Vol. 5, p. 206.

INTERVENTION by the Queen's Proctor.

The case is reported only on the question of the costs of the intervention. The Queen's Proctor contended that the legal aid certificate granted to the petitioner for the purpose of prosecuting the suit did not cover the costs of the intervention. The petitioner contended that the certificate continued in operation until it was either discharged or revoked or until the conclusion of the "action, cause or matter", which in this case meant the decree absolute.

Comyn for the Queen's Proctor.

C. T. Reeve for the petitioner.

PEARCE, J.: This was a Queen's Proctor's intervention caused by the fact that the petitioner deliberately deceived the court as to the true circumstances of his own adultery. Counsel for the Queen's Proctor has submitted that the petitioner's legal aid certificate does not apply to the Queen's Proctor's intervention. The petitioner started as an assisted person, and, by reg. 20 (4) of the Legal Aid (General) Regulations, 1950, those regulations have applied to him at all material times.

Regulation 3 deals with applications by persons desiring legal aid and reg. 3 (3) reads:

"Every application shall contain such information and shall be accompanied by such documents as may be requisite to enable—(a) a local committee to determine—(i) the nature of the proceedings in relation to which legal aid is sought and the circumstances in which legal aid is required; and (ii) the question whether it is reasonable that a certificate should be granted . . ."

By reg. 5:

"(1) A certificate may be issued in respect of the whole or a part of—(a) proceedings in a court of first instance; or (b) proceedings in an appellate court. No certificate shall relate to proceedings (other than interlocutory appeals) both in a court of first instance and in an appellate court. (2) A certificate shall not relate to more than one action, cause or matter, but may include proceedings for the enforcement of any such order or agreement as is referred to in para. (3) of reg. 16."

Regulation 6 states that the committee may refuse an application for a certificate on the grounds:

" . . . (d) that the applicant has not shown that he has reasonable grounds for taking, defending or being a party to proceedings; or (e) that it appears unreasonable that he should receive legal aid in the particular circumstances of the case (whether as a result of any discretion given to a local committee under any provision of these regulations or otherwise) . . ."

Regulation 11 provides for the discharge and revocation of certificates. They may be revoked inter alia where the committee are satisfied that an assisted person in furnishing information has knowingly made a false statement or false representation. By reg. 11 (4):

"At any time during the hearing of any proceedings to which an assisted person is a party the court may, upon application by or on behalf of any other party to the proceedings . . . consider whether the assisted person . . . (b) in furnishing . . . information has knowingly made a false statement or false representation; and . . . may make an order revoking the certificate or discharging it from such date as may be appropriate and the court's decision shall be final . . ."

Regulation 14 provides that in certain circumstances an assisted person's solicitor shall apply to the legal aid committee and by para. (3):

"Where it appears to the assisted person's solicitor necessary for the proper conduct of the proceedings to take or to apply to the court for leave to take any one or more of the following steps, namely:—(a) to add any further party to the proceedings; or (b) to bespeak any transcript of short-hand notes of any proceedings; or (c) to lodge any interlocutory appeal; or (d) to instruct more than one counsel; or (e) to set up or set off any right or claim having the same effect as a cross-action (other than a counterclaim or set off arising out of the same transaction and capable of being pleaded as a defence), or to reply to any right or claim so set up or so set off by any other party; he shall (unless the certificate provides for the act in question to be done) apply to the appropriate area committee for authority so to do, and no payment shall be allowed on taxation for any such step taken without their approval."

Counsel for the Queen's Proctor argues that from the point of view of common sense it is right that a petitioner should have to go back to the legal aid committee in a case where he has obtained a decree nisi, but, owing to his own deception, the Queen's Proctor has intervened. It would be in accordance with the sense of the regulations, it is said, that the petitioner should have to put forward circumstances which will show the extent of the intervention, the nature of the intervention, and whether it is reasonable that a certificate should be granted to deal with that intervention. Alternatively, if the certificate is in force, counsel asks me to revoke it under reg. 11 (4).

Counsel for the petitioner, on the other hand, contends that the Queen's Proctor's intervention is covered by the certificate which was given to the petitioner for prosecuting a suit for divorce. He relies on reg. 11 (2) (c), which says that a certificate may be discharged or revoked by the area committee,

"if they are satisfied, after considering any report of the assisted person's solicitor, that the proceedings to which the certificate relates have been disposed of."

He argues that no certificate comes to an end until it is either discharged or revoked, and that this certificate has never been discharged or revoked. He says that a suit for divorce is not finished until a decree absolute has been pronounced, and in this case no decree absolute has been pronounced and the solicitor has not reported to the area committee under reg. 11 (2) (c). Further, he argues that under reg. 5 (2), whereby a certificate shall not relate to more than one action, cause or matter, it is implied that a certificate continues to exist for so long as that one action, cause or matter continues, and that the Queen's Proctor's intervention is part of the action, cause or matter which started as a suit for divorce. I am told that there is no authority which bears on the matter.

In my view, the Queen's Proctor's contentions are correct, for this reason. I do not think that the Queen's Proctor's intervention can properly be said to be included in the action, cause or matter for which the petitioner was given a certificate. That certificate was for a suit for divorce. In this intervention the title of the suit is different. There are new pleadings, new parties, and new issues. The issues fought out in the intervention were not issues in the original suit. The regulations envisage that the local committee shall have a reasonable control over the proceedings before they start, and should know what their nature is and whether it is reasonable to grant a certificate. If the result of giving a certificate for prosecuting a suit for divorce is that the assisted person may continue to keep the protection of that certificate even though he has lied and thus drawn down on himself a Queen's Proctor's intervention (which might last for several days), the control of the proceedings is entirely removed from the supervision of the local committee. From an administrative point of view it is clearly better that, as soon as the Queen's Proctor intervenes, the matter should go to the local committee again for them to consider whether they will issue a certificate for the petitioner to contest the Queen's Proctor's intervention.

Under reg. 11 (4), if the certificate were in force, I should have to consider the question of revoking a certificate where (as here) the assisted person has knowingly made a false statement or representation, and in such a case as this I should feel bound to do so. It is obviously better that the question whether there shall be a certificate for the intervention should be dealt with at the beginning of the intervention, rather than afterwards when all the costs have been incurred. That is a consideration which, of course, would not weigh with me if the regulations expressly provided otherwise, but where the rules are silent on a particular point and one is trying to get guidance from the general intention as shown by express regulations, that consideration is not to be wholly disregarded. Both from the language of the regulations and the general intention to be derived from them and also from the common-sense point of view it appears to me that a petitioner is not entitled to contest a Queen's Proctor's intervention under a certificate given to him for prosecuting a suit for divorce. Therefore, the petitioner in this case is not covered by the certificate that has been issued.

The practical result, so far as concerns the Queen's Proctor's costs, is unchanged by that conclusion. I have decided that I ought to order the petitioner to pay enough costs to make him appreciate that legal costs have to be paid, but at the same time order him to pay only such sum as he can over a period hope to discharge. I heard evidence in regard to his finances, and, in my view, the right order is that he should pay £25 towards the Queen's Proctor's costs. I shall assess the costs at that figure in order to avoid the expense of a taxation. The costs will be payable under an instalment order of 5s. a week, the first instalment being within fourteen days.

Order accordingly.

Solicitors: *Treasury Solicitor; A. M. V. Panton (for the petitioner).*

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

TOWNSEND (INSPECTOR OF TAXES) v. ELECTRICAL YARNS, LTD.

[CHANCERY DIVISION (Donovan, J., sitting as a judge of the Division), February 26, 29, 1952.]

Income Tax—Deductions against profits—Wear and tear—Balancing charge—Assessment—No effect on amount of profit chargeable—Income Tax Act, 1945 (c. 32), s. 55 (3).

A
B
A company permanently discontinued its trade in the year of assessment 1949-50. Its assessment for the penultimate year, 1948-49, based on the profits of the preceding year, was £3,038, and the actual profits of that year were £2,578. During that year the company sold plant and machinery on which, under r. 6 (1) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, it had been allowed deductions for wear and tear, the sale being at a price which recouped the company for its loss through wear and tear. As a result the company was assessed to a balancing charge under s. 17 and s. 55 (3) of the Income Tax Act, 1945. On the question what was the correct figure of assessment for the penultimate year,

C
HELD: under s. 55 (3) the assessment in respect of the balancing charge was a separate assessment and did not affect the amount of the profits chargeable, so that the company was correctly assessed on £3,038 in respect of the profits of the penultimate year and in addition on £600 in respect of the balancing charge.

D
FOR THE INCOME TAX ACT, 1945, s. 55 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 660.

Cases referred to:

- E
(1) *Whitney v. Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 28 Digest 105, 649.
(2) *Penang & General Investment Trust, Ltd. v. Inland Revenue Comrs.*, [1943] 1 All E.R. 514; [1943] A.C. 486; 112 L.J.K.B. 356; 169 L.T. 93; 25 Tax Cas. 219; 2nd Digest Supp.

CASE STATED by General Commissioners of Income Tax.

F
The company appealed to the general commissioners against an assessment of £600 in respect of a balancing charge for the penultimate year of its trade, 1948-49. The company contended that the balancing charge should be added to the amount of its profits of the penultimate year, and that, since its actual profits of the penultimate year, when added to the balancing charge, exceeded the assessment based on the profits of the preceding year, the additional assessment was limited to £140, the amount of the excess, by virtue of s. 31 (1) (b) of the Finance Act, 1926. The general commissioners accepted the company's contention, and reduced the assessment accordingly. The Crown appealed.

G
Heyworth Talbot, Q.C., and *Sir Reginald Hills* for the Crown.

Cyril King, Q.C., and *H. H. Monroe* for the company.

Cur. adv. vult.

H
Feb. 29. DONOVAN, J., read the following judgment. This company ceased to trade as cotton spinners on Dec. 21, 1949, and, accordingly, the assessment to income tax on its trading profits for the year of assessment 1949-50 fell to be computed on the company's actual profits from Apr. 6, 1949 to Dec. 21, 1949. In addition, the last year but one of the company's trading had to be considered in case the existing assessment for that year should require to be increased. Section 31 (1) (b) of the Finance Act, 1926, requires that this should be done in cases where the actual profits of a trader's penultimate year of trading exceed the assessment for that year. This might well happen in some cases because that assessment would be based on the profits of the year before the penultimate year. Accordingly, the inspector of taxes in the present case looked

at the penultimate year of the company's trading and found the actual profits were £2,578. But the existing assessment for that year, 1948-49, based on the results of the year before, was £3,038, and so no upward revision of the assessment was required. One may note in passing that no downward revision was required either, for the Income Tax Acts are one-sided on this point, and allow no such relief to the taxpayer.

- A So far, the case presents no difficulty, but, oddly enough, the next thing one finds is the company insisting that its assessment for the penultimate year, 1948-49, should be increased by £140. The explanation of this seeming aberration lies in the following circumstances. In this penultimate year the company sold some of its plant and machinery. In respect of that plant and machinery it had previously received wear and tear allowances. Deducting those allowances from the cost of the plant would leave what may be called the written-down value. The sale price of the plant and machinery exceeded the written-down value. In these circumstances something called a balancing charge has to be made on the company, the amount of that charge being on the surplus of sale price over written-down value, limited, however, to the amount of the wear and tear allowances previously received by the company. In other words, the effect of the balancing charge is to cancel allowances previously given for capital loss through wear and tear where that loss is recouped by the taxpayer on a sale of his machinery. In the present case it is agreed that the facts justified a balancing charge on the sum of £600 for the year 1948-49. Accordingly, a separate assessment was made for that year in that sum.

- D Against this assessment the company appealed to the general commissioners and persuaded them to reduce the assessment to £140. How this came about can best be explained by referring first of all to certain statutory provisions relating to a balancing charge. They are all contained in the Income Tax Act, 1945, and they begin with s. 17, which, so far as here material, says this:

- E “(1) Subject to the provisions of this section, where, on or after the appointed day, any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or a deduction under r. 6 of the Rules Applicable to Cases I and II of sched. D has been made or allowed for any year of assessment to a person carrying on a trade, that is to say, either—(a) the machinery or plant is sold, whether while still in use or not . . . and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Part of this Act referred to as ‘a balancing allowance’ or ‘a balancing charge’) shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs . . . (2) Where there are no sale, insurance, salvage or compensation moneys or where the amount of the capital expenditure of the person in question on the provision of the plant or machinery still unallowed as at the time of the event exceeds those moneys, a balancing allowance shall be made, and the amount thereof shall be the amount of the expenditure still unallowed as aforesaid, or, as the case may be, of the excess thereof over the said moneys. (3) If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess or, where the said amount still unallowed is nil, to the said moneys.”

Sub-section (4) limits the amount of the balancing charge to tax allowances previously received. As I say, it is common ground that s. 17 (1) (3) and (4) applies in this case, and that a balancing charge has to be made and the amount on which it is to be made is £600. Section 22 of the Act provides, among other things, that where a balancing charge is made it shall, except in a case which

is not this one, be made on a person "in charging the profits or gains of his trade." Section 55 (3) enacts thus:

"Any charge falling to be made under any of the provisions of this Act on a person for any year of assessment in charging the profits or gains of his trade shall be made by means of an assessment on the profits or gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year."

So a balancing charge is to be made by means of an assessment on the profits and gains of that trade for the relevant year. It is these words which create the difficulty. The company contend that s. 55 requires the amount of the balancing charge to be added to the trading profits for 1948-49 (the relevant year) for the purpose of assessment. If that be done, the result is to bring such profits up to the aggregate figure of £3,178, or £140 more than the existing assessment for 1948-49. Then, it is argued, s. 31 (1) (b) of the Finance Act, 1926, comes into operation and requires an assessment to be made on the £140, but on no more. When that is done all liability in respect of the balancing charge of £600 is satisfied. With this argument the general commissioners agreed.

It is an odd result, but, if it clearly flows from the relevant statutory language, there is no more to be said. The crucial words are those in s. 55 (3) requiring the balancing charge to be made "by means of an assessment on the profits or gains of that trade". Do these words require that the balancing charge must be levied as the company contends? If so, it would seem also to follow that in a year for which a balancing charge has to be made, but in which there are no profits or gains of the trade to be taxed, no balancing charge can be made at all. Or, on the contrary, do the words merely define the kind of assessment by which the balancing charge is to be levied? In considering this problem it has to be remembered that the balancing charge falls to be made because, by the sale of his plant and machinery, the taxpayer has recouped the capital loss in respect of which he was previously given wear and tear allowances. That is the whole purpose of the balancing charge, and there is, therefore, no reason whatever why the effective levy of the charge should depend on whether there are profits or gains of the trade, or, as in this case, on the amount of them. In the present case the taxpayer had £600 allowed for capital loss. He has got back £600 at least as a profit above written-down value by the sale of his plant. So a balancing charge on £600 is imposed by s. 17. Nevertheless, says the company in this case, the result of s. 55 is to reduce the balancing charge to £140 only. If that be so, then I ought to be satisfied that such is the clear result of the language employed.

In *Whitney v. Inland Revenue Comrs.* (1) LORD DUNEDIN said this ([1926] A.C. 52):

"Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

In the present case a balancing charge on £600 is clearly imposed by s. 17 of the Act of 1945. Is the charge defeated except to the extent of tax on £140 by the clear language of s. 55? The company says it is because that section requires the assessment to be made on the profits or gains of the trade. That means you

must in the present case simply augment the profits or gains of 1948-49 by £600, and, if the resulting assessment by reason of other considerations comes out only at £140, that is simply the result of the statutory language which is not to be distorted so as to produce a different result thought to be more in line with what the legislature intended. Alternatively, it is said, if s. 55 leaves the matter in doubt, the doubt should be resolved in the taxpayer's favour on the well known principle that he is not to be taxed except by clear words.

A In *Penang & General Investment Trust, Ltd. v. Inland Revenue Comrs.* (2), a question arose on the construction of s. 21 of the Finance Act, 1922, which penalises a company which does not declare reasonable dividends "in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax". In that case the shareholders were trustees and trustees are not liable to include trust income in their return of total income for the purposes of surtax. Accordingly, it was argued, the section had no application to the company, for how could it be penalised for not doing the impossible. The House of Lords held that the words in question were simply descriptive of the kind of distribution the legislature had in mind and not the result of such distribution. As LORD MACMILLAN put it, it is the character of the distribution, not its ultimate tax effect, that is referred to in the section. This result which undoubtedly modified the literal meaning of the words was reached by considering among other things the purpose of the particular legislation. In the present case, bearing in mind that the purpose of s. 17 and s. 55 is clearly to levy a balancing charge on £600, I am faced with the problem whether the words in s. 55, "by means of an assessment on the profits or gains of the trade", mean literally that there must be an assessment on such profits—that is, do they describe what the result of the assessment is to be, or are they descriptive merely of the kind of assessment the legislature had in mind?

D I think the latter is the true interpretation. Even on the company's construction there would have to be some modification of the words so as to make them mean that the amount of the balancing charge is to be included among the profits or gains of the trade for the purposes of assessment. I think that I do no violence to the language of s. 55 by reading the relevant words as "by means of an assessment purporting to be on the profits or gains of the trade." That avoids the incongruous result yielded by the rival interpretation, and does so, in my opinion, by a fair and reasonable construction of the language. This construction seems to be supported by the concluding words of s. 55 (3), "in addition to any other assessment falling to be made thereon", that is on the trading profits for the year. This indicates, I think, that there shall be a separate assessment in respect of the balancing charge whether there are any profits or gains of the trade or not.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Barlow, Parkin & Co.*, Stockport (for the company).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

READ v. ASTORIA GARAGE (STREATHAM), LTD.

[CHANCERY DIVISION (Harman, J.), March 12, 13, 14, 19; *Affirmed*. C.A. [1952] 2 All E.R. 29]

Company—Director—Managing director—Removal—Notice required—Companies Act, 1929 (c. 23), Table "A", art. 68.

A private company, incorporated in 1932, adopted as its articles Table "A" of the Companies Act, 1929, art. 68 of which provides: "The directors may from time to time appoint one or more of their body to the office of managing director . . . for such term and at such remuneration . . . as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors; but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director . . . be determined." In January, 1932, at the first meeting of the directors of the company it was resolved that the plaintiff "be and he is hereby appointed managing director of the company at a salary of £7 per week as from Monday, Feb. 1, 1932." On Mar. 15, 1949, the directors decided "to relieve Mr. Read [the plaintiff] of his position as managing director of the company and to give him two months' leave on full pay." On the expiration of the plaintiff's leave, the directors passed a further resolution that the plaintiff's "employment be terminated as and from May 13, 1949", and the secretary was instructed to send him one month's notice so determining his employment. In fact, however, the company paid the plaintiff his salary until, on Sept. 28, 1949, an extraordinary general meeting of the company was held at which a resolution approving the action of the directors in removing the plaintiff was passed. The plaintiff claimed damages for wrongful dismissal and breach of contract on the footing that he had not been given reasonable notice.

Held: on the true construction of art. 68, the plaintiff's appointment was immediately and automatically terminated on the passing of the resolution at the extraordinary general meeting of Sept. 28, 1949, and, while it might well be that it would have been a breach of contract for the company so to alter its articles as to give the directors the power to determine the plaintiff's appointment, it was not a breach of contract for the company to dismiss the plaintiff without notice, the company having, by art. 68, expressly retained such power in its own hands.

Dictum of SWINFEN EADY, L.J., in *Nelson v. Nelson (James) & Sons, Ltd.* ([1914] 2 K.B. 779), applied.

AS TO MANAGING DIRECTORS, see HALSBURY, Hailsham Edn., Vol. 5, p. 317, note (g); and FOR CASES, see DIGEST, Vol. 9, pp. 528, 529, Nos. 3490-3492.

Cases referred to:

- (1) *Allen v. Gold Reefs of West Africa, Ltd.*, [1900] 1 Ch. 656; 69 L.J.Ch. 266; 82 L.T. 210; 9 Digest 344, 2174.
- (2) *Nelson v. Nelson (James) & Sons, Ltd.*, [1914] 2 K.B. 770; 83 L.J.K.B. 823; 110 L.T. 888; 9 Digest 529, 3492.
- (3) *Southern Foundries (1926), Ltd. v. Shirlaw*, [1939] 2 All E.R. 113; [1939] 2 K.B. 206; 108 L.J.K.B. 747; 160 L.T. 353; *affd.*, H.L., [1940] 2 All E.R. 445; [1940] A.C. 701; 109 L.J.K.B. 461; 164 L.T. 251; 2nd Digest Supp.
- (4) *Bluett v. Stutchbury's, Ltd.*, (1908), 24 T.L.R. 469; 9 Digest 529, 3491.

ACTION for a declaration that the plaintiff was the chairman of the defendant company, Astoria Garage (Streatham), Ltd., and that his employment as managing director of the company had not been validly terminated. Alternatively, the plaintiff claimed damages for wrongful dismissal or breach of contract.

The company was a private company, promoted by the plaintiff in 1932 to carry on a garage business which had theretofore been carried on by him. The initial share capital was £2,000, all of which was subscribed in cash, except the eight hundred shares held by the plaintiff which were allotted to him in consideration of the transfer of his business. Table "A" of the Companies Act, 1929, with some amendments, was adopted as the articles of the company which

A provided that the plaintiff was to be permanent chairman. At the first meeting of the company it was resolved that the plaintiff "be and he is hereby appointed managing director of the company at a salary of £7 per week as from Monday, Feb. 1, 1932." On Apr. 15, 1938, a resolution was passed at a directors' meeting that the plaintiff be no longer the chairman of the company and that the articles be altered accordingly. On May 24, 1938, at an extraordinary general meeting a

B resolution that the plaintiff be no longer chairman and that one, S., be appointed chairman was defeated. On June 30, 1938, a further extraordinary general meeting was held, and a special resolution was passed altering the articles and appointing D. chairman. HARMAN, J., held that as from June 30, 1938, the plaintiff was not entitled to act as chairman of the company. On Mar. 15, 1949, the directors resolved: "The directors after discussion, decided to relieve

C Mr. Read [the plaintiff] of his position as managing director of the company and to give him two months' leave on full pay." They then purported to appoint S. managing director as from Mar. 16, 1949. The plaintiff did not agree that he could be relieved of his position in that manner, but he was in bad health and agreed to take leave for two months. On May 11, 1949, when the plaintiff returned from leave, a further directors' meeting was held, and

D it was resolved that "Mr. Read's employment be terminated as and from May 13, 1949, and the secretary was instructed to send him one month's (sic) notice so determining his employment." In fact, the company paid him for four months thereafter. On Sept. 28, 1949, an extraordinary general meeting of the company was held and a resolution approving the action of the directors in removing the plaintiff was passed on a poll vote by the necessary majority.

E HARMAN, J., further held that the plaintiff's claim to be managing director failed. On the question of wrongful dismissal the relevant article, art. 68, is set out in the headnote.

H. J. Brown for the plaintiff.

Bradburn for the defendant.

F HARMAN, J. (having stated the facts and reached the conclusions stated above): There remains the question whether the plaintiff is entitled to damages for wrongful dismissal. He was dismissed by this resolution of the company out of hand. The plaintiff says that that was a breach of contract because a director who is appointed, as he was, in general terms and without limitation of time, is entitled to reasonable notice. In my judgment, it is right to say that as between

G the plaintiff and the board he was entitled to reasonable notice. I think that under art. 68 of Table "A", the board, although there is no reference to their having a power to revoke an appointment, must have the right to enter into an agreement with a director or appoint a managing director for a fixed term subject to six months' notice or whatever it may be, or to appoint him generally, and, if generally, then the ordinary rule will be applied that reasonable notice

H on either side is necessary to put an end to that relationship. Counsel for the plaintiff very cogently argued that, that being so, it was not open to the company in general meeting by a resolution to do that which the board could not do, viz., dismiss a managing director out of hand. The answer to that, I think, is not very easy. Article 68 provides that his appointment "shall be subject to determination ipso facto if he ceases from any cause to be a director". That, apparently, is literally any cause, e.g., if the company does not re-elect him, or if he becomes bankrupt. But the article goes on:

" . . . or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined."

The company could validly exercise that power as between itself and the managing director. It does not necessarily follow that that would not be a course which would give him a right to damages, and that, I think, is shown, if it is necessary to show it, by the judgment of LINDLEY, M.R., in *Allen v. Gold Reefs of West Africa, Ltd.* (1).

It is difficult to find any direct authority for this matter. The nearest case, I think, is *Nelson v. Nelson (James) & Sons, Ltd.* (2) where the facts were quite different because, for one thing, there was a special article expressly empowering the board to revoke a managing director's appointment and not a Table "A" article, and for another thing (to quote the headnote)

"The board appointed the plaintiff to be managing director upon the terms of an agreement which provided that he should hold the office so long as he should remain a director of the company and retain his due qualification and efficiently perform the duties of the office."

The board subsequently revoked that appointment, relying on their express power to revoke. LORD READING, C.J., said ([1914] 2 K.B. 776) that one must read that power to revoke as subject to the contract which had been made, and the contract, he said, was for a term of years, and the power to revoke only gave the directors

"power to take away that which they have given provided that they have not bound themselves to give it for any period of time."

He said that that was an appointment for a period of time and could not by the exercise of a power of revocation be altered. SWINFEN EADY, L.J., however, does deal with Table "A". He says (*ibid.*):

"The articles may give a power to the directors to appoint one of their number to be managing director, but no power to revoke or cancel the appointment. The company may keep that power in its own hands to be exercised in general meeting."

That is the position under Table "A" in the Companies Act, 1908, which is the same for this purpose as the Act of 1929. He goes on (*ibid.*):

"With an article in that form it is manifest that the directors can only appoint a managing director subject to the right of the company in general meeting to resolve at any time that his tenure of the office of managing director is to be determined."

These observations are obiter, but, nevertheless, they are germane to the matter in question.

In *Southern Foundries (1926), Ltd. v. Shirlaw* (3) there was a division both in the House of Lords and in the Court of Appeal. The majority held that there was a breach of contract if a company which had appointed a managing director for ten years allowed its articles to be so altered that a power to remove was imported. I do not think, in view of the unfortunate differences of opinion which made themselves plain, that that case helps very much.

It seems to me that I ought to apply the observations of SWINFEN EADY, L.J., in the *Nelson* case (2). The article does, after all, say quite clearly that the appointment is "subject to determination ipso facto if the company resolve" that that be so. So, everybody who becomes a managing director of this company which has adopted Table "A" knows that he has certain rights, and that the board cannot alter them. It may be that the company cannot, by altering its articles, give them power to do that. That would seem to be so from the majority decision in the House of Lords in *Southern Foundries (1926), Ltd. v. Shirlaw* (3). But that does not, it seems to me, forbid, as being a breach of contract, the company itself (having power to dismiss) to exercise that power, because every contract which is entered into with the company must on the

face of it be subject to that chance. In my judgment, therefore, the company was entitled to dismiss the director out of hand and not to give him any notice. That being so, he is not in a position to claim damages for wrongful dismissal.

Judgment for the defendant.

Solicitors: *William Foux & Co.* (for the plaintiff); *Mawby, Barrie & Letts* (for the defendant).

[Reported by R. D. H. OSBORNE, Esq., *Barrister-at-Law.*]

MORRISS v. MARSDEN AND ANOTHER.

[QUEEN'S BENCH DIVISION (Stable, J.), March 18, 19, 20, 21, 24, 25, 1952.]

Tort—Assault—Liability of person of unsound mind—Knowledge of nature and quality of act—No knowledge that act wrongful.

The defendant, while suffering from mental disease, attacked and injured the plaintiff. At the material time owing to disease of the mind, while he knew the nature and quality of his act, he did not know that what he was doing was wrong. In an action for damages for assault and battery,

HELD: as the defendant knew the nature and quality of his tortious act, he was liable for damages for it even though he did not know that what he was doing was wrong.

Rules in *M'Naghten's Case* (1843) (10 Cl. & Fin. 200), held not applicable.

National Coal Board v. J. E. Evans & Co. (Cardiff), Ltd. ([1951] 2 All E.R. 310), applied.

AS TO INSANITY AS A DEFENCE IN AN ACTION OF TORT, see HALSBURY, *Hailsham Edn.*, Vol. 21, p. 288, para. 498; and FOR CASES, see DIGEST, Vol. 33, p. 141, Nos. 186, 187.

Cases referred to:

- (1) *Anon.*, (1807), 13 Ves. 590; 33 E.R. 415; 4 Digest 30, 240.
- (2) *Re Farnham*, [1895] 2 Ch. 799; 64 L.J.Ch. 717; 73 L.T. 231; 4 Digest 30, 243.
- (3) *M'Naghten's Case*, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; 14 Digest 56, 229.
- (4) *White v. White*, [1949] 2 All E.R. 339; [1950] P. 39; 113 J.P. 474; 2nd Digest Supp.
- (5) *Read v. Lyons (J.) & Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 2nd Digest Supp.
- (6) *Stanley v. Powell*, [1891] 1 Q.B. 86; 60 L.J.Q.B. 52; 63 L.T. 809; 55 J.P. 327; 15 Digest 826, 9034.
- (7) *Holmes v. Mather*, (1875), L.R. 10 Exch. 261; 44 L.J.Ex. 176; 33 L.T. 361; 39 J.P. 567; 15 Digest 826, 9036.
- (8) *National Coal Board v. Evans (J. E.) & Co. (Cardiff), Ltd.*, [1951] 2 All E.R. 310; [1951] 2 K.B. 861.
- (9) *Astle v. Astle*, [1939] 3 All E.R. 967; [1939] P. 415; Digest Supp.

ACTION for damages for assault and battery against the first defendant and for negligence and breach of duty against the second defendant.

The first defendant was born on May 16, 1927, and on or about Aug. 29, 1945, his brother applied for an "urgency order" for his reception as a private patient in a mental hospital. The application was supported by a medical certificate of a Dr. Macauley, and on Sept. 5, 1945, a justice of the peace for the county borough of Northampton authorised a mental hospital at Northampton to receive him as a patient. The order was supported by medical certificates of Dr. Macauley and Dr. Bull the contents of which were admitted in evidence. Dr. Macauley said that the reasons which made it expedient to place the defendant under care and treatment were:

"He is irresponsible, unfit to look after himself properly, violent towards

his mother. She is frightened to have him in the house. There is nobody who has any influence over him."

It was said further that he deserted from the Army because he did not like it, that he was lacking in the normal attitude towards life, that he had heard voices speaking to him when nobody was present, and that he admitted to homosexual tendencies and to having no desire to be different. It subsequently transpired that the reception order was invalid because at the time of the application the brother was under twenty-one years of age and on Oct. 6, 1945, the defendant left the mental hospital. His mother, the second defendant, signed an authority to discharge him and an undertaking to be responsible for his proper care and treatment. On June 17, 1949, he took a room at a hotel at Brighton, of which the plaintiff was manager. On June 22 he violently attacked the plaintiff while he was in conversation with a Mr. Jackling, who contemplated taking a room at the hotel, striking him on the head with a blunt implement and turning on Mr. Jackling when he sought to come to the plaintiff's assistance. When Mr. Jackling picked up a chair the defendant ran away, pursued by the hall porter at whom he threw the implement. He was subsequently found by the police at Southampton and was handed over to the Brighton police. On a charge of criminal assault on the plaintiff at Lewes Assizes on July 14, 1949, on the evidence of two doctors he was found unfit to plead to the indictment and was directed to be detained to await His Majesty's pleasure. For the first defendant it was contended that he was not liable for damages because at the time of the commission of the assault and battery he did not know the nature and quality of the act or that what he was doing was wrong. The plaintiff's case against the second defendant was that she knew that the first defendant was of unsound mind and liable to have outbreaks of violence and to attack people without provocation and to be dangerous, that when she reserved the room at the hotel for the first defendant it was her duty to warn the plaintiff as the manager of the hotel accordingly and that she had been negligent in failing to do so.

Beney, Q.C., and Stinson for the plaintiff.

Thesiger, Q.C., and Van Oss for the defendants.

STABLE, J.: The chief problem which this case raises can be compendiously, though not very accurately, formulated as: What degree of mental illness, if any, can constitute a defence to an action in tort, and in what circumstances? LORD ELDON, L.C. (*Anon.* (1)), said that whether a lunatic could be made a bankrupt was an open question. LINDLEY, L.J., when confronted with the same problem, left it open: *Re Farnham* (2). So far as I know, it has never been decided, but for the most part the bankruptcy cases fall under one or other of two heads, viz., (i) those where the lunatic has been so adjudged and his property has been put under the control of the court in lunacy and a conflict as to the administration of the assets has arisen between the court in lunacy and the court in bankruptcy, and (ii) cases which raised the question whether, e.g., a lunatic whose estate was being administered by the court could be said to have committed an act of bankruptcy by non-compliance with a bankruptcy notice in failing to pay a judgment debt inasmuch as the purse strings had been taken out of his hands and were in the control of the court. In the present case we are not considering the quasi-status of a lunatic, i.e., the status of a man who by due process of law has been certified as unfit to be at large and incapable of controlling his own affairs. We are dealing with the case of a man who at the material time was mentally ill.

[HIS LORDSHIP stated the facts and found as facts that the defendant was not in a condition of automatism or trance at the time of the attack on the plaintiff, but that his mind directed the blows he struck, and that at the material time he was a catatonic schizophrenic and a certifiable lunatic who knew the nature and quality of his act, but whose incapacity of reason arising from the disease of his mind was of so grave a character that he did not know that what he was

doing was wrong. He continued:] Counsel for the defendant has contended that that concludes the case. He submits that the test of civil responsibility is the application of the rules in *M'Naghten's Case* (3) and that, since my finding as to his mental state would absolve him from responsibility if this were a criminal charge tried on indictment, applying the same yardstick, he is equally absolved from liability in a civil court. *White v. White* (4) has been cited as an authority

A binding me to hold that the M'Naghten rules are the only test, whether in a civil or a criminal court, where the responsibility of a mentally sick person is in question. In my view, that is not the law. I do not think that *White v. White* (4) supports that proposition, nor do I think that it ever presented itself to the minds of the lords justices when they were dealing with that case. It cannot be suggested that the M'Naghten rules are the appropriate test when the question is

B one of testamentary capacity. In determining whether a contract is binding on a person who was mentally sick at the time it was made, the consideration whether he had a capacity to recognise that what he was doing was wrong seems to me to be wholly inapt. The ethical propriety of making a particular contract hardly comes into the matter. *White v. White* (4) was a divorce case in which there was an allegation of cruelty, and the spouse against whom the allegation was

C made was of unsound mind. The lords justices were unanimous in coming to the conclusion that cruelty had been proved, but DENNING, L.J., expressed the view ([1949] 2 All E.R. 350-352) that, provided the series of acts relied on as amounting to cruelty were acts which would have been cruel if the person responsible had been sane and that they had had a deleterious effect on the other spouse's health, it was immaterial whether the person doing the acts was of

D sound or unsound mind. BUCKNILL, L.J. (*ibid.*, 344-347), certainly did not indicate his assent to that view, and ASQUITH, L.J. (*ibid.*, 347), dissented from it. Counsel for the defendant urged that certain passages in ASQUITH, L.J.'s judgment laid down the principle that in every case the M'Naghten rules must be applied. I do not accept that view.

I do not think I need discuss the question referred to in argument—whether

E the trend of our law is in the direction of culpability or compensation. Conflicting views on that matter have been expressed in various judgments: see *White v. White* (4), per DENNING, L.J. (*ibid.*, 350-352), as contrasted with *Read v. J. Lyons & Co., Ltd.* (5) per LORD MACMILLAN ([1946] 2 All E.R. 476) and per LORD SIMONDS (*ibid.*, 481-482). I think it is sufficient if I examine the essential facts which must be proved to establish the cause of action on which the plaintiff

F relies. Counsel for the plaintiff says in effect that where the action is an action of trespass in the highly technical sense, no averment either of negligence or intention is essential to support it. Counsel for the defendant, on the contrary, argues that, whatever the position may have been 150 or two hundred years ago, the whole trend of modern decisions is that in an action, whether it be founded on trespass or on case, negligence or intention must be averred. I cannot

G think that, if a person of unsound mind converts my property under a delusion that he is entitled to do it or that it was not property at all, that affords a defence. I can bring an action against him for the recovery of my property, or, if it has been converted and destroyed, for its value. Against that it may be said: "There all you are seeking is restitution, either the return of your property or the equivalent. In this case what is being asked for is damages, which is compensation and

H involves in a sense some punitive element". On the whole, I accept the view that an intention—i.e., a voluntary act, the mind prompting and directing the act which is relied on, as in this case, as the tortious act—must be averred and proved. For example, I think that, if a person in a condition of complete automatism inflicted grievous injury, that would not be actionable. In the same way, if a sleepwalker inadvertently, without intention or without carelessness, broke a valuable vase, that would not be actionable. I agree that there is much force in the contention that, in those cases where it has been held that an intention

must be averred and proved, the act in itself was a legitimate piece of behaviour: e.g., in *Stanley v. Powell* (6), where a man shooting pheasants shot the beater, and *Holmes v. Mather* (7) where the defendant was being driven in his carriage along a highway when the horse bolted. Those cases may well be different from the present matter where the act complained of was a trespass, as direct an act of violence as possible. The injuries were not the indirect result of a legitimate activity gone wrong, but were the direct result of illegal behaviour, which was wrongful from the beginning and could not conceivably be anything else. The distinction may be succinctly stated as being between conduct tortious in its very essence and conduct innocent in itself, but becoming tortious by the addition of some ingredient such as intention, heedlessness, or malice. But though the argument is extremely attractive, I must hold that an intention to do the thing complained of must be alleged and proved.

The latest authority on this question is *National Coal Board v. J. E. Evans & Co. (Cardiff), Ltd.* (8). It may be said that in that case the Court of Appeal were dealing with an act that was perfectly innocent and legitimate in itself and only became actionable, if at all, because inadvertently it resulted in injury to the plaintiffs' property. It is possible that, if that court had been confronted, as I am, with an activity of a wholly different character, viz., a violent assault and battery on a harmless man, they would have held that a different principle applied and that such considerations as intention and conception of right and wrong were wholly immaterial, the act of trespass being all that was required to support the cause of action. The matter is by no means free from doubt, but I think I ought to apply that decision, which is in accordance with my own view of the law though it is not directly in point. It appears that DENNING, L.J., does not agree with that aspect of the law: see *White v. White* (4) ([1949] 2 All E.R. 351). It is a matter of controversy. There is no authority directly in point, but I venture to think the weight of the dicta on the subject and the trend of authority point to the conclusion I have reached.

The next matter to consider is whether, granted that the defendant knew the nature and quality of his act, it is a defence in this action that, owing to mental infirmity, he was incapable of knowing that his act was wrong. If the basis of liability be that it depends, not on the injury to the victim, but on the culpability of the wrongdoer, there is considerable force in the argument that it is, but I have come to the conclusion that knowledge of wrongdoing is an immaterial averment, and that, where there is the capacity to know the nature and quality of the act, that is sufficient although the mind directing the hand that did the wrong was diseased. I am fortified in that view by the decision in *Asile v. Asile* (9). That was a divorce case, in which cruelty was alleged, and HENN COLLINS, J., allowed the answer to be amended by inserting the plea that the respondent was of unsound mind and did not know the nature and quality of the act he was committing, but nothing was said about inserting in the amended pleading the other branch of the M'Naghten rules, that he did not know that what he was doing was wrong. In the result, HENN COLLINS, J., allowed the decree on the ground that cruelty during a lucid interval had been proved. He held that acts otherwise amounting to cruelty, if done by a person of unsound mind who did not know the nature and quality of what he was doing, did not constitute a matrimonial offence.

HIS LORDSHIP assessed the damages at £341 11s. 1d. special damages and £5,500 general damages and gave judgment for the plaintiff for those amounts. He held there was no evidence to support the action against the second defendant and gave judgment for her against the plaintiff.

Judgment for the plaintiff against the first defendant.

Judgment for the second defendant against the plaintiff.

Solicitors: *John Bartlett & Son*, agents for *Aldrich, Crowther & Bartlett*, Brighton (for the plaintiff); *Neish, Howell & Haldane* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Observation of SINGLETON, L.J., at
p. 931, explained. KENT v. CONNIF.
[1953] 1 All E.R. 155.

ANOTHER.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.J.J.), March 6, 7, 1952.]

Agriculture—Agricultural holding—Claim by landlord for compensation for breach of covenant—Jurisdiction of court to entertain—Notice to quit given before Mar. 1, 1948—Agricultural Holdings Act, 1948 (c. 63), s. 57 (3), s. 70 (1) (b), s. 99.

On Dec. 16, 1947, the landlord of an agricultural holding gave the tenants a valid notice to quit expiring at Michaelmas, 1949. On June 9, 1950, the tenants being still in possession, he issued a writ claiming possession and damages for breaches of covenant to repair. On the issue of damages for breach of covenant, the tenants contended that the court had no jurisdiction to entertain the landlord's claim and that that matter must be referred to arbitration in accordance with s. 70 (1) (b) of the Agricultural Holdings Act, 1948.

HELD: (i) the claim was not one for compensation under s. 57 (3) of the Agricultural Holdings Act, 1948, and, accordingly, it was not a claim arising on or out of the termination of the tenancy within the meaning of s. 70 (1) (b) of the Act, so that the provisions of s. 70 (1) requiring a claim to be referred to arbitration did not apply.

(ii) the notice to quit being valid, the tenants were to be regarded as having quitted the holding after the commencement of the Agricultural Holdings Act, 1948, in pursuance of a notice to quit given before Mar. 1, 1948, within the meaning of s. 99 of the Act, and, accordingly, the provisions of the Act relating to the rights of landlords, tenants and occupiers (which included the provisions of s. 70 relating to arbitration) did not apply.

Decision of BARRY, J. (ante, p. 97), affirmed.

FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 57 (3), s. 70 (1), and s. 99, see HALSBURY'S STATUTES, Second Edn., Vol. 28, pp. 72, 80 and 97.

Case referred to:

(1) *Preston v. Norfolk County Council*, [1947] 2 All E.R. 124; [1947] K.B. 775; [1947] L.J.R. 1301; 177 L.T. 390; 2nd Digest Supp.

APPEAL by the tenants from an order of BARRY, J., made on Dec. 12, 1951, and reported ante, p. 97.

The landlord claimed possession of an agricultural holding by virtue of a notice to quit, and damages for breaches of covenant to repair. The tenants contended that the notice to quit was bad, and that the court had no jurisdiction to entertain the claim for damages which must be referred to arbitration under s. 70 (1) of the Agricultural Holdings Act, 1948. BARRY, J., held that the notice to quit was good, and that, by virtue of s. 99 of the Act, the claim for damages was not one which had to be referred to arbitration under the Act. The tenants appealed on the issue whether the claim for damages had to be referred to arbitration.

Percy Lamb, Q.C., and *D. Peck* for the tenants.
Laskey for the landlord.

SINGLETON, L.J.: The plaintiff (the landlord) in this action, Mr. Charles Gulliver, is the owner of Great Worsham Farm, Bexhill-on-Sea, and the defendants (the tenants) are administrators of the estate of Ethel May Catt, deceased, who was tenant of the farm under an agreement dated Oct. 15, 1947. It was an agricultural holding in respect of which the rent was £200 a year. On Dec. 16, 1947, notice to quit the farm was given by the landlord, and that notice, according to its tenor, expired at Michaelmas, 1949. On Mar. 1, 1948, Part III of the Agriculture Act, 1947, came into force. For all practical purposes the provisions of that Act are the same as the provisions of the Agricultural Holdings Act, 1948, which came into force on July 30, 1948. On June 9, 1950,

the writ in this action was issued, the tenants being still in possession at that date. Indeed, they remained in possession until two days ago. BARRY, J., decided that the notice to quit was good. Before this court the question whether or not the notice to quit was good was not contested. The only question argued was whether or not the landlord was entitled to bring an action in respect of his claim for damages for breaches of covenant. The tenants contended that under the Agricultural Holdings Act, 1948, and the earlier Acts relating to this subject that was not a matter in respect of which the landlord could sue in the courts.

Section 70 (1) of the Act of 1948 is in these terms:

"Without prejudice to any other provision of this Act, any claim of whatever nature by the tenant or landlord of an agricultural holding against his landlord or tenant, being a claim which arises—(a) under this Act or any custom or agreement; and (b) on or out of the termination of the tenancy of the holding or part thereof, shall, subject to the provisions of this section, be determined by arbitration under this Act."

Counsel for the tenants submitted that the claim of the landlord came under that sub-section, that it was a claim for damages under an agreement, and that it arose on the termination of the tenancy. He did not claim that it arose out of the termination of the tenancy. His claim that it arose on the termination of the tenancy was based on his submission on s. 57 of the Act which provides:

"(1) The landlord of an agricultural holding shall be entitled to recover from a tenant of the holding, on the tenant's quitting the holding on the termination of the tenancy, compensation in respect of the dilapidation or deterioration of, or damage to, any part of the holding or anything in or on the holding caused by non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry. (2) The amount of the compensation payable under the foregoing sub-section shall be the cost, as at the date of the tenant's quitting the holding, of making good the dilapidation, deterioration or damage."

Counsel for the tenants places reliance on s. 57 (3) which provides:

"Notwithstanding anything in this Act, the landlord may, in lieu of claiming compensation under sub-s. (1) of this section, claim compensation in respect of matters specified therein under and in accordance with a written contract of tenancy, so however that—(a) compensation shall be so claimed only on the tenant's quitting the holding on the termination of the tenancy; and (b) compensation shall not be claimed in respect of any one holding both under such a contract and under the said sub-s. (1); and for the purposes of para. (b) of this sub-section any claim under s. 7 (1) of this Act shall be disregarded."

It is to be observed that throughout s. 57 the words "quitting the holding" appear.

Counsel for the tenants submits that, if a tenancy agreement contains covenants such as those sued on in this case and if there be breaches of those covenants which give rise to dilapidation, deterioration, or damage, it is open to the landlord, instead of claiming under those covenants, to claim compensation under the provisions of s. 57 (3). I draw attention to the words in s. 57 (3) "the landlord may, in lieu of claiming compensation under sub-s. (1) . . ." Prima facie, if a tenancy agreement contains covenants of the kind I have mentioned and there is breach of them with dilapidation, deterioration, or damage resulting the landlord might have a claim under the Agricultural Holdings Act, 1948, and also a claim for damages for breach of covenant. Counsel for the tenants submits that they are both brought into one by s. 57 (3), and that the claims which are made in this case ought to be regarded as within s. 57 (3), and, consequently, to be dealt with by arbitration under the Act. Counsel for the landlord asks the court to look at the words "the landlord may, in lieu of claiming

compensation under sub-s. (1) . . . claim . . . in respect of" the breaches so far as the breaches also are matters under sub-s. (1). The landlord is given an option, he submits, and, if he exercises that option so as to claim under s. 57 (1), he can only claim compensation on the tenant quitting the holding, but there is nothing in s. 57 to show that the landlord must take that course, particularly if the claim arises in the middle of the tenancy. Counsel added that, if it is desired to show that the rights of any person to resort to the Queen's courts are taken away, it must be shown by clear language, from which he argued that the option given to the landlord by s. 57 (3) does not have that effect. Counsel for the tenants agreed that, unless he could bring this claim, within s. 57 (3), s. 70 would not apply.

The covenants numbered 3, 4 and 5 in the tenancy agreement are:

"3. During the said term to keep in proper repair as farm road so much of the road adjoining the said farm as the outgoing tenant has been liable to repair. 4. To keep and leave the house, farm buildings and cottages and all other parts of the said farm and premises in a state of good tenantable repair on being found the necessary materials by the landlord within a distance of five miles, but she shall not be called upon to leave the house, cottages and buildings in a better state than at entry, as evidenced by the record to be attached hereto. 5. To keep the hedges properly made and the ditches and watercourses properly cleaned and scoured, the landlord finding the necessary stakes and wires."

Of the breaches of those covenants alleged in the statement of claim and the particulars a considerable number of the items relate to the house and more to the land, hedges and the like. The claim is made by the landlord for breaches of covenant in the tenancy agreement, and it may well be that, if such a claim came forward when the tenants quitted the holding, the landlord could, if he liked, have treated it in the way envisaged as possible by s. 57 (3), but the landlord has said that he did not want to do so. Counsel for the landlord pointed out that some part of the items might be within sub-s. (1) and so included, but not all. The landlord's case is that he is claiming under an agreement of which there have been breaches.

Counsel for the tenants submitted that under s. 57 (3) this claim arose on the termination of the tenancy, and, therefore, was within s. 70 (1) (b). I am not satisfied that it did. Section 70 (1) (b) deals with a claim arising on or out of the termination of the tenancy of the holding or part thereof, and s. 57 throughout is dealing with a position which arises on the tenant quitting the holding on the termination of the tenancy—a different proposition. The whole of s. 57, indeed, presupposes the tenant quitting the holding. At the time that the answer of the tenants in the present case was set up they had not quitted the holding. They were still on the holding, and the landlord could not get compensation under s. 57 until they quitted it. Is it open to the tenants to say: "We are not going. We are staying here as long as we like. We are not going to pay you the damages which you claim, because the claim ought to be regarded as compensation claimed under s. 57, and we are not going to pay you compensation under s. 57, because we have not quitted the holding"? It does not sound to me to make sense. I do not think that s. 57 (3) applies to bring the tenants within s. 70 of the Act.

BARRY, J., did not express any final view on that part of the case. He dealt with it under s. 99 of the Act. That is a long section, and the submission made on behalf of the landlord is that, even if it could be said that his claim in this case fell under s. 70 of the Act, it is taken out of it again by s. 99 which provides:

"In a case where the tenant of an agricultural holding has quitted the holding before the commencement of this Act, or quits it after the commencement of this Act in consequence of a notice to quit given (whether by

him or his landlord) before Mar. 1, 1948 . . . the provisions of this Act, so far as relating to the rights of landlords, tenants and occupiers to compensation . . . shall not apply, and in lieu thereof the enactments specified in sched. VIII to this Act, so far as relating to the matters aforesaid, shall continue to apply and shall accordingly be excepted from the operation of the last foregoing section."

It is not necessary that I should enumerate the enactments specified in sched. VIII to the Act, for counsel for the tenant agrees that, if s. 99 applies to this case, he is out of court and is thrown back on the provisions of the Agricultural Holdings Act, 1923. I do not mention the Agriculture Act, 1947, because for this purpose it was the same as the Agricultural Holdings Act, 1948.

Counsel for the tenants submitted that s. 99 could not apply because of the words "has quitted the holding", or "quits it after the commencement of this Act in consequence of a notice to quit given before Mar. 1, 1948." He said that could not apply, because (a) his clients had not quitted before the commencement of the Act; and (b) they had not quitted on the date of the hearing. As I have already said, the quitting of the holding by the tenant in s. 57 is something which must occur before the landlord can get his compensation, but when one finds this submission made by counsel for the tenants one is forced to ask oneself what is the position of tenants who say: "I cannot have that section used against me, because I had not quitted on the day of trial. True, I ought to have done. True, I got a notice, and the judge has held that to be a good notice. I ought to have been out eighteen months ago, but here I still am." That, to my mind, is not a very sound argument. It is blowing hot and blowing cold, or, to put it another way, seeking to take advantage of their own (I will not say wrong) failure to act on a good notice. That submission was really not pressed, but, if I may go further into the matter, it is agreed by everyone that on the authorities, if a tenant is given a notice to quit and that is subsequently held by the court to be a good notice and on the order of the court the tenant goes out, the tenant goes out in consequence of the notice to quit. The tenants have now gone out, and they have gone out in consequence of a notice to quit. The notice to quit was given on Dec. 16, 1947—that is, before Mar. 1, 1948, the date when Part III of the Act of 1947 came into operation. Thereupon it is said that the provisions of this Act, so far as relate to the rights of the landlord to compensation, shall not apply. Counsel for the tenants submitted that those words "the rights of the landlords, tenants and occupiers to compensation" did not cover this case. I do not know why. If reference is made to the section on which counsel for the tenants places reliance, s. 57 of the Act of 1948, that section gives a right to the landlord, on the tenant's quitting the holding on the termination of the tenancy, to compensation in respect of dilapidation or deterioration of, or damage to, any part of the holding. The words in s. 57 (3) on which counsel for the tenants relies as bringing him under s. 70, are:

"Notwithstanding anything in this Act, the landlord may, in lieu of claiming compensation under sub-s. (1) . . . claim compensation in respect of matters specified therein under and in accordance with a written contract of tenancy . . ."

If, then, there be in regard to matters included in the covenant which are within s. 57 (1) breaches giving the landlord a right to recover compensation on the tenant quitting the holding on the termination of tenancy by reason of s. 57 (3), they appear to me to be within s. 99, while, if there are other matters entirely outside any right to compensation, no question under the Agricultural Holdings Act, 1948, arises. There may be some items not within s. 57 (1) at all. Those would not be matters for compensation under s. 57 (3), but, if there were claims of the nature covered by s. 57 (1) which the landlord

could, if he liked, cause to be dealt with under s. 57 (3), those matters, I should say, come within the words of s. 99:

“ . . . the provisions of this Act, so far as relating to the rights of landlords, tenants and occupiers to compensation . . . shall not apply . . . ”

A That was the view of BARRY, J., and it is the view I take. Even if I should be wrong in what I have said with regard to s. 57, I think that s. 99 is wide enough to take this case out of the provisions of the Act, including s. 57. For these reasons, I think that this appeal ought to be dismissed.

B **BIRKETT, L.J.:** I am of the same opinion. The question to be determined by the court may be put in this way: Has access to the Queen's courts been taken away from the landlord in the circumstances of this case? I observe that in the preface to JACKSON'S AGRICULTURAL HOLDINGS AND TENANT RIGHT VALUATION, 10th ed., there are the following words:

“ It is also to be noted that access to the King's courts has, with a few exceptions, been taken away from both landlord and tenant of an agricultural holding.”

C On p. 178 he deals with s. 57, and at the bottom of that page he says:

“ . . . but now by s. 70 any claim of whatever nature which arises on or out of the termination of a tenancy must be determined by arbitration under the Act.”

Finally, at p. 193, he says with regard to s. 70:

D “ These opening words must be borne in mind in determining the meaning and effect of this section which only deals with claims between landlord and tenant on the termination of the tenancy. During the currency of the tenancy the landlord and tenant may still have freedom to have their differences determined in an action in a court of law unless the Act directs that the difference shall be settled by arbitration.”

E As I understand the argument of counsel for the tenants, he admitted that it was essential for him, if he were to succeed, to show that this claim arose on or out of the termination of the tenancy. He, therefore, relied on s. 57 (3) of the Act of 1948, or the appropriate section of the Act of 1947, to show that the claim in lieu of compensation mentioned in s. 57 (1) was by that sub-section postponed until the termination of the tenancy, and, that being so, he could
F invoke s. 70 (1) and say that the claim arose on or out of the termination of the tenancy. SINGLETON, L.J., has dealt with that, and BARRY, J., who stated the matter plainly in the court below, said:

“ I am relieved from the duty of dealing with it, because I think there is another point which makes ss. 57 and 70 quite inapplicable to the present case, and that is s. 99.”

G So the real point there is whether this claim can properly come within the word “ rights ” in the expression “ rights of landlords, tenants and occupiers to compensation ” in s. 99. Counsel for the landlord said that under s. 57 (3), they were rights under the Act, and I agree with the learned judge. In his judgment he set out the argument which counsel for the tenants summarised
H for us in this court this morning (ante, 99):

“ The tenants' arguments can be quite shortly stated. Section 57 (1) of the Act of 1948, which, in matters material to this case, is similar in terms to s. 29 (1) of the Act of 1947, provides that a claim by a landlord for compensation under and in accordance with a written contract of tenancy in respect of the dilapidation or deterioration of, or damage to, the holding may only be made on the tenant quitting the holding on the termination of the tenancy. The tenants say that the present claim is a claim for compensa-

tion or damages in respect of the dilapidation or deterioration of, or damage to, the holding, and thus falls within the provisions of one or other of those sections. The claim cannot, therefore, be made until the tenant quits the holding—i.e., until the termination of the tenancy—and, for this reason says counsel, it becomes a claim which arises on or out of the termination of the tenancy.”

When the learned judge deals with s. 99 he says (ante, 100):

“The present claim was brought after the notice to quit had expired, but the operative word in the Acts is not ‘bring’, but ‘arise’, and I am satisfied that this claim is not one which arises on or out of the termination of the tenancy. Indeed, as I understand it, counsel for the tenants did not seek to establish that it was, except by invoking the aid of the express words of s. 29 (1) of the Act of 1947, or s. 57 (1) of the Act of 1948, neither of which, to my mind, is applicable to the present claim. Can the tenants obtain assistance from any of the other sections of the Acts of 1947 or 1948 on which counsel relied? I do not think they can.”

Then the learned judge goes on to consider s. 70, and he says (ante, 101):

“Section 70 (1) of the Act of 1948 is, I think, a provision ‘relating to the rights of landlords, tenants and occupiers to compensation’ [and] ‘the payment and recovery of compensation’ within the meaning of s. 99; that is a section relating to the settlement of claims and, I think, relates to the ‘recovery of compensation’. If I am right in this view, the Act of 1948 can be wholly disregarded and one must turn to the Act of 1947.”

The learned judge discusses that matter and continues in this way (ibid.):

“I have already indicated that without the aid of s. 29 (1) of the Act of 1947, or s. 57 (1) of the Act of 1948, the landlord’s present claim cannot be said to fall within this category. Thus, in my judgment, the landlord is entitled to pursue his claim for damages for breach of covenant in the ordinary courts”.

I think, with great respect to the argument of counsel for the tenants here today, that the finding of the learned judge about that matter and his construction of the section were right. I, too, agree that, having regard to the wording of s. 99, this appeal fails and should be dismissed.

MORRIS, L.J.: I also agree. On a determination of the issues which were raised before him the learned judge by his order directed that the tenants should give up possession. Obedience to the order of the court would bring about the result that the tenant would have quitted after the commencement of the Agricultural Holdings Act, 1948, within the words of s. 99 of that Act. Following the decision of this court in *Preston v. Norfolk County Council* (1), the tenant would have quitted in consequence of a notice to quit. That notice to quit was admittedly given before Mar. 1, 1948. The opening words of s. 99 of the Agricultural Holdings Act, 1948, would, therefore, be satisfied, namely:

“In a case where the tenant of an agricultural holding has quitted the holding before the commencement of this Act, or quits it after the commencement of this Act in consequence of a notice to quit given . . . before Mar. 1, 1948 . . .”

The result, therefore, once those opening words are satisfied, is that certain provisions of the Act, including, among others, those relating to the rights to compensation of landlords, tenants, and occupiers, are not to apply.

In my judgment, s. 57 of the Act of 1948 is one of the sections covered by those words, and the result of that is that there is an exclusion of s. 57 and s. 70 cannot be relied on by counsel for the tenants, for he relies on the applicability of s. 57 (3) to bring s. 70 into operation in this case. When the provisions of s. 99 have effect,

the matter is to be dealt with on the basis of the enactments specified in sched. VIII. On that basis counsel for the tenants does not submit that his contention can prevail. The learned judge was entitled, in my judgment, when he ordered possession, to deal with the remaining claims in the action, including the claim for damages, on the footing that his order for possession was correct and would be obeyed. He was entitled to say that, by his adjudication, he made s. 99 applicable. Para. 9 of the defence in the action reads:

“Further, or in the further alternative, the tenants will rely on s. 70 of the Agricultural Holdings Act, 1948.”

When dealing with that matter, the learned judge was entitled to do so on the basis of the decision at which he was arriving, which decision brought into operation s. 99 of the Act, with the result that the provisions of s. 70 would not avail the tenants. I do not propose to say anything further with regard to s. 57 beyond saying that I am in agreement with the way in which the matter has been dealt with by SINGLETON and BIRKETT, L.JJ. I am not satisfied that the claims that were put forward in this action were claims that could be described as being in lieu of claims for compensation under s. 57 (1). If they could not be so described, they were not within s. 57 (3).

Appeal dismissed.

Solicitors: *Blyth, Dutton, Wright & Bennett*, agents for *Menneer, Idle & Brackett*, St. Leonards-on-Sea (for the tenants); *Edwin Coe & Calder Woods*, agents for *Tomkins & Bowes*, Bexhill-on-Sea (for the landlord).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

NORRIS v. SYNDI MANUFACTURING CO., LTD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), March 6, 7, 21, 1952.]

Factory—Dangerous machinery—Safety guard not kept in position by workman—“Provision” of guard—Workman not instructed to use guard—Factories Act, 1937 (c. 67), s. 16, s. 119 (1).

The plaintiff, a tool setter employed by the defendants in their factory, having, while making adjustments, removed from a power press the guard which had been fitted by the defendants, failed to replace the guard when testing the press in motion and suffered injury. When first instructed on how to test the press by the defendants, the plaintiff had not been told to keep the guard in position and the defendants were aware that he carried out tests with the guard not in position.

HELD: in having had a guard fitted to the press the defendants had “provided” a safety appliance within the meaning of s. 119 (1) of the Factories Act, 1937, although they might not have intended the plaintiff to use it; under s. 119 (1) the plaintiff was under a duty to use the guard, and under s. 16 of the Act he was under a duty to keep it in position while the parts required to be safeguarded were in motion; and, therefore, he was in breach of his statutory duties under those sections.

FOR THE FACTORIES ACT, 1937, s. 16 and s. 119 (1), see HALSBURY’S STATUTES, Second Edn., Vol. 9, pp. 1011 and 1097.

Cases referred to:

- (1) *Murray v. Schwachman, Ltd.*, [1937] 2 All E.R. 68; [1938] 1 K.B. 130; 106 L.J.K.B. 354; 156 L.T. 407; 30 B.W.C.C. 466; Digest Supp.
- (2) *Finch v. Telegraph Construction & Maintenance Co., Ltd.*, [1949] 1 All E.R. 425; 2nd Digest Supp.
- (3) *Gibby v. East Grinstead Gas & Water Co.*, [1944] 1 All E.R. 358; 170 L.T. 250; 2nd Digest Supp.

- (4) *Nash v. High Duty Alloys, Ltd.*, [1947] 1 All E.R. 363; [1947] K.B. 377; 2nd Digest Supp.
- (5) *Harrison v. National Coal Board*, [1951] 1 All E.R. 1102; [1951] A.C. 639.
- (6) *McCarthy v. Coldair, Ltd.*, [1951] 2 T.L.R. 1226.
- (7) *Clifford v. Challen (Charles H.), Ltd.*, [1951] 1 All E.R. 72; [1951] 1 K.B. 495.
- (8) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.

APPEAL by the plaintiff from an order of DEVLIN, J., dated Dec. 14, 1951.

The plaintiff, who was at all material times employed in the defendants' factory as a tool setter, was injured while testing a power press from which he had removed the guard. In an action by him against the defendants in which he claimed damages for breach of their duty under the Factories Act, 1937, to fence and keep fenced the press and also of their duty at common law to provide a safe system of work, DEVLIN, J., held that the defendants were liable for a breach of their duty under s. 14 (1) and s. 16 of the Act and of their common law duty. He held that the plaintiff had not committed a breach of s. 119 (1) of the Act, and was not guilty of contributory negligence, and awarded him £1,500 damages. On appeal, the defendants, while not disputing their liability, contended that the plaintiff was guilty of a breach of s. 119 (1), and of contributory negligence.

Beney, Q.C., and *J. N. Watkins (Jukes with him)* for the defendants.

Nelson, Q.C., and *R. E. Hopkins* for the plaintiff.

Cur. adv. vult.

Mar. 21. The following judgments were read.

SOMERVELL, L.J.: This is an action for damages for personal injuries based on an alleged breach by the defendants, the plaintiff's employers, of s. 14 (1) or s. 16 of the Factories Act, 1937, and of their common law duty. The defendants denied liability, and, alternatively, alleged that the plaintiff was guilty of a breach of s. 119 (1) of the Act and of contributory negligence. Before the learned judge it became clear, subject to a defence of "delegation" which failed, that the defendants were liable under the Act. The learned judge also regarded them as having failed to provide a safe system of work. The learned judge found that the plaintiff had not committed a breach of s. 119 (1) and was not guilty of contributory negligence. He assessed the damages at £1,500. The defendants appeal and take three points. Counsel on their behalf submits (i) the damages are excessive, (ii) the plaintiff committed a breach of s. 119, (iii) the plaintiff was guilty of contributory negligence. I will consider (ii) and (iii) first.

The plaintiff worked for the defendants as a tool setter. The defendants had a number of power presses and it was at one of these that the accident happened. In its normal operation metal strips are fed successively by the operator into the press. Pressure on a foot pedal causes the press to descend by electrical power, stamping the strip of metal into the required shape. It is not disputed that the machine has to be securely fenced under s. 14 (1) of the Act, and the fencing maintained and kept in position under s. 16, subject to the exception under the latter section that it may be removed for adjustment. The press had a proper guard or fencing. The plaintiff's work was to adjust and set the machine when this was required. To do this, admittedly, the fencing had to be removed. To test whether the setting had been properly done it was necessary to take one or more sample pressings. It was when engaged on taking such a sample pressing, the fencing or guard not having been replaced, that by some inadvertence the plaintiff pressed the pedal when his hand was within the area of the press and he had to have the top joints of three fingers on his right hand amputated. The replacing and removal of the fencing took some time, about

five minutes. As it is sometimes necessary to take a dozen samples this would add an hour to the operation of setting the tools, though it was said that some adjustments could be done, though obviously less conveniently, through the bars of the fencing. It is not disputed that under the Act the fencing should have been in position when the plaintiff was taking samples. The relevant words of s. 119 (1) are as follows:

A " . . . where any means or appliance for securing . . . safety is provided for the use of [a person employed in a factory] under this Act, he shall use the means or appliance."

B The plaintiff entered the defendants' employment in 1946. He then had no previous experience of power presses. He was shown how to set and test the tools by two of the directors. Neither of them replaced the guard while taking samples. He was told to make sure the guard was secure before the ordinary operator used the press. He must frequently have been seen by one of the directors taking samples with the fencing not in position. He was never told expressly not to replace it. I will read the paragraph of the learned judge's judgment in which he construed and applied s. 119 (1):

C "In my judgment, an article is not 'provided' within the meaning of the Acts merely by supplying it and making it available. When the term is considered in the light of the policy of the Acts, I think that the article must be provided in a manner which makes it clear to the workman that he is expected to use it. That will not always involve an express oral direction. The purpose for which an article is supplied may often be too obvious for words. It is not so in this case. When the plaintiff was initiated into the use of the guard he was told to replace it after testing, and before operation was begun. That would convey to him (and the subsequent attitude of the defendants would amply confirm it) that the guard was intended for use in operation only, and that he was not expected to use it for testing. In these circumstances I do not think that the plaintiff broke s. 119 (1) because he did not use the guard for a purpose other than that for which it was provided."

E If the construction is right, I would agree with the conclusion. Counsel for the defendants submits it is wrong, and I have with respect come to that conclusion. The plaintiff here, of course, knew all about the appliance. He would have just removed it. It was at hand and available.

F I will deal with the authorities. In *Murray v. Schwachman, Ltd.* (1), although there was a fencing or guard on the premises, the plaintiff had been forbidden to use it. It was held that the result was the same as if it had never been provided at all. In *Finch v. Telegraph Construction & Maintenance Co., Ltd.* (2) the learned judge who tried the present case had to decide whether goggles had been provided under s. 49 of the Act. He accepted evidence that there were goggles in the foreman's office, but he found that the plaintiff did not know where they were. G He held, therefore, that they had not been provided. Neither of these cases, in my opinion, assist the plaintiff here. We were, however, referred to a dictum of DU PARCQ, L.J., in *Gibby v. East Grinstead Gas & Water Co.* (3), agreed to by the other members of the court, which, undoubtedly, on the face of it supports the learned judge's construction. The deceased had met his death by falling from an unfenced gantry at night. The claim was based on breach of statutory H duty and negligence. The defendants pleaded that the deceased was guilty of a breach of s. 119 (1) and of contributory negligence. The learned judge had found that there was no breach of statutory duty or negligence on the part of the defendants, and that the deceased had been guilty of contributory negligence as well as a breach of s. 119 (1). In the appeal the first judgments were delivered by SCOTT, L.J., and GODDARD, L.J. They dismissed the appeal on the ground that the plaintiff was guilty of contributory negligence, making no reference to s. 119. Assuming, therefore, and on this point the defendants were not called

on to argue, that the defendants had been guilty of a breach of statutory duty or negligence, the plaintiff's contributory negligence was at that date an answer to the whole claim. DU PARCQ, L.J., dismissed the appeal on the same ground, but at the beginning of his judgment he dealt with the alleged breach of s. 119. This was because the plaintiff had not used a hurricane lamp. DU PARCQ, L.J., said he was "strongly inclined to disagree" with the judge on that point. He said this ([1944] 1 All E.R. 363):

"I doubt very much whether the deceased, if he had lived, could have been convicted, on the known facts, of an offence under that section. It is not at all clear that the hurricane lamp of which we have heard so much was, within the meaning of that section, provided for the use of this workman, among others, under the Factories Act; and the further difficulty arises that he was not ordered to use it, or ordered to use it at any particular time. It was left to his discretion whether to use it or not."

The learned lord justice went on to express his doubts whether the plaintiff had committed any offence. He then considered contributory negligence, and that is clearly the ratio of his decision. The other members of the court expressed their agreement with what he had said with regard to s. 119 (1). One has to consider the words used in the light of the facts. It seems clear that hurricane lamps were available for this or other purposes. Some of the men who had to go on this gantry at night used their own torches. It may well be that, if one is dealing with an appliance of general use like a lamp, it is not "provided for use" under the Act for any particular operation unless its use is by instructions related to that operation. On this view the words used would have no necessary application to the facts here where the guard was part of the machine being used. If they were intended to be of general application, I find them difficult to reconcile with the words of the Act.

We are dealing here with a case in which the plaintiff knew all about the appliance. He had just removed it and it was at hand and available. Was an order by the defendants to use the guard for the process on which the plaintiff was engaged a condition precedent to liability as suggested? The duty of providing something and the duty of ordering it, if provided, to be used are two different things. If Parliament had intended the giving of an order to be a condition precedent to an offence it would, I think, have said so. I think the words of s. 119 (1) impose an absolute duty once it is established that the appliance was there and available. The plaintiff wanted to save time for his employers. The facts that the directors demonstrated his work to him without the guard and acquiesced in his not using it would be very relevant in considering whether it was a proper case for a prosecution, or whether, if proceedings were brought, any penalty should be imposed. They are also relevant to the question which we have to decide, namely, to what extent are the defendants entitled to say that the plaintiff should bear part of the damages. I cannot, however, find anything in the words of s. 119 (1) which enables it to be said that in the circumstances of this case no offence was committed under that sub-section.

Counsel for the plaintiff argued that an appliance could not be said to be provided for the plaintiff's use when it was indicated to him that he need not use it. I have come to the conclusion that the words "for the use of any such person", followed, as they are, by the words "under this Act" are simply to identify the category of persons within the scope of the section. The guard was "provided" in the ordinary sense of the word and under the Act it was the plaintiff's duty to use it. [HIS LORDSHIP held that the plaintiff had not been guilty of contributory negligence, and that the award of £1,500 damages was not excessive, but that that figure should be reduced to £1,200 by reason of the plaintiff's breach of s. 119 (1), and to that extent the appeal should be allowed.]

DENNING, L.J.: This power press was a dangerous machine which had to be securely fenced. It was provided with a perfectly proper guard, but, in

order to comply with the Act, it was absolutely essential that the guard should be kept in position while the press was in motion: see s. 16 and *Nash v. High Duty Alloys, Ltd.* (4). The question in this case is: Whose duty was it to see that the guard was kept in position? Undoubtedly, it was the duty of the occupiers of the factory, but was it not also the duty of the man who was working the machine? The answer to this question is, I think, that the statute is quite imperative. It requires the guard to be kept in position while the press is in motion: see s. 16. Ignorance of the statute is no excuse either for the occupiers or for the workman. If a guard is provided under the Act for the use of the workman, then he becomes under a statutory duty to use it. It is no defence for him to say that his employers did not insist on his using it. That goes to mitigation, not to exculpation. The learned judge seems to have thought that under s. 119 (1) a means or appliance was not "provided for the use of" the men unless the occupiers intended them to use it. I do not think that is correct. The true interpretation of the second part of s. 119 (1) is, I think, this: The occupier must provide the means or appliance required by the Act. Once he has provided a proper means or appliance in good condition and ready to hand in a proper place, then the workman comes under a duty to use it. This duty on the workman is imposed by the Act, not by the employer. The important thing is the intention of the Act, not the intention of the employer. If the Act intends the man to use it, then use it he must, no matter what the employer thinks about it, nor even what he says or does, so long as he does not actually forbid the man to use it. Acquiescence by an employer may mitigate the man's offence, but cannot absolve him of his duty.

We were reminded in this case that the Factories Act, 1937, creates criminal offences and that any ambiguity should be resolved in favour of the accused. I find it more helpful, however, to remember that the Act is intended to prevent accidents to workmen, and I think it should be construed so as to further that end: see what LORD PORTER said ([1951] 1 All E.R. 1107) in *Harrison v. National Coal Board* (5) which I quoted in *McCarthy v. Coldair, Ltd.* (6). It would, I think, be unfortunate if little or no responsibility were to be placed on the workmen themselves. Once a proper guard is provided, then the men are just as responsible as the occupier for seeing that it is used. All the various regulations under the Act proceed on this basis; see, for instance, *Wood-working Machinery Regulations, 1922* and the *Horizontal Milling Machines Regulations, 1928*. It is also, I think, the basis of s. 119 (1) of the Act itself. The words and deeds of the employer may have, of course, a great bearing on the relative responsibilities. If the employer encourages the men not to use the guard that aggravates his responsibility and lessens that of the men, but it cannot take away their responsibility altogether: *Clifford v. Charles H. Challen, Ltd.* (7). What is the relative responsibility in the present case? The employers are mainly responsible because they set the man a bad example and acquiesced in his failure to use the guard, but the man himself was a skilled man who knew as much about the machine as his employers did, and he admitted that they never told him not to use the guard. They left him to take his own course for his own safety. He clearly failed to fulfil s. 119 (1), and I agree that the damages should be reduced by one-fifth on that account.

ROMER, L.J.: The only point on which I find myself at variance with the judgment of the learned judge is with regard to the meaning and effect of s. 119 (1) of the Factories Act, 1937, and I propose to confine my observations to that question. [His LORDSHIP read the relevant part of the sub-section and continued:] The learned judge held that, although a guard was, in fact, fitted to the press which the plaintiff was using for testing purposes at the time of the accident, it cannot be regarded as having been "provided" within the meaning of the sub-section, and, accordingly, the plaintiff, in not making use of it, was

not in breach of the statutory obligation which the sub-section imposes. **DEVLIN, J.**, said with regard to this:

"In my judgment, an article is not 'provided' within the meaning of the Acts merely by supplying it and making it available. When the term is considered in the light of the policy of the Acts, I think that the article must be provided in a manner which makes it clear to the workman that he is expected to use it. That will not always involve an express oral direction. The purpose for which an article is supplied may often be too obvious for words."

The learned judge then went on to say that that was not so in this case on the ground that the plaintiff was impliedly told by his employers that the guard was intended for use in operation only and that he was not expected to use it for testing. If the learned judge had found (which he did not find) that the employers told the plaintiff that he was not to use the guard during the process of testing, then *Murray v. Schwachman, Ltd.* (1) is authority for the proposition that the guard was not, quoad that process, "provided", on the obvious ground that a thing cannot be regarded as provided for use if a prohibition is placed on its user. That was not, however, the case here, and the argument which was advanced before us (and which is, I think, supported by the language of the learned judge which I have quoted) is that an employer does not "provide" a safety device within the meaning of s. 119 (1) unless he tells the workmen concerned that they have got to use it. I am unable to find any sufficient warrant for that view. The primary meaning of the word "provide" is to "furnish" or "supply", and, accordingly, on the plain, ordinary interpretation of s. 119 (1), a workman's statutory obligation is to use safety devices which are furnished or supplied for his use by his employers. I am aware that the section, being a penal section, has to be construed strictly, but I cannot see any reason why that should involve reading into it words that are not there, particularly when the section makes perfectly good sense without them. I respectfully adopt the words of **LORD MACMILLAN** in *London & North Eastern Ry. Co. v. Berriman* (8), where he said ([1946] 1 All E.R. 260):

"Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language."

Taking, then, s. 119 by itself, I can find no legitimate reason for attributing to sub-s. (1), through the medium of the word "provided", the same effect as it would have had if words such as "if he has been ordered to use them" had been added at the end. It is for Parliament, if it thinks proper to do so, and not for the courts, to add to a statutory obligation a qualification which is not there.

So much for s. 119 (1) when taken by itself. If, however, one looks to s. 14 and s. 16 of the Act (which are complementary to s. 119 and impose obligations on the employers), there is still further reason for rejecting the suggested implication. By the proviso to s. 14 (1) it is enacted that the requirements of the sub-section

"shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

Section 16 refers to

"All fencing or other safeguards provided in pursuance of the foregoing provisions of this Part of this Act . . ."

Those provisions include, inter alia, sub-ss. (2) and (4) of s. 13, which compel employers to "provide" the devices and mechanical appliances therein mentioned. The word "provide" must, on ordinary principles of construction,

surely have the same meaning in s. 119 (1) as in s. 13 (2) and (4) and s. 14 (1) of the Act, and it would follow that, if a safety device is not "provided" within s. 119 (1) unless its physical provision is accompanied by an order to use it then, in the absence of such an order, employers who have done all that they are expressly told to do have yet not performed their statutory obligations under s. 13 and s. 14 in full and can be proceeded against accordingly. I cannot accept a construction of s. 119 (1) which, while qualifying the obligations of the workmen, might fairly be regarded as adding pro tanto, and merely by implication, to the statutory obligations of the employers. It is, I think, clear that the word "provided" is used in s. 13, s. 14 and s. 16 in its ordinary, natural, sense and is similarly so used in s. 119 (1).

I am conscious of the fact that some of the language of *DU PARCQ, L.J.*, in *Gibby v. East Grinstead Gas & Water Co.* (3) is not altogether in conformity with the views above expressed. His observations, however, were not necessary for the decision of the case which was before the court and which was determined on quite different grounds. Moreover, the lord justice only referred to the fact that the workmen had not been ordered to use the hurricane lamps which were there in question as a "difficulty" in the way of a conviction under s. 119 (1) from which I gather that he was not expressing a concluded view that a prosecution would necessarily fail. It may well be that, if a complicated safeguard is provided for use in connection with a process or machinery of an intricate character and the workman is not instructed as to the purpose of the safeguard or how to use it, he could not be convicted of a breach of the relevant obligations under s. 119 (1). Indeed, in such circumstances, it is unlikely that he would be prosecuted at all. Assuming, however, that to be so, it by no means follows that a workman who has been so instructed can successfully defend himself by saying that he had not been ordered to use the safeguard, and, for the reasons which I have endeavoured to express, such a defence would, in my judgment, be of no avail.

I would add that I quite agree with what my brethren have said to the effect that safeguards which employers are under a duty to provide must be placed ready to the workman's hand. That view is in no way attributing a strained or unnatural meaning to the word "provide", for it cannot fairly be said that a safeguard is being provided for the use of workmen unless it is made readily and obviously available. A butcher does not "provide" or "supply" his customer with meat if he leaves it at the roadside a mile away from the customer's house. On the other matters that were argued before us there is nothing that I wish to add to what my Lord has said, and I agree that the damages which were awarded to the plaintiff should be reduced by twenty per cent. owing to the breach of his statutory obligation.

Appeal allowed.

Solicitors: *R. I. Lewis & Co.* (for the defendants); *George C. Carter & Co.* (for the plaintiff).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

GIBBS v. GIBBS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Havers, J.), March 5, 6, 10, 1952.]

Legal Aid—Costs—Taxation—Principles to be applied—Legal Aid and Advice Act, 1949 (c. 51), sched. III, para. 4 (1)—R.S.C., Ord. 65, r. 27 (29).

On June 22, 1951, the petitioner, who had obtained a certificate under the Legal Aid and Advice Act, 1949, entitling him to legal aid, was granted a decree nisi. The decree contained a direction that the costs of the petitioner be taxed as between solicitor and client in accordance with the provisions of sched. III of that Act. A bill of costs was lodged for taxation with the registrar who disallowed certain items. By the Legal Aid and Advice Act, 1949, sched. III, para. 4 (1): “. . . costs shall be taxed for the purposes of this schedule according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested”. Objections to the taxation were carried in and on a summons to show cause why the registrar's decision should not be reversed,

HELD: in carrying out a taxation under the Legal Aid and Advice Act, 1949, the taxing master should adopt as his normal standard the direction in R.S.C., Ord. 65, r. 27 (29), but at the same time he should make more generous allowances than he would in a taxation as between party and party; in making more generous allowances the taxing master was permitted, not only to allow items which could be properly included on a party and party taxation at a higher figure than that at which they would be allowed on a party and party taxation, but also to allow additional items which would not be allowed on a taxation as between party and party.

Observations with regard to items in the bill carried in.

FOR THE LEGAL AID AND ADVICE ACT, 1949, sched. III, para. 4 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 566.

Cases referred to:

- (1) *Andrews v. Barnes*, (1888), 39 Ch.D. 133; 57 L.J.Ch. 694; 58 L.T. 748; 53 J.P. 4; Digest, Practice, 899, 4398.
- (2) *Jones v. Coxeter*, (1742), 2 Atk. 400; 26 E.R. 642.
- (3) *Burford Corpn. v. Lenthall*, (1743), 2 Atk. 551; 26 E.R. 731; 8 Digest 412, 2516.
- (4) *Mordue v. Palmer*, (1870), 6 Ch. App. 22; 40 L.J.Ch. 8; 23 L.T. 752; 35 J.P. 196; 2 Digest 530, 1667.
- (5) *Allen v. Allen & D'Arcy*, (1860), 2 Sw. & Tr. 107; 30 L.J.P.M. & A. 9; 3 L.T. 480; 164 E.R. 933; 27 Digest 538, 5861.
- (6) *Ottaway v. Hamilton*, (1878), 3 C.P.D. 393; 47 L.J.Q.B. 725; 38 L.T. 925; 42 J.P. 660; 27 Digest 207, 1796.
- (7) *McIver & Co., Ltd. v. Tate Steamers, Ltd.*, [1902] 2 K.B. 184; 71 L.J.K.B. 717; 87 L.T. 320; Digest, Practice, 948, 4879.
- (8) *Re Ermen*, [1903] 2 Ch. 156; 72 L.J.Ch. 492; 88 L.T. 353; Digest, Practice, 947, 4873.
- (9) *Price v. Midland, etc., Cleaning Co., Ltd.*, unreported, (1940), July 12.
- (10) *Goodwin v. Storrar*, [1947] 1 All E.R. 203; [1947] K.B. 457; [1947] L.J.R. 1013; 2nd Digest Supp.
- (11) *Giles v. Randall*, [1915] 1 K.B. 290; 84 L.J.K.B. 786; 112 L.T. 271; Digest, Practice, 948, 4881.
- (12) *Frankenburg v. Famous Lasky Film Service, Ltd.*, [1931] 1 Ch. 428; 100 L.J.K.B. 187; 144 L.T. 534; Digest, Practice, 948, 4878.
- (13) *Pêcheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co.*, [1928] 1 K.B. 750; 97 L.J.K.B. 445; 138 L.T. 532; Digest Supp.
- (14) *Re Joint Stock Trust & Finance Corpn., Ltd.*, (1927), 137 L.T. 630.
- (15) *Reed v. Gray*, [1952] 1 All E.R. 241.

(16) *Palmer v. Walesby*, (1868), 3 Ch. App. 732; 37 L.J.Ch. 612; 19 L.T. 1; 33 Digest 232, 1450.

(17) *Harbin v. Gordon*, [1914] 2 K.B. 577; 83 L.J.K.B. 322; 109 L.T. 794; 42 Digest 213, 2375.

A SUMMONS by the petitioner in a divorce suit to show cause why the decision of the registrar on the objections to his taxation of the petitioner's bill of costs should not be reversed. The petitioner was an "assisted person" receiving legal aid under the Legal Aid and Advice Act, 1949.

Seuffert for the petitioner.

Colin Duncan for the Queen's Proctor.

Cur. adv. vult.

B Mar. 10. **HAVERS, J.:** This is a summons by the petitioning husband in a suit for divorce to show cause why the decision of Mr. Registrar LONG on the objections to his taxation of the petitioner's bill of costs should not be reversed. Though the summons was in the name of the petitioner, he, being an assisted person under the Legal Aid and Advice Act, 1949, was not financially interested in the result. The persons really interested were the solicitors who had acted for him under the provisions of the Act. I adjourned this summons into open court because it seemed to me to raise questions of general interest to solicitors who act for assisted persons under the provisions of the Legal Aid and Advice Act, 1949. As there was nobody concerned to put before me any argument on the other side, I thought it right to direct that the papers in the suit be sent to the Queen's Proctor so that I might have the benefit of any argument which counsel D on his behalf thought right to present to the court.

The petition was heard on June 22, 1951, and a decree nisi was then granted to the petitioner, the court exercising its discretion in his favour. The decree nisi contained a direction that the costs of the petitioner be taxed as between solicitor and client in accordance with the provisions of sched. III to the Act of 1949. In due course the solicitors for the petitioner lodged a bill of costs for E taxation with Mr. Registrar LONG. The learned registrar taxed off £6 5s. 8d. from the total costs as mentioned in the bill of £35 17s. 10d. The total bill as taxed, including disbursements, was £63 13s. 9d.

Section 1 of the Legal Aid and Advice Act, 1949, provides:

F " (5) Legal aid shall consist of representation, on the terms provided for by this Part of this Act, by a solicitor and so far as necessary by counsel (including all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings) . . . (7) Save as expressly provided by this Part of this Act or by regulations made thereunder,—(a) the fact that the services of counsel or a solicitor are given by way of legal aid shall not affect the relationship between or rights G of counsel, solicitor and client or any privilege arising out of such relationship; and (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

H Section 2 deals with the financial conditions of legal aid, and sub-s. (2) provides:

"Where a person receives legal aid in connection with any proceedings—(a) the expenses incurred in connection with the proceedings, so far as they would ordinarily be paid in the first instance by or on behalf of the solicitor acting for him, shall be so paid except in the case of those paid direct from the legal aid fund as provided by this Part of this Act; (b) his solicitor and counsel shall not take any payment in respect of the legal aid except such

payment as is directed by this Part of this Act to be made out of the legal aid fund."

That is an important provision because, if any costs are incurred which are not allowed on taxation, the solicitor cannot recover them from any source. The sub-section continues:

"(c) he [the assisted person] may be required to make a contribution to the legal aid fund in respect of the sums payable thereout on his account; (d) any sums recovered by virtue of an order or agreement for costs made in his favour with respect to the proceedings shall be paid to the legal aid fund; (e) his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute."

Section 3 provides that the assisted person may be called on to make contributions to the fund. Section 4 deals with the assessment of disposable capital and income and of maximum contribution. Section 6 deals with solicitors and counsel who act for assisted persons under the provisions of the Act, and s. 6 (1) provides:

"Panels of solicitors and barristers willing to act for persons receiving legal aid shall be prepared and maintained, and there may be separate panels for different purposes, for different courts and for different districts."

Sub-section (2) says that solicitors or barristers may have their names on the appropriate panel. Sub-sections (4), (5) and (6) provide:

"(4) Where a person is entitled to receive legal aid, the solicitor to act for him and, if the case requires counsel, his counsel shall be selected from the appropriate panel, and he shall be entitled to make the selection himself . . . [subject to certain provisos]. (5) Subject to this Part of this Act, a solicitor who has acted for a person receiving legal aid shall be paid for so acting out of the legal aid fund, and any fees paid to counsel for so acting shall also be paid out of that fund. (6) The sums payable under the last foregoing sub-section to a solicitor or counsel shall not exceed those allowed under sched. III to this Act."

That, again, is an important provision for the purposes of the case with which I am now dealing. Schedule III to the Act deals with remuneration of persons giving legal aid under Part I. By para. 1 (1):

"The sums allowed to counsel in connection with proceedings in the House of Lords or the Supreme Court shall be eighty-five per cent. of the amount allowed on taxation of the costs: Provided that this sub-paragraph shall not apply in relation to proceedings in the High Court in a matrimonial cause, where the solicitor is one employed for a salary to act in connection with matrimonial causes."

That proviso has no application to this case. Paragraph 2 (1) provides:

"The sums allowed to a solicitor in connection with proceedings in the House of Lords or the Supreme Court shall be the full amount allowed on taxation of the costs on account of disbursements and eighty-five per cent. of the amount so allowed on account of profit costs: Provided that so much of this sub-paragraph as relates to profit costs shall not apply to a solicitor employed for a salary to act in connection with matrimonial causes".

The relevant paragraph for the purposes of the question which I have to determine is para. 4 (1):

"Subject to the last foregoing paragraph [that is, para. 3, which has no application to the facts of this case] costs shall be taxed for the purposes of this schedule according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common

fund in which the client and others are interested: Provided that no question shall be raised as to the propriety of any act for which prior approval was obtained as required by regulations."

The only other matter to which I need refer is reg. 18 (3) of the Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), which were made pursuant to a power contained in the Act, which is in these terms:

A "Any order for the payment of the costs of any proceedings to which an assisted person is a party shall include a direction that his costs are (in addition to any other direction as to taxation contained in the order) to be taxed as between solicitor and client in accordance with the provisions of sched. III to the Act."

B As I have already said, the decree which the petitioner obtained in this court did contain such a direction.

Counsel for the Queen's Proctor submitted to me that in para. 4 (1) of sched. III to the Act of 1949 stress should be laid on the words "according to the ordinary rules applicable on a taxation as between solicitor and client". He submitted that, in view of those words, when the taxing master was called on to tax a bill his mind should not be coloured by the fact that the litigant was an assisted person or by the fact that the fund out of which the costs were to be paid substantially consisted of moneys provided by Parliament. I accept that argument, and I think that these words are important. I ought to refer also to r. 66 of the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), which provides:

D "(1) Every bill of costs shall be referred to a registrar for taxation and may be taxed by him or such other taxing officer as the President may appoint . . . (3) In any cause or matter to which these rules apply the costs allowed to solicitors and the taxation of such costs shall, except where these rules otherwise provide, be in accordance with the provisions of Ord. 65 of the Rules of the Supreme Court so far as the same are applicable."

E The rules have not otherwise provided, so that the costs allowed to solicitors and the taxation of such costs are to be in accordance with the provisions of R.S.C., Ord. 65, in matrimonial suits. Counsel for the Queen's Proctor submitted, therefore, that on a taxation of a bill of costs under the provisions of sched. III to the Act of 1949 the governing regulation was R.S.C., Ord. 65, r. 27 (29), which is in these terms:

F "On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

G Though the question which I have to determine lies within a very short compass, counsel for the Queen's Proctor was good enough to provide me with the historical background relating to orders for costs generally and to the different classifications which have grown up on taxations as between solicitor and client. H Before 1873 the common law courts had no power to award anything except party and party costs. Counsel referred me to the ANNUAL PRACTICE, 1951, p. 1498n.

"Solicitor and Clients Costs. The High Court of Justice has, as the Court of Chancery formerly had, a general and discretionary power in matters of equitable jurisdiction to give to a successful party costs as between solicitor and client; but quære, whether the power exists in matters of common law jurisdiction."

The case there cited was *Andrews v. Barnes* (1), which shows the origin of the jurisdiction to award costs as between solicitor and client. The headnote reads:

"The Court of Chancery formerly had, and the High Court of Justice now has in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client. Whether the High Court has the same power in matters of common law jurisdiction, quære."

FRY, L.J., who delivered the judgment of the Court of Appeal, examined the old jurisdiction of the Lord Chancellor, and said (39 Ch.D. 138):

"The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. 'The giving of costs in equity,' said LORD HARDWICKE in *Jones v. Coxeter* (2) 'is entirely discretionary, and is not at all conformable to the rule at law.' 'Courts of equity,' said the same great judge in another case, 'have in all cases done it' (i.e., dealt with costs) 'not from any authority' (i.e., as we understand, from any statutory or delegated authority)—'but from conscience and arbitrio boni viri, as to the satisfaction on one side or other on account of vexation': *Burford Corpn. v. Lenthall* (3) (2 Atk. 551)."

Then he makes an examination of the older general orders of the court and shows the various phrases which have been used in reference to costs. He said (*ibid.*, 140):

"The general jurisdiction of the Court of Chancery in this respect is stated with great clearness by the lords justices in the case of *Mordue v. Palmer* (4). In the course of a Chancery suit a reference was made to arbitration, which ordered that the costs should be in the discretion of the arbitrator. He awarded them as between solicitor and client, and the Court of Appeal held that as the reference was in Chancery the arbitrator had power so to do. 'The common law courts,' said MELLISH, L.J. (6 Ch. App. 32), 'have no power to give costs between solicitor and client, and therefore, when there is a reference, the arbitrator cannot give any other than costs between party and party. But it is otherwise with courts of equity; and I therefore think that, when a reference as to costs is made by a court of equity, the court gives the arbitrator jurisdiction to award costs as between solicitor and client if he shall think fit'."

The practice in this Division has been to award costs as between party and party only. I was referred to *Allen v. Allen and D'Arcy* (5) which showed that there was some difference between a taxation between party and party in this Division in a matrimonial suit and that of a taxation between party and party in a common law cause. The headnote is:

"Costs of wife in a matrimonial suit are taxed as between party and party, but not in all respects on the same principles as a taxation at common law between party and party. Thus, though certain issues may have been found against the wife, whose costs are being taxed, the expenses incurred by them will be allowed unless the registrar should think that they were wantonly and vexatiously raised. Expense of witnesses to prove the circumstances of a plea not in issue, if such circumstances have a bearing on other parts of the case in issue, may be allowed; and a reasonable amount of expense incurred in investigating and acquiring information as to the circumstances of the case should be allowed."

The Judge Ordinary (SIR CRESSWELL CRESSWELL) said (2 Sw. & Tr. 110):

"This taxation must certainly be reviewed. The question of the principle on which costs are to be taxed in matrimonial suits has not yet been settled, but I apprehend that I must adopt, as far as I can, the principles on which the Ecclesiastical Courts proceeded. I am informed that the principle of taxation in those courts was as between party and party; but that term had a very different construction from that put upon it in common law

courts, because there they only allow the costs of such issues as are found for the persons who are to receive costs. I think that the only limit which can with propriety be put upon the allowance of the costs of the different issues raised in this court is this: where the taxing officer is satisfied that an issue has been vexatiously and improperly put on the record, so as to occasion a wanton and unnecessary increase in the amount of costs, he is not to allow the costs of that issue."

A

It was pointed out that, notwithstanding that, a solicitor who appeared for a wife in a matrimonial suit and was awarded party and party costs might nevertheless be entitled at common law to recover extra costs incurred beyond those which were allowed on a party and party taxation. The authority for that proposition is *Ottaway v. Hamilton* (6). It is enough for me to read the headnote,

B

which is in these terms:

"A solicitor employed by a wife to take proceedings against her husband to obtain a divorce on the ground of cruelty and adultery, may sue the husband for 'extra costs,' i.e., costs reasonably incurred by him beyond the costs taxed and allowed as between party and party. His common law right to sue the husband as for 'necessaries' supplied to the wife, is not to be limited to the statutable rights and remedies for costs given to the wife under the Divorce Acts."

C

I need not trouble with whatever the position was in the early days because the governing rule which applies to every taxation today is R.S.C., Ord. 65, r. 27 (29). That rule has been the subject of judicial consideration and interpretation in the courts, and I was referred to a number of authorities in which this took place. One of them was *McIver & Co., Ltd. v. Tate Steamers, Ltd.* (7) in the Court of Appeal which was heard soon after the new rule, which was introduced in 1902 and is now R.S.C., Ord. 65, r. 27 (29), came into operation. The headnote is:

D

"Rule 10 of the Rules of the Supreme Court, January, 1902, applies to taxation of costs both as between party and party and as between solicitor and client. In an action upon a charterparty a witness, whose evidence was essential to the plaintiffs' case, was examined in London before the trial of the action. The plaintiffs' solicitor from Liverpool attended at the examination for the purpose of instructing counsel. The plaintiffs having succeeded in the action, upon the taxation of costs between party and party, the taxing master allowed in respect of the solicitor's attendance as aforesaid an amount exceeding two guineas, the maximum allowance for such an attendance specified in Appendix N to Ord. 65, No. 147. HELD, that the taxing master had power to make the allowance which he made in the exercise of the discretion given to him by r. 10 of the Rules of the Supreme Court, January, 1902."

F

G MATHEW, L.J., says ([1902] 2 K.B. 187):

"But it is argued that under the rules the master had no discretion to allow these costs. According to the practice as to taxation of costs between party and party prior to the rules of January, 1902, the scale given in Appendix N was no doubt binding on the master, and this allowance could not have been made. But, on consideration of the objections to this rule, it was thought desirable to modify it to some extent, and accordingly the new r. 10 of the Rules of the Supreme Court, January, 1902, was made, by which it is provided that 'regulation 29 of Ord. 65, r. 27, is hereby annulled and the following regulation is substituted therefor'."

H

He sets out the new rule, and continues (*ibid.*, 188):

"We are asked to construe this rule as meaning that the taxing master shall allow no costs, charges or expenses beyond those provided for by

the scale given in Appendix N. The new regulation was framed with full knowledge of the terms of the old regulations and of the scale, and it cannot, I think, be doubted that it ought to be construed according to its terms, namely, as giving the master on 'every taxation' discretion to allow such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, subject to the exceptions mentioned in the latter part of the rule. In this case there appears to be no reason for suggesting that the allowance made was not perfectly reasonable, and it comes within the plain terms of the rule. For these reasons I think the appeal must be dismissed."

The other case to which I was referred was *Re Ermen* (8). That really followed the decision of the Court of Appeal to which I have just referred. The headnote to that case is:

"Under r. 8 of Ord. 65, and r. 10 of January, 1902 (which is the new sub-r. 29 of r. 27 of the same order), the discretion of the taxing officer is no longer limited to the maximum fee prescribed by Appendix N; but under these regulations he has now on every taxation a two-fold discretion—first, in ordinary cases, the discretion conferred on him by Appendix N, and, in addition to that, a general discretion in special cases to allow all such costs, charges, and expenses as appear to him to have been necessary or proper for the attainment of justice, or for defending the rights of any party. The Practice Notes of the Masters of Hilary Sittings, 1902—known as the 'Blue Book'—though framed and issued by them under the power conferred on them by sub-r. 37 of r. 27 of Ord. 65, have no statutory authority, and do not abrogate or fetter the discretion given them by the Rules of the Supreme Court. They merely define the practice which, as a general rule, should be followed by the masters on taxations."

In his judgment FARWELL, J., says ([1903] 2 Ch. 160):

"In this case the learned registrar, after consulting the taxing masters in London, was of opinion that he had no discretion to allow more than the maximum of £1 ls. prescribed by Appendix N, No. 65, or by the Blue Book; although, if he had had such a discretion, he considered that the fee of £5 5s. claimed was proper and reasonable, and ought to be allowed. In my opinion, on the construction of the rules, apart from any question of authority, the learned registrar and the taxing masters have not taken the right view. Now Ord. 65, r. 8, is a rule of old standing, and contains negative words: 'In causes and matters commenced after these rules come into operation, solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "Lower Scale" in Appendix N in all causes and matters, and no higher fees shall be allowed in any case, except such as are by this order otherwise provided for.' Turning on to find what are 'otherwise provided for,' I find a fasciculus of sub-clauses headed 'Special allowances and general regulations,' fifty-eight in number, contained in r. 27. One of those sub-rules is No. 29. In the old rules which were in force before January, 1902, sub-r. 29 was expressed in the negative. There was, first, r. 8, with the negative words: 'No higher fees shall be allowed in any case except such as are by this order otherwise provided for'; and then the old sub-r. 29, which said: 'As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper,' and so on. But in January of last year it was thought fit to alter that sub-rule and to put it into an affirmative form. I think it is fair to infer that when eminent persons like the Rule Committee alter the phraseology of a rule they intend to alter the substance also. When you are dealing with a set of sub-rules under the head 'Special allowances and general regulations,' which involve or may involve an exception to

the negative words in r. 8, 'No higher fees shall be allowed, etc.,' and you find only a negative sub-rule that such and such a thing shall not be allowed, it is impossible to hold (and in fact the contrary was held) that under those regulations the maximum limit fixed in Appendix N can be exceeded. But when those negative words in the sub-rule are altered into the affirmative, and become an express power or direction that 'on every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice,' and so on, then, having regard to the collocation in which you find them, it appears to me that the Rule Committee did intend to give the general discretion which the words import."

Then he says he considers he is bound by the decision of the Court of Appeal in *McIver & Co., Ltd. v. Tate Steamers, Ltd.* (7).

Counsel for the Queen's Proctor put before me a classification of the various methods of taxation of costs. His classification consisted of six different classes. His first class was a taxation as between solicitor and own client, that is to say, where the costs are payable by a client to his solicitor. His second class was a taxation as between solicitor and client where the costs are payable out of a fund wholly owned by the party. His third class was a taxation as between solicitor and client under R.S.C., Ord. 22, r. 14 (11). His fourth class was a taxation as between solicitor and client where the costs are payable out of a common fund. His fifth class was a taxation as between solicitor and client where the costs are payable out of a fund in which the party has no interest. I think he ought to add, to complete that, "or where the costs are payable by one party to another". The sixth class was a taxation of costs as between party and party.

Dealing first with his first class, that is to say taxation between solicitor and own client, counsel called my attention to an unreported case which appears in LORD ATKIN'S ENCYCLOPAEDIA OF COURT FORMS AND PRECEDENTS IN CIVIL PROCEEDINGS, vol. 7, p. 215, note (z), and from which it appears that some judges, at any rate, disapprove of the phrase "solicitor and own client". The note is in these terms:

"The expression 'solicitor and own client' has been disapproved by judges. It is more accurate to direct taxation on the footing of an indemnity."

The case cited is *Price v. Midland, etc., Cleaning Co., Ltd.* (9). With regard to counsel's second class of taxation as between solicitor and client—where the costs are payable out of a fund wholly owned by the party—he said, and I think rightly, that there is no practical difference between classes one and two. He referred to the passage in SETON'S JUDGMENTS AND ORDERS, 7th ed., vol. 1, at p. 244. The note is:

"When costs are directed to be taxed as between solicitor and client, it does not necessarily mean that all costs which the solicitor is entitled to against his client are to be allowed, but the allowance will vary according to the circumstances of the case; regard being had to the position of the parties, and the fund out of which the costs are to be paid; and a distinction is made: first, where such costs are payable out of a fund belonging to other parties; secondly, where such costs are payable out of a common fund, in which the party has only a limited interest; and, thirdly, where such costs are payable out of a fund belonging exclusively to the party himself."

There is a passage in very similar terms in DANIELL'S CHANCERY PRACTICE, 8th ed., vol. 2, at p. 1078. Both these classes are really taxation on an indemnity basis and neither has any application to this case.

Counsel's third class was taxation as between solicitor and client under R.S.C., Ord. 22, r. 14 (11), which is in these terms:

"The costs of the plaintiff or if more than one of all the plaintiffs in any such cause or matter or incident to the claims therein or consequent thereon shall be taxed by the taxing master, or, if such cause or matter is proceeding in a district registry by the district registrar, as between party and party and as between solicitor and client, and the taxing master or district registrar shall certify the respective amounts of the party and party and solicitor and client costs, and the difference (if any) and the proportion of such difference (if any) payable respectively by any adult party to the cause or matter and by or out of the moneys of any party who is an infant or person of unsound mind, and no costs other than those so certified shall be payable to the solicitor for any plaintiff in the cause or matter."

I was referred to the decision of DENNING, J., in *Goodwin v. Storrar* (10). The headnote to that case reads:

"The words 'costs as between solicitor and client' in R.S.C., Ord. 22, r. 14 (11), which provides for the taxation of the costs of the plaintiff in any cause or matter, mean the costs which a client ought properly to pay to his own solicitor. Where therefore a consent order was made in favour of the plaintiffs in an action brought by personal representatives under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, and a provision was included that the defendant should pay to the plaintiffs' solicitors the costs of the action as between solicitor and client to be taxed:—HELD, that the plaintiffs' solicitors were entitled to be paid such costs as were found by the taxing master to be properly payable to them by their own clients. *Giles v. Randall* (11) considered and distinguished."

That was a case in which infants were concerned, and, therefore, the rule applied. DENNING, J., gave the following judgment in open court ([1947] 1 All E.R. 204):

"The words 'taxation as between solicitor and client' have two meanings. One meaning, which I will refer to as meaning (A), is an inquiry as to the costs which a client ought properly to pay to his own solicitor, as distinct from 'taxation as between party and party,' which is an inquiry as to the costs which he should recover from the opposite side. The distinction is based on common sense, for if a client authorises his solicitor to incur an unusual or unnecessary expense, it is only right that the client should reimburse his own solicitor for it, but it does not follow that he should be able to recover it from the opposite side. The other meaning of 'taxation as between solicitor and client,' which I will refer to as meaning (B), is an inquiry as to the costs to be paid to the solicitor out of a common fund in which the client and others are interested, and is substantially a taxation as between party and party, but on a more generous scale. When meaning (B) is used, a different form of words is needed to describe an inquiry as to the costs which a client ought properly to pay his own solicitor, and that is then described as a 'taxation as between solicitor and own client' . . . In my opinion, in R.S.C., Ord. 22, r. 14 (11), the words are used in meaning (A). The rule is designed to protect widows and children in accident cases by disentitling solicitors from deducting from the compensation a lump sum for their costs and by subjecting their claim for costs to taxation, i.e., to an inquiry in every case as to the costs properly payable to them. If meaning (A) is given, that result is achieved, but if meaning (B) is given, the effect of the sub-rule, especially the concluding words thereof, would mean that the solicitor would be deprived of costs properly payable to him. In the present case, for instance, the solicitors would have to pay the fee of £11 for the second leading counsel out of their own pockets, although the expenditure had been authorised by the plaintiffs and proved, in fact, greatly to the benefit of the estate and the children. I reject an interpretation of the sub-rule which leads to such a result. If I am right in thinking that in the sub-rule

A the words are used in meaning (A), it shows that it is a valid meaning to be attached to them in any legal document, and this enables me to distinguish *Giles v. Randall* (11). The court in that case recognised that meaning (A) was the ordinary meaning, but felt compelled to give the words the meaning (B) because that was the technical meaning, and where words in a legal document have a technical meaning, it is the technical meaning that should be received. Now that a rule of the Supreme Court has been made, in which are used the words in meaning (A), it follows that meaning (A) at the present day is, not only the ordinary meaning, but also a valid technical meaning, and that there is no reason why in construing a legal document that meaning should not ordinarily be given. In the order as to costs in this case, therefore, there is no reason why I should not adopt meaning (A), when that appears to be the meaning intended by the parties, as I think it is. In view of this development it may be that *Giles v. Randall* (11) would be decided differently at the present day. At the instance of the parties and with their consent, I have seen the senior taxing master and he tells me that the practice in cases under R.S.C., Ord. 22, r. 14, is to tax according to meaning (A), i.e., to ascertain the costs properly payable by the client to the solicitor. In *Giles v. Randall* (11), it is to be noticed that the Court of Appeal were much influenced by the practice of the taxing office. I would hesitate long before I disturbed the present practice. I decline to do so. I hold that the taxation of this bill by the senior taxing master of this court was on the correct principles and I do not interfere with it."

D is acting for an assisted person under the Legal Aid and Advice Act, 1949, is very analogous to that of a solicitor who is acting for a widow and infant in a case to which R.S.C., Ord. 22, r. 14 (11), applies. He invited me, therefore, to put on the words in sched. III to the Legal Aid and Advice Act, 1949, an interpretation similar to that which DENNING, J., put on the words in R.S.C., Ord. 22, r. 14 (11). I am unable to accept that argument for two reasons. First, the order in question has no application to the facts of the present case, and, secondly, the order uses the words "as between solicitor and client", whereas in sched. III to the Legal Aid and Advice Act, 1949, the words are different. They are: "according to the ordinary rules applicable on a taxation as between solicitor and client where the costs are to be paid out of a common fund in which the client and others are interested". The case, however, is of assistance to me because DENNING, J., deals with the position where there is a taxation out of a common fund in which the client and others are interested, which is the precise method of taxation referred to in the Act of 1949. The interpretation put by DENNING, J., on those words is that it is substantially a taxation as between party and party, but on a more generous scale.

G I pass by for the moment counsel for the Queen's Proctor's fourth class, because that is the one which applies to the facts of this case and I shall have to refer to it hereafter. His fifth class was a taxation as between solicitor and client where the costs are payable out of a fund in which the party has no interest, with my suggested addition of the words "or where the costs are payable by one party to another". Under his fifth class my attention was called to *Giles v. Randall* (11). This decision of the Court of Appeal is the leading authority on R.S.C., Ord. 65, r. 27 (29). The headnote sets out the terms of sub-r. (29) and then goes on to say:

"An action was settled upon the terms that judgment should be entered for the plaintiff against the defendant for a sum of money 'with costs as between solicitor and client to be taxed (if necessary).' The judgment was accordingly drawn up to that effect. The taxing master taxed the costs upon the footing that the second part of sub-r. 29 applied, and he disallowed or reduced in amount a large number of items, stating in effect that a taxation

of costs as between solicitor and client, where the costs were to be paid by one party to another party, was stricter than a taxation as between solicitor and client where the costs were to be paid by the client to his solicitor and gave little more than a taxation as between party and party:—HELD, that the second part of sub-r. 29, from the words 'but save as against the party who incurred the same,' applied to all taxations except a taxation as between a solicitor and his own client, and that, having regard to the above distinction in taxations as between solicitor and client, the taxing master had taxed the costs on the proper principle."

BUCKLEY, L.J., said this ([1915] 1 K.B. 295):

"There are three modes of taxation as between solicitor and client. The first is where a client is taxing his own solicitor's bill of costs, commonly called taxation as between solicitor and own client. The second is where the costs are to be paid out of a common fund in which the client and others are interested. This case does not come within either of those two classes. The third is where the costs are payable by one party to another or out of a fund in which the party entitled to the costs has no interest. The present case falls within this last mentioned class. The plaintiff was to have her costs as between solicitor and client to be paid by the defendant. A practice has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale."

I call attention to those words. BUCKLEY, L.J., continued:

"In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor. That distinction is too firmly established for this court to interfere with it, though it may be a matter proper to be considered by the Rule Committee. I have no doubt that litigants who stipulate for and by agreement are to receive costs as between solicitor and client often intend to get an indemnity in respect of costs. The taxing master has taxed the costs upon the footing that the latter part of r. 27 (29) of Ord. 65 applies. The history of that sub-rule is this. As the sub-rule stood before the alteration in 1902 it was negative in form and was confined to costs as between party and party. It ran thus: 'As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.' In January, 1902, this sub-rule was so altered as that the first part was reproduced in an affirmative instead of a negative form and was made to extend to every taxation. It now runs thus: 'On every taxation the taxing master shall allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party.' So far the new sub-rule was silent as to the costs dealt with in the latter part of the old sub-rule, namely, costs incurred through over-caution, etc. Those costs are remitted to the latter part of the new sub-rule, which runs thus: 'But save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence, or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses.' Here I find picked up and reproduced in negative words the latter part of the old sub-rule. The meaning is this. The earlier part of the new sub-rule says that the taxing master shall allow a certain class of costs. The latter part says that,

except in one particular case, certain costs which were formerly to be disallowed are still to be disallowed. The excepted case is that of taxation of costs as between a solicitor and his own client. This part of the sub-rule in effect provides that as between solicitor and own client those costs may be allowed, but that in all other cases they shall not. The other cases include taxation as between solicitor and client as distinguished from taxation as between solicitor and own client. Accordingly upon such a taxation as this the costs described in the latter part of sub-r. 29 are not to be allowed. The taxing master in this case has proceeded upon that footing. He says that 'the taxation in the case of No. 3, which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed'. That is not very well expressed. 'Necessary letters to and attendances on the client' are allowed as between party and party; the letters and attendances there referred to must be letters and attendances beyond those that would be allowed as between party and party. The taxing master has taxed this bill of costs on the footing that the latter part of sub-r. 29 applies. For the reasons I have given I think that he was right. Except upon a taxation as between solicitor and own client such costs as there mentioned are not to be allowed. That is the only question of principle argued before us. This court does not interfere on questions of quantum."

PICKFORD, L.J., delivered judgment to the same effect.

The first thing to be observed is that BUCKLEY, L.J., there set out that there were three modes of taxation as between solicitor and client, and he described each of those modes. He obviously recognises and approves those three modes of taxation. I have no doubt that when the draftsman of the Legal Aid and Advice Act, 1949, drafted para. 4 of sched. III, he must have been well aware of these three modes of taxation, and that they were recognised by the courts and had been approved by the Court of Appeal in *Giles v. Randall* (11). Now, that case decided that on a taxation as between solicitor and client R.S.C., Ord. 65, r. 27 (29), applied to every taxation, and, except in one case, the latter part of the sub-rule also applied, the exception being in a case where the taxation was between solicitor and own client. But it is to be observed that BUCKLEY, L.J., referred to the observations of the taxing master dealing with necessary letters to and attendance on the client. He did indicate that on a taxation as between solicitor and client there may be other items allowable which would not be allowable on a taxation as between party and party. The other matter of importance from the point of view of the question which I have to determine is contained in the words of BUCKLEY, L.J., where he regrets the practice of differentiation between taxation as between solicitor and client and taxation as between solicitor and own client, and he then goes on to say (*ibid.*, 295):

"In the former case the taxation is substantially a party and party taxation on a more generous scale."

There, he uses the same language as that used by DENNING, J., in *Goodwin v. Storrar* (10).

I was also referred to *Frankenburg v. Famous Lasky Film Service, Ltd.* (12).

The material passage which was cited to me was a passage from the judgment of LORD HANWORTH, M.R. ([1931] 1 Ch. 436):

"It appears to me that that case [*Pêcheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co.* (13)] is abundant authority for allowing, as the registrar has allowed, these costs before action. It is to be observed that in the *Pêcheries Ostendaises* case (13) the plaintiff's bill of costs which were to be paid was taxed on the basis of party and party, and that in the present case the costs are to be taxed on the basis of solicitor and client,

but the difference between party and party and solicitor and client costs is undoubtedly this, that the solicitor and client costs are intended to embrace a more generous allowance for the actual costs which have been incurred by the plaintiff. It appears to us, therefore, that these costs incurred before action are costs which may be fairly attributable to the conduct of the defendants and thus within the costs which it was contemplated would have to be paid by the defendants."

The sixth class to which counsel for the Queen's Proctor referred was a taxation as between party and party, and he referred me to one case, *Pêcheries Ostendaises (Soc. Anon.) v. Merchants' Marine Insurance Co.* (13). ATKIN, L.J., says ([1928] 1 K.B. 762):

"The other matter that arises is as to the costs incurred before the action was commenced. That has nothing to do with the stay of proceedings, but it is a pure question whether or not the costs incurred before the writ was issued are costs which the plaintiffs can recover under an order for the costs of the action. Upon that question it appears to me to be very important to bear in mind that the taxing masters have got to apply the words of Ord. 65, r. 27 (29). That rule is the guiding rule in the taxation of costs. It is intended to sum up generally the principles upon which costs are awarded; and I cannot help thinking that if that rule were really rigorously applied by everybody—and by 'rigorously applied' I mean applied in all cases and giving full effect to the width of its language—there would be many fewer complaints by successful litigants than there are at the present moment. It is a rule which is intended to give to the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action. It says in terms that the taxing master is to allow 'all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice.' That is the whole principle that the taxing master has got to apply."

I come now to class four in counsel's classification which is a taxation as between solicitor and client where costs are payable out of a common fund, which is the basis provided in para. 4 (1) of sched. III to the Act of 1949. I was referred to two cases dealing with this classification. The first was *Re Joint Stock Trust & Finance Corp., Ltd.* (14). The object of citing this report was to show that there was authority for the proposition that on a taxation as between solicitor and client where the costs were payable out of a common fund, the taxing master could properly allow items which would not be allowable on a taxation as between party and party. The headnote to that case reads as follows:

"Costs—Taxation—Solicitor and client—Costs payable out of common fund—Transcript of shorthand writer's notes of misfeasance proceedings—Costs incurred through over-caution . . . or other unusual expenses—Ord. 65, r. 27 (29). Summons to review taken out by the applicant in certain misfeasance proceedings in which judgment was given by EADY, J., on Feb. 1, 1912. At that time the judgment was irrecoverable, but in the year 1921 after leave had been given to proceed on the judgment, and a subsequent summons issued to compromise, a sum of £25,000 became divisible amongst the debenture holders of the Selected Gold Mines of Australia Limited. Party and party costs of the compromise were taxed and paid. In these costs a transcript of the whole of the misfeasance proceedings was included, but disallowed. Subsequently the applicant, who was also the applicant on the misfeasance and the compromise summons, brought in a solicitor and client bill of costs payable out of the fund as directed by the order sanctioning the compromise. The taxing master disallowed these costs on the ground that the same were incurred through over-caution. HELD, that in the circumstances the transcript was necessary and the costs thereof should be allowed."

EVE, J., in his judgment said (137 L.T. 631):

A "I think the objection ought to be allowed. It is no reflection on the taxing master that he should have construed the language of P. O. LAWRENCE, J., as he has done. He regards the matter as concluded by what the learned judge said. I do not think it is. The applicant incurred these costs for the benefit of a body of debenture holders of whom she was one, and I regard the learned judge's statement as a reservation in her favour. Undoubtedly there were grounds for treating the matter as concluded, but, on the other hand, the language of the learned judge implies some reservation, and the only point to which it could relate was the point whether as between solicitor and client this item, disallowed as between party and party, could be allowed. These transcripts were made for the benefit of all the parties concerned in obtaining payment of the fund now in court, and, in my opinion, were useful, if not absolutely necessary to that end. I think, therefore, the item—not a very serious one in amount—ought to be allowed in the applicant's costs."

C The other authority to which I was referred was the recent decision of ROXBURGH, J., in *Reed v. Gray* (15), which is of great assistance to me in deciding the question which I have to decide. The headnote is:

D "A solicitor brought an action for specific performance of a contract to sell to him certain land. By his defence the defendant alleged that the sale was not genuine, but was the outcome of an unlawful conspiracy to defraud and deprive him of the real value of the premises. The case came to trial, but the defence collapsed, and the court ordered that the costs of the plaintiff be referred to the taxing master to tax as between solicitor and client. HELD: under the order for taxation it was the duty of the taxing master (as on a taxation as between party and party) to adopt as his norm or standard the directions in R.S.C., Ord. 65, r. 27 (29), but at the same time to make more generous allowances than he would in a taxation as between party and party; there was no basis for the view that, under the order made, the taxing master should tax the costs as between party and party, allowing on a more generous scale only the costs of certain letters and attendances; but the order could not be construed as an order for taxation as between solicitor and own client."

E The learned judge, after dealing with the facts of the case, said this ([1952] F 1 All E.R. 242):

G "The case came to trial, was part heard, and then the defence collapsed. Having regard to all the circumstances, I thought that, in the exercise of the discretion which I considered myself to have on the authority of *Andrews v. Barnes* (1), I ought to award the plaintiff costs as between solicitor and client, and, accordingly, I made, on Nov. 16, 1950, an order that it be referred to the taxing master to tax as between solicitor and client the costs of the plaintiff of this action other than certain costs. What is the true construction of that order? On this point *Giles v. Randall* (11) is the leading case and R.S.C., Ord. 65, r. 27 (29), is the relevant sub-rule . . . In *Giles v. Randall* (11) the plaintiff brought an action against the defendant to recover damages for breach of promise of marriage. When the case was in the day's list for hearing terms were agreed and indorsed on counsel's briefs 'that judgment should be entered for the plaintiff for £500 with costs as between solicitor and client to be taxed (if necessary),' and, accordingly, the judgment as drawn up stated that 'it is adjudged that the plaintiff recover against the defendant £500 and her costs as between solicitor and client to be taxed (if necessary).' The plaintiff's bill of costs was taxed, and the taxing master disallowed or reduced in amount a large number of items therein, such as charges for instructions for briefs and

counsel's fees. The plaintiff carried in objections to the disallowances before the taxing master, which, so far as material, were as follows: 'The plaintiff objects generally to the taxation and to the disallowance of the items hereinafter mentioned on the grounds: (1) Such taxation was conducted upon the basis of a party and party taxation. (2) It ought to have been conducted upon the basis of a taxation as between solicitor and client where the costs are to be paid by the client, because the terms of the settlement of the action were that the plaintiff was to receive £500 damages clear, and all the costs for which she was liable to her solicitor were to be paid by the defendant.' The taxing master in his answer thereto (so far as material) said: 'It is well settled that there are various forms of taxation as between solicitor and client. No. 1. Where the costs are payable by the client to his solicitor or where the costs are payable out of a fund belonging entirely to the party. No. 2. Where the costs are payable out of a general or common fund. No. 3. Where the costs are payable out of a fund which belongs to other parties and in which the party has no interest or where the costs are payable by one party to another. The taxation in the case of No. 3, which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed.' These last words, which, it is to be observed, are derived from the taxing master's answers to objections and not from any judgment of any member of the court, are the linchpin of the case which I am now trying, and it is also to be observed that they purport, not to set out a norm or standard of taxation, but to state in summary form the result of a taxation on what the taxing master calls a No. 3 basis. I desire to emphasise that. I cannot believe that the taxing master in that case was ignorant of r. 27 (29), or failed to realise that that was the sub-rule which supplied the norm or standard for taxations as between solicitor and client. I think he was merely stating what in his experience was the general effect of a taxation so conducted. It is noted that he used the words 'in effect', and he does not say 'gives no more than'. He says 'gives little more than'. BUCKLEY, L.J., adopts the classification into three classes indicated by the taxing master."

ROXBURGH, J., then reads the passage ([1915] 1 K.B. 295) that I have already referred to in *Giles v. Randall* (11), and continues (ibid.):

"That reinforces my conclusion that the taxing master knew perfectly well that it was that sub-rule which supplied the norm or standard for taxation, and that the paragraph to which I have referred was not intended by him to be substituted for the norm or standard, but was intended to state a broad summary of the results as he had experienced them. BUCKLEY, L.J., proceeds to discuss the sub-rule and then he says ([1915] 1 K.B. 296): 'The latter part [of the sub-rule] says that, except in one particular case, certain costs which were formerly to be disallowed are still to be disallowed. The excepted case is that of taxation of costs as between a solicitor and his own client. This part of the sub-rule in effect provides that as between solicitor and own client those costs may be allowed, but that in all other cases they shall not. The other cases include taxation as between solicitor and client as distinguished from taxation as between solicitor and own client. Accordingly upon such a taxation as this the costs described in the latter part of sub-r. 29 are not to be allowed. The taxing master in this case has proceeded upon that footing. He says that "the taxation in the case of No. 3, which is the one that applies to this action, is the strictest and in effect gives little more than a taxation as between party and party, except that any necessary letters to and attendances on the client are allowed." That is not very well expressed. "Necessary letters to and attendances on the client" are allowed as between party and party; the letters and attendances there

referred to must be letters and attendances beyond those that would be allowed as between party and party. The taxing master has taxed this bill of costs on the footing that the latter part of sub-r. 29 applies. For the reasons I have given I think that he was right. Except upon a taxation as between solicitor and own client such costs as there mentioned are not to be allowed. That is the only question of principle argued before us'.

A PICKFORD, L.J., agreed. He regretted that he felt bound to affirm the decision, and said that logically costs as between solicitor and client could mean only one thing, viz., such costs as were properly chargeable between a solicitor and his client and were properly payable by the client to his solicitor, but he agreed that the sub-rule did apply to a solicitor and client taxation. He made no reference to the paragraph in the taxing master's answers to which I have referred. That case, in my judgment, decided one thing quite clearly, i.e., that the latter part of the sub-rule applies to a solicitor and client taxation with the inevitable corollary that a solicitor and client taxation cannot be assimilated to, or cannot be made identical with, a solicitor and own client taxation. In my judgment, it decided nothing else. Counsel for the defendant suggested that, as BUCKLEY, L.J., referred to the particular paragraph in the taxing master's answer and criticised it in one respect only, I ought to infer that he impliedly approved it in all other respects. First, I do not think that it was ever intended to be a pronouncement of a norm or standard. Secondly, I do not think that BUCKLEY, L.J., did approve it in all other respects, because it is not really consistent with what he himself has said. He said that in the former case, i.e., the solicitor and client taxation, the taxation is substantially a party and party taxation on a more generous scale. That must be so, because the whole of sub-r. (29) applies equally to both a party and party taxation and to a solicitor and client taxation. Therefore, the characteristics of the items which can properly be allowed must be the same in both classes of taxation. The only scope for difference is that the allowances should be on a more generous scale in one class of taxation than in the other. There is, in my judgment, no possible ground for thinking that BUCKLEY, L.J., thought that the only things that could be treated more generously were certain letters and attendances to the exclusion, for example, of counsel's fees."

D He then deals with the items of counsel's fees, and he says (*ibid.*, 245):

F "For my part, I do not think that BUCKLEY, L.J., by his reference to this particular passage and his criticism of it in one respect only, intended to imply that it was to be read as a limitation on the generality of his own phrase, which is 'that a solicitor and client taxation is substantially a party and party taxation on a more generous basis.' If, contrary to my view, BUCKLEY, L.J., did intend to make that implication, it was plainly obiter dictum. He himself says that the only point of principle decided in the case was whether or not the sub-rule applied to a solicitor and client taxation. This point had no relevance to the decision of that point of principle and PICKFORD, L.J., does not refer to the taxing master's words at all. Therefore, I am not prepared to accept the view that those words have been put forward by anybody, by the taxing master in that case or by the court, as a norm or standard for a solicitor and client taxation. G H In my judgment, the duty of a taxing master is to approach both classes of taxation, both party and party and solicitor and client taxation, with his mind on the sub-rule, which is his proper norm or standard, but, at the same time, he is to make more generous allowances in taxing as between solicitor and client because, though the sub-rule prevents him from fully achieving the intention clearly expressed by the direction in the order, i.e., to allow all that a solicitor can properly claim against a client, it is his duty to carry out that intention so far as permissible."

I respectfully adopt that passage in the judgment of ROXBURGH, J., because, in my view, it is equally applicable to a taxation under para. 4 of sched. III to the Legal Aid and Advice Act, 1949. The only distinction between that case and a taxation under the Legal Aid and Advice Act is that ROXBURGH, J., was dealing with case No. 3 in *Giles v. Randall* (11), whereas the taxation under sched. III would be a taxation under case No. 2 in *Giles v. Randall* (11), that is, where costs are payable out of a common fund. For convenience, I adopt the classification which was made in *Giles v. Randall* (11) and approved by the Court of Appeal. I assume that the taxing master, in dealing with case No. 2, would make more generous allowance than he would in dealing with a case under No. 3. I do not profess to know the precise difference between them. I assume that it is well-known to the taxing master and that it would be on a more generous footing, whereas, of course, compared with No. 1, which is on an indemnity basis, a taxation on the basis of case No. 2 would obviously be less generous.

ROXBURGH, J., went on (*ibid.*, 245):

"In his reply, counsel for the plaintiff referred me to a passage in *Frankenburg v. Famous Lasky Film Service, Ltd.* (12), in the Court of Appeal, which appears to me to embody the same principle. LORD HANWORTH, M.R., said ([1931] 1 Ch. 436): '... the difference between party and party and solicitor and client costs is undoubtedly this, that the solicitor and client costs are intended to embrace a more generous allowance for the actual costs which have been incurred by the plaintiff.' Counsel asks me to go further and to hold that in the present case the order should be construed as though it had directed a solicitor and own client taxation, or, in other words, an indemnity. He says that because *Andrews v. Barnes* (1) was the case on which I relied as giving me jurisdiction to make the order which I made. It is undeniably true that FRY, L.J., delivering the judgment of the court in *Andrews v. Barnes* (1), refers to indemnity. He says (39 Ch.D. 140): '... various circumstances have been stated as influencing the discretion of the court—in some cases to vindicate the honour and justice of the court, and in *Palmer v. Walesby* (16) on the ground of the right of the applicant to indemnity, the reason assigned by KAY, J., for awarding them in the present case.' I cannot accept that submission. In my judgment, this order is not to be construed differently from any other order for solicitor and client costs merely because I thought I found my jurisdiction to make it in *Andrews v. Barnes* (1)."

I, again, respectfully agree with what ROXBURGH, J., says there. He continues (*ibid.*):

"Counsel for the plaintiff further says that *Goodwin v. Storrar* (10) is an authority for the proposition that an order for solicitor and client costs ought now to be construed as though it were an order for solicitor and own client costs. There is no doubt that *Goodwin v. Storrar* (10) has not previously been taken into account in carrying out taxations as between solicitor and client in the Chancery Division. It is a decision of DENNING, J. The plaintiffs were personal representatives of a man and his wife who were killed as a result of an explosion at a munition works, and they brought an action against the defendant claiming damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and a sum under the Fatal Accidents Act for the benefit of the two children of the deceased. The action was settled on the terms that £250 was to be paid in respect of each of the deceased under the Law Reform (Miscellaneous Provisions) Act, 1934, and £1,750 under the Fatal Accidents Act. The settlement was embodied in a consent order approved by the court, which contained the following provision as to costs . . . On taxation, the taxing master taxed the costs on the basis that under Ord. 22, r. 14 (11), the plaintiffs' solicitors were entitled to be paid

such costs as they would be properly entitled to receive from their own clients. The defendant applied for a review."

ROXBURGH, J., then cites the passage which I have already read from the judgment of DENNING, J. ([1947] 1 All E.R. 204), and goes on (*ibid.*, 246):

"Order 22, r. 14, has no application to the action with which I am concerned, but Ord. 65, r. 27 (29), has and still stands. *Giles v. Randall* (11) decided that that sub-rule applies to my order, for, indeed, there is no ground of distinction known to me, other than that with which I have already dealt, between the order in *Giles v. Randall* (11) and the present order. Accordingly, my order cannot be construed as directing a solicitor and own client taxation because so to construe it would be to hold that the sub-rule did not apply to it. But I find in DENNING, J's., decision support for what I have myself already said about the duty of a taxing master in a solicitor and client taxation."

Those are the authorities to which I have been referred. As I have already said, I have no doubt that when the draftsman came to draft para. 4 (1) of sched. III he must have been well aware of R.S.C., Ord. 65, r. 27 (29), and of the decisions of the court that that was the governing regulation which applied to every taxation, not only as between party and party, but also as between solicitor and client, and that the latter part of that sub-rule applied to taxations as between solicitor and client with the one exception where the taxation was as between solicitor and own client. The draftsman must also have been well aware of the classification of the three different methods of taxation as between solicitor and client which had been discussed in *Giles v. Randall* (11) and there recognised and adopted by the Court of Appeal. I have no doubt that with that knowledge Parliament deliberately selected class 2 of the methods of taxation referred to in *Giles v. Randall* (11) as being the appropriate method of taxation of a bill of costs in a case where a litigant had been assisted under the Act of 1949. The question, therefore, which I have to decide, is the principle which the learned registrar ought to adopt in taxing a solicitor's bill of costs, having regard to R.S.C., Ord. 65, r. 27 (29), and to sched. III of the Act and bearing in mind the various authorities which I have already cited.

In my view, the principle which the taxing master ought to adopt is as follows:

(i) Under the order for taxation it is the duty of the taxing master on a taxation as between party and party to adopt as his normal standard the direction in R.S.C., Ord. 65, r. 27 (29). (ii) At the same time he should make more generous allowances than he would on a taxation as between party and party. In making more generous allowances the taxing master, in my judgment, is permitted, not only to allow items which can be properly included on a party and party taxation at a higher figure than that at which they would be allowed on a party and party taxation, but also to allow additional items which would not be allowed on a taxation as between party and party. The taxing master has, of course, a very wide discretion. (iii) The order in my judgment cannot be construed as an order for taxation as between solicitor and own client. I have adopted the language of ROXBURGH, J., in *Reed v. Gray* (15). As I have already pointed out, it seems to me that the only difference between the two cases is that he was dealing with a taxation on a No. 3 basis whereas I have to deal with a taxation on a No. 2 basis.

I come now to the facts of this particular case. The solicitors for the petitioner carried in a bill of costs in which their total for items of costs was £35 17s. 10d. The amount taxed off by the learned registrar was £6 5s. 8d. leaving a balance of £29 12s. 2d., to which had to be added the fifty per cent. authorised increase, which amounted to £14 16s. 1d., making a total of £44 8s. 3d., to which had to be added the disbursements £17 13s. 6d. making a total of £62 1s. 9d. which with the taxing fee of £1 12s. totalled £63 13s. 9d. The learned registrar had disallowed

a considerable number of items and had made reductions in others. Accordingly, objections numbering twenty to the taxation by the learned registrar were carried in. The grounds of objections were:

"The grounds for the objections to the disallowance of these items are that: (i) They were properly incurred in connection with the conduct of these proceedings (ii) That the costs are to be taxed on a solicitor and client basis where the costs are payable out of a common fund. Mr. ERIC SACHS, Q.C., in his book on Legal Aid defines the basis of taxation at pp. 136 and 137 as follows: The solicitor and client basis referred to in sched. III of the Legal Aid and Advice Act, 1949, is a little less stern than the party and party basis the total allowed being normally about fifteen per cent. higher where costs are taxed on the footing that they are to be paid out of a common fund. This results in part through additional items being allowed and in part through discretionary items being allowed at a higher figure."

There was an additional objection carried in to the last item which was

"Petitioner's fee for attendance in court and expenses. The disallowance of this item is objected to on the grounds that the petitioner is entitled to charge his expenses for attending court."

Counsel was not able to cite any authority for the passage in Mr. SACHS' book that the result of the taxation was normally about fifteen per cent. higher where costs are taxed on the footing that they are to be paid out of the common fund. I myself am not aware of the precise way in which the different modes of taxation are worked out and I prefer to express no opinion about it. I read this objection to mean this, that the solicitor is arguing that a taxation as between solicitor and client when costs come out of a common fund is entitled to embrace a more generous allowance than on a taxation as between party and party, and that generosity can extend, not only to increasing the amounts of items, but also to allowing additional items beyond those which would be allowed on a taxation as between party and party. If so, leaving out for the moment the precise percentage of increase, it seems to me to embody the true principle which I have been endeavouring to state.

The learned registrar made some observations. He says:

"My answer is applicable to all objections. This is a solicitor and client bill and not a solicitor and own client bill. I can well understand the difficulty in which solicitors who undertake legal aid cases find themselves. They really, perhaps not unreasonably, desire an indemnity as to costs, however incurred. My own view is that the legislature would have said so had they so intended. I understand that the solicitor is not allowed to recover any sum from the client and in some ways this seems a logical outcome of the proposal for legal aid. But it opens the door to the abuse of a privilege not so much by the solicitor as by the client. I should be very grateful for a ruling."

I agree with the learned registrar that this is a taxation as between solicitor and client out of a common fund and not a taxation as between solicitor and own client. However, the learned registrar disallowed or reduced these twenty items and it seems to me clear that he cannot have accepted the objection which was put forward on behalf of the petitioner to which I have already referred, namely, that there ought to be a more generous allowance than on a taxation as between party and party. I think the proper inference I ought to draw is that the learned registrar declined to accept that basis of taxation, and it seems to me to follow that he must have adopted a standard of taxation which was less generous than that which the petitioner's solicitors were inviting him to adopt. If so, it seems to me that he failed to apply the right principle and, as his answer applied to all the objections, it, therefore, vitiates all the items disallowed which are affected by these objections.

I have to consider now the detailed items in the bill. I am going to refer to them by the numbers in the objections. The first two items raised were negotiations between the petitioner's solicitors and the respondent's solicitors in regard to interim custody and access to the child of the marriage and for maintenance for the child. A small charge was made in the bill for both those items and they have both been disallowed by the learned registrar. In my view, negotiations

- A between solicitors with reference to the interim custody of or access to the child or the maintenance of the child pending the hearing of the suit fall within the class which would be allowable on a party and party taxation and, of course, would be allowable on a solicitor and client taxation, and, if my view is correct, a more generous allowance should be made than would be made in a party and party taxation. I think the registrar was clearly wrong in disallowing those
- B items. I can deal with items 3, 4, 6, 7, 9, 10, 11, 13, 14, 16, 17, together. They all really refer to letters from the petitioner's solicitor to the respondent's solicitors enclosing a weekly sum of 10s. on account of maintenance of the child. Those items seem to me to fall within the category of permitted items as to which the learned registrar should exercise his discretion. In an ordinary case where a solicitor is merely acting as a post office for the purpose of sending
- C a letter enclosing 10s. I should myself find it very difficult to see any valid ground on which such items could be justified, but there might be special cases where it could be properly held desirable or necessary that direct communication should not be made by one spouse to another and in such cases the items might possibly be justified. These are, therefore, matters which, in my view, the learned registrar could allow in the exercise of his discretion if he thought it right to do so in the
- D circumstances of this particular case.

There are one or two other items to which I ought to refer. Item 5 was a charge for writing to the petitioner informing him of the refusal to reduce his legal aid contributions. Apparently an effort was made to persuade either the National Assistance Board or the area legal aid committee to reduce the contributions which had been fixed at the time when the certificate was granted to the

E petitioner. As counsel for the Queen's Proctor pointed out, there is no power to do that unless under the rules there has been an alteration in the circumstances and that did not seem to be suggested here. Unless there were an alteration in the circumstances, or events had happened which would entitle the petitioner under the rules to apply for a variation of the amount of the contributions which had been fixed, that item would seem to be an item which could not be justified.

- F Objection No. 8 is: "Writing petitioner reporting case set down for trial". That, again, appears to me to be an item which falls within the category of a permitted item, but one in which the learned registrar ought to exercise his discretion in every case. It is to be observed that later on in the bill there are charges for "Attending clerk of the rules and fixing case for hearing" and then giving notice to the petitioner. No doubt, the learned registrar would take that into
- G account and consider whether in view of that item the other item was an item which he, in the exercise of his discretion, thought he ought or ought not to allow. Item 12 is: "Writing respondent's solicitors, informing them that the date to be inserted in the summons for maintenance when the payments were to be increased was Jan. 4, 1952. Enclosing 10s. P.O. on account of maintenance of the child". There, again, that seems to be an item which falls within the category
- H of permitted items and one on which the learned registrar should exercise his discretion. Item No. 15 was: "Writing petitioner informing him of result of hearing of maintenance application and as to payment of costs". It seems to me that that clearly falls within the category of permitted items.

Item 19 was instructions for brief which was reduced by the learned registrar from ten guineas to seven guineas. It is the practice of the court never to review a case where the only question is quantum and that practice applies to this Division as well as to all the other Divisions of the court. Counsel for the

petitioner contended before me that the fee which was actually allowed was really the fee which was applicable on a party and party taxation and that on a solicitor and client taxation a more generous figure ought to have been allowed. If the basis on which the learned registrar proceeded was that, then I should think he was clearly wrong and that this matter could and should go back to him for re-consideration. I have, however, no material on which I can attempt to decide whether seven guineas is the usual charge for a party and party taxation. However, on this matter, I follow ROXBURGH, J., in the case of *Reed v. Gray* (15) to which I have already referred where he deals with the somewhat similar problems in that case. An objection was put before him that all the questions which he had to decide were questions of quantum and the learned judge said ([1952] 1 All E.R. 248):

"I do not agree. The question is not the quantum, but from what point of view does one approach the ascertainment of the quantum? If one approaches it from a wrong point of view, the quantum must necessarily be vitiated."

As I have already said, I think the learned registrar did approach these items from the wrong point of view, and, therefore, this item, together with the others, should go back to him for re-consideration in the light of the judgment which I have delivered. The last objection was No. 20: "Petitioner's fee for attendance in court and expenses". In my view, that is a permissible item. I was referred by counsel for the Queen's Proctor to *Harbin v. Gordon* (17) which concerned the allowance for the plaintiff's travelling and hotel expenses. BUCKLEY, L.J., said ([1914] 2 K.B. 586):

"The plaintiff, as a party litigant, was not entitled to any allowance, but as a witness he was entitled to an allowance like any other witness, and none the less because he was also a party litigant. If he had not been a party litigant, but an ordinary witness, the taxing master would have been entitled to require evidence that the amount had been paid before he included it in his allocatur for recovery from the defendant. The whole question is whether, when he is a party litigant, the taxing master is not also entitled to be satisfied that the amount has been paid or that the plaintiff knows that it is going to be recovered for him from the defendant. In my opinion he is so entitled."

In my view, that is the true basis on which this point should be settled, and as in this case, and, indeed, in every petition for divorce, the petitioner is a necessary witness (unless the leave of the court has been obtained to give his evidence by affidavit), it is, in my view, normally permissible and the learned registrar in his discretion should grant a proper fee in respect of it.

I have now reviewed the whole of the items, and, accordingly, I direct that the bill of costs be referred back to the learned registrar for him to re-consider it in the light of my judgment. There is one small matter in regard to the petitioner's fee for attendance in court and expenses. I think the learned registrar might properly require, if he thought fit to do so, that there should be some voucher produced to him at the time of taxation to show that this amount has been paid to the petitioner.

Order accordingly.

Solicitors: *Pyke, Middleton & Brown* (for the petitioner); *Treasury Solicitor*.

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

Re SIMPSON'S MARRIAGE SETTLEMENT.
CHADDERTON AND OTHERS *v.* SIMPSON AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), March 20, 1952.]

A *Power of Appointment—Fraudulent exercise—Exercise to further some purpose other than benefit of object—Special power of appointment among children and remoter issue—Power, contained in appointor's marriage settlement, exercised by will in favour of appointor's surviving children—Condition directing forfeiture of appointee's share of appointor's residuary trust funds unless appointee's share under settlement settled as directed.*

B An appointment will be held to be fraudulent if it is exercised with a view to furthering some purpose which the appointor had in view other than the sole purpose of benefiting the object of the power.

C By a settlement made on his marriage, and dated Apr. 9, 1902, the testator was given a power to appoint the trust funds in favour of the children or remoter issue of the marriage, and, in default of appointment, the funds were to be held on trust for all the children of the marriage as should attain the age of twenty-one years in equal shares. There were four children of the marriage, each of whom attained the age of twenty-one, but one of whom died in 1927. By his will, made on Mar. 29, 1950, the testator, who died on Sept. 27, 1950, directed his trustees to hold his residuary trust funds on trust for such of his children as should be living at his death in equal shares, and then settled the share of each child. He then purported to exercise the power of appointment contained in the marriage settlement by directing the trustees of the settlement to hold the trust funds on trust for such of his three surviving children as should be living at his death, if more than one, in equal shares. He then went on to say, in the same clause of the will: "Provided always and I declare that no child of mine who shall survive me shall be entitled to a share of the residuary trust funds or any income thereof unless such child shall . . . assign to or otherwise vest in my trustees the share of such child under the . . . settlement . . . to be held by my trustees upon the same trusts in every respect . . . as the share of such child in the residuary trust funds under this my will and in case any child of mine shall after the expiration of such time as my trustees shall determine refuse or neglect to assign to or otherwise vest in my trustees his or her share under the . . . settlement then the residuary trust fund shall be held on such trusts as would be applicable under this my will if my child so refusing or neglecting as aforesaid had died in my lifetime a bachelor or a spinster".

F **G** **H** HELD: (i) the power of appointment under the marriage settlement was exercised by the testator, not solely with the object of benefiting the appointees, but for the purpose of carrying out his own project, viz., to have the marriage settlement funds dealt with as if they were his own property, and, therefore, the appointment was not clean of the taint of equitable fraud and was void, and the trust funds were now held on trust for the three surviving children and the personal representative of the deceased child in equal fourth shares under the trusts in default of appointment contained in the settlement.

(ii) "the share of such child under the . . . settlement" in the proviso to the clause whereby the testator purported to exercise the power of appointment was a proper description of the share which the child took in default of appointment, and, on the true construction of the will, the condition requiring each of the three surviving children to settle, as mentioned in the will, his or her share under the settlement was valid and binding and affected the share which each child took in default of appointment.

(iii) in the event of all of the three surviving children refusing to comply with the condition, the testator's residuary trust funds would be held on trust for the persons entitled thereto under the Administration of Estates Act, 1925, Part IV, on the footing that the testator died intestate in respect thereof.

AS TO FRAUDULENT APPOINTMENTS, see HALSBURY, Hailsham Edn., Vol. 25, pp. 581-585, paras. 1033-1035; and FOR CASES, see DIGEST, Vol. 37, pp. 502-504, Nos. 961-971, and p. 513, Nos. 1046-1052. A

Cases referred to:

- (1) *Re Neave*, [1938] 3 All E.R. 220; [1938] Ch. 793; 107 L.J.Ch. 395; 159 L.T. 210; Digest Supp.
- (2) *King v. King*, (1864), 15 L.Ch.R. 479; 20 Digest 429, 1590i.
- (3) *Re Marsden's Trust*, (1859), 4 Drew. 594; 28 L.J.Ch. 906; 33 L.T.O.S. 217; 62 E.R. 228; 37 Digest 513, 1048. B
- (4) *Pryor v. Pryor*, (1864), 2 De G.J. & Sm. 205; 33 L.J.Ch. 441; 10 L.T. 360; 46 E.R. 353; 37 Digest 511, 1031.
- (5) *Vatcher v. Paull*, [1915] A.C. 372; 84 L.J.P.C. 86; 112 L.T. 737; 37 Digest 492, 865.
- (6) *Re Crawshay*, [1947] 1 All E.R. 643; [1947] Ch. 356; *affd.* C.A. [1948] 1 All E.R. 107; [1948] Ch. 123; [1948] L.J.R. 586; 2nd Digest Supp. C
- (7) *Sweetapple v. Horlock*, (1879), 11 Ch.D. 745; 48 L.J.Ch. 660; 41 L.T. 272; 37 Digest 478, 758.

ADJOURNED SUMMONS, in the Liverpool District Registry, to determine inter alia (a) whether the exercise by the testator's will of a power of appointment contained in his marriage settlement was valid or was void as being a fraud on the power by reason of a condition, attached to the appointment, that the appointees, three surviving children of the marriage on whom the testator had settled his residuary trust funds, were to settle, in like manner, the share which each child took under the settlement; (b) whether the condition, under which a child was to forfeit his share of the testator's residuary trust funds if he failed to settle his share under the settlement, was valid and binding on the children; and (c) if the condition was held to be binding and all the children refused to comply with it, the destination of the testator's residuary trust funds. D

E. W. Griffith for the plaintiffs, the trustees of the will.

E. B. Stamp for the first and third defendants, children of the marriage.

J. F. Bowyer for the second defendant, a child of the marriage. E

Joseph Turner for the fourth defendant, the legal personal representative of a deceased child of the marriage. F

Hunter-Brown for the fifth and sixth defendants, infant children of the second defendant.

Arthur Bagnall for the seventh and eighth defendants, infant children of the third defendant. G

P. I. Bell for the ninth defendant, the sole trustee of the testator's marriage settlement.

VAISEY, J.: This summons raises certain questions of construction and of law. The main question which I have to decide is whether the will of Stephen Simpson, deceased, discloses, on the face of it, that an appointment, which the testator purported to exercise by the will, and which was made under the trusts of his marriage settlement, is invalid as being a fraud on the power of appointment. H

The settlement, which was made in consideration of the marriage of Nathalie Hesketh and the testator, was dated Apr. 9, 1902, and was made between Nathalie Hesketh, of the first part, the testator, of the second part, and certain trustees, of the third part. The relevant trusts were to pay the income to the wife, i.e., Nathalie Hesketh, during her life, and on her death to pay the income to the

husband, i.e., the testator. The wife died on Aug. 9, 1921. The testator died on Sept. 27, 1950, having made a will on Mar. 29, 1950, which was duly admitted to probate. That will exercised, or purported to exercise, the power of appointment which was contained in the marriage settlement, and which was made in common form in favour of the issue of the marriage. The trusts of the settlement were that, after the death of the survivor of the husband and wife, the trustees were directed to stand possessed of the trust fund and the income thereof

" . . . in trust for all or such one or more exclusively of the others or other of the children or remoter issue of the said intended marriage at such age or time . . . ",

and so forth, as the husband and wife should jointly appoint, and, subject to any such appointment, as the survivor might appoint. There was no exercise of the power except the exercise, if it were an exercise, by the will of the testator. There were issue of the marriage four children, of whom a son, Stephen Hesketh Simpson, and two daughters, Melene Irving Barnes and Christine Valerie Stuart (each of whom has attained the age of twenty-one years), are defendants to this summons. Another daughter, Mrs. O'Sullivan, died [without issue] on Dec. 23, 1927, having attained the age of twenty-one years and having married. Her husband and legal personal representative is before the court as a defendant.

The testator's will begins by appointing executors, and making a certain number of dispositions. The testator then gave his residuary estate to trustees on the usual trusts for conversion, the payment of his funeral and testamentary expenses, debts and legacies, and the investment of the balance as residuary trust funds. He then directed his trustees [in cl. 6] to hold the residuary trust funds in trust for such of his children as should be living at his death, and, if more than one, in equal shares. There were three children living at his death, and, therefore, down to that point, there was a clear trust for the three children in equal shares. By cl. 7 (a) of the will the testator declared that

" . . . my trustees shall retain the share of each of my children who shall survive me in the residuary trust funds upon the following trusts (that is to say) upon trust to pay the income thereof to each such child as to my son as provided in the next clause and as to each of my daughters for her life and after the death of each child in trust for the child or children or remoter issue of such child or any of them at such ages or times not being earlier than the age of twenty-one years or day of marriage in such shares (if more than one) and in such manner as such child shall by will or codicil appoint and in default of and subject to such appointment in trust for all the children of my same child who being male attain the age of twenty-one years or being female attain that age or marry . . . "

if more than one, in equal shares. By an accruer clause at the end of cl. 7 (a), in case the trusts declared concerning any share of the residuary trust funds should fail or determine, there was a gift over to the other shares of the residuary trust funds. The direction [contained in cl. 7 (b)] with respect to the share of the son is, putting it shortly, in the nature of a protected life interest with discretionary powers as to the application of the income subjoined to it.

Having dealt with his own estate in that manner, the testator proceeded to exercise the power of appointment given to him by the settlement. By cl. 8 of the will he directed the trustees of the settlement to hold the trust funds on trust for such of them, the son and the two surviving daughters, as should be living at his death, and, if more than one, in equal shares, and he continued:

" Provided always and I declare that no child of mine who shall survive me shall be entitled to a share of the residuary trust funds or any income thereof unless such child shall as soon as conveniently may be at the expense of my trust estate assign to or otherwise vest in my trustees the share of such child under the said settlement dated Apr. 9, 1902, to be held by my trustees

upon the same trusts in every respect (including the gift over) as the share of such child in the residuary trust funds under this my will and in case any child of mine shall after the expiration of such time as my trustees shall determine refuse or neglect to assign to or otherwise vest in my trustees his or her share under the said settlement then the residuary trust fund shall be held on such trusts as would be applicable under this my will if my child so refusing or neglecting as aforesaid had died in my lifetime a bachelor or a spinster."

The value of the testator's residuary trust funds is said to be approximately £34,000. The value of the property subject to the trusts of the marriage settlement is £4,000 or thereabouts. The three children, the son and the two surviving daughters, have informed the executors

"... that they do not consider the condition attached by the will of the testator to his appointment to them respectively of the property subject to the trusts of the settlement to be binding upon them, and that, if it should be held to be an effective condition, they would propose to refuse to comply therewith if the result of such refusal would be to cause the testator to die intestate in respect of his residuary trust funds."

That being the position, this summons was issued. The first question that I am asked to decide is whether the property subject to the trusts of the settlement is now held (a) on trust for the son and surviving daughters

"... in equal third shares absolutely by virtue of the appointment contained in the will of the testator; or (b) upon trust for the three defendants and [the personal representative of the deceased daughter] in equal quarter shares by virtue of the trusts in default of appointment contained in the said settlement upon the footing that the appointment thereof contained in the will of the testator is ineffective..."

That alternative submission is based on the proposition that, on the face of it, the will, in purporting to exercise the power of appointment, was fraudulent in the technical sense and inoperative, with the result that the fund remains unappointed and so passes in equal fourth shares to the three surviving children and the representative of the fourth child, and not under the appointment to the surviving three.

I do not think that this is an easy question, and there are, I think, only two authorities, *Re Neave* (1), a decision of FARWELL, J., and *King v. King* (2), an Irish decision, which appear to support the proposition that this kind of scheme is operative by quasi application of the principle of election or otherwise. In *Re Neave* (1) FARWELL, J., held that the conditions sought to be proposed by the proviso in the will which was before him were ineffective and invalid, and that the appointees took under the appointment free from the conditions which were designed to bring about the settlement of the appointed share. In his judgment, FARWELL, J., said ([1938] 3 All E.R. 224):

"... [the testator] has sought to impose a condition upon the two sons in connection with their enjoyment of the property which they take under the power. He has endeavoured to impose upon them a condition that they shall settle that property in such a way that, if it had been contained in the appointment itself, it would obviously have been void on one ground, at any rate—namely, that it exceeded the power. In my judgment, a testator cannot so exercise his power as to impose a condition as to the enjoyment of the property which he is appointing in such a way that the appointment would have an illegal effect. However, a testator may, of course, say: 'I exercise the special power of appointment in favour of the objects of the power, and I give the residue of my property, some other portion of my property, to those objects, but, if those objects do not make a settlement

of the property which they get under the appointment, then they shall forfeit what I otherwise would have given them out of my own property.' That is a perfectly legal thing, and one which any testator is entitled to do. It is said in this case that, on the true construction of this will, that is really what the testator has done."

But FARWELL, J., decided that that was not the effect of the will in that case.

- A It seems to me that that dictum of FARWELL, J., really covers the present case. In *King v. King* (2), which was decided by the Lord Chancellor of Ireland (MAZIERE BRADY) in 1864, it was held (and not merely stated by way of dictum), that, because of the express clause in the will then before the court, the legatees could not take the legacies which were given to them by the will without settling their shares in the appointed fund according to the direction of the testatrix.
- B Those two cases, one by its decision and the other by its dictum, are undoubtedly in favour of the view that the testator's appointment was valid and was not vitiated by any taint of fraud. On the other side, there is a great mass of authority as to what is or is not a fraud within the meaning of that expression as used in connection with frauds on the power. Neither *Re Marsden's Trust* (3) nor *Pryor v. Pryor* (4) is really similar to the present case, because in each of
- C these cases there was something in the nature of an understanding, which raises entirely different questions from those which I have to decide in the present case. There is no question of bargain here, so far as I know. The testator had not approached the children to induce them to do anything with their shares after his death, and the whole matter turns on what appears in the will itself.

- D In my opinion, the law on the subject is best to be found in *Vatcher v. Paull* (5), where there is a very clear enunciation of the principle by LORD PARKER OF WADDINGTON, delivering the judgment of the Privy Council. Then I might also refer, not because of anything which it decides, but because the authorities are there summed up, to my own decision in *Re Crawshay* (6), which was approved in the Court of Appeal, where, again, the authorities were exhaustively considered in the judgment of the court delivered by COHEN, L.J., on the second question
- E for determination. The doctrine of fraud on a power has received a good deal of illumination in recent times, and I think that, as compared with 1864, there is a much greater emphasis laid on that principle today. The doctrine can be summed up in the shortest possible way by saying that an appointment will be held to be fraudulent if it is exercised with a view to furthering some purpose which the appointor had in view other than the sole purpose of benefiting the
- F appointee who is or may be the object of the power. In *Re Crawshay* (6) what the appointor had in view was to bring in some children who had been excluded from taking any benefit under her father's will whereby the power was created. The appointment was made to a relative whom the appointor had good reason to suppose would remedy what was regarded as a grave injustice. In the present case, it seems to me that the exercise of the power under the marriage settlement
- G was made for the purpose of furthering an object which the testator had in view, which was not confined to the benefits simpliciter of the appointees themselves. I think he was determined that, so far as he could, he would tie up the property with his own property and have it dealt with as if it were his own property. In my view, according to the modern trend of authorities, as exemplified in *Vatcher v. Paull* (5), and as explained by reference to the earlier authorities in
- H my own judgment and in the judgment of the Court of Appeal in *Re Crawshay* (6), that kind of intention on the part of the appointor vitiates the appointment because he was doing something to serve his own ends, to carry out his own projects, to give effect to his own ideas of what was right and proper, and not merely to further the benefit of the appointees themselves, without any regard to those issues. Therefore, I think, on the whole, that the appointment of the marriage settlement fund by the will of the testator was void, as it was not clean of that taint of equitable fraud which, according to well settled

principles, destroys the efficacy of the exercise of the power. I feel bound to hold, though not without some hesitation, that, as the appointment was invalid, the trust funds are now held on trust for the three surviving children and the personal representative of the deceased child in equal fourth shares, not under the appointment, but by virtue of the trusts in default of appointment which are contained in the settlement. That is the declaration I shall make on the first question raised by the summons.

The second question which is raised is:

"Whether the condition contained in the will of the testator requiring [the three surviving children] to settle as therein mentioned the share appointed to him or her of the property subject to the trusts of the above mentioned settlement is (a) valid and binding upon them respectively; or (b) void and ineffective."

No share, as I have already held, has been appointed to them, but when I look at the words of the will a curious difficulty appears to me to arise. In cl. 8 the testator says:

"In exercise of the power conferred upon me by the settlement . . . I appoint and direct that the trustees of the said settlement shall hold the trust funds comprised therein upon trust for such of [the three surviving children] as shall be living at my death and if more than one in equal shares . . ."

I have already held that that is inoperative, but he goes on:

"Provided always and I declare that no child of mine who shall survive me shall be entitled to a share of the residuary trust funds or any income thereof unless such child shall as soon as conveniently may be at the expense of my trust estate assign to or otherwise vest in my trustees the share of such child under the said settlement . . . to be held by my trustees upon the same trusts . . ."

as the share of the child in the residuary trust funds. The question is whether "the share of such child under the said settlement" refers exclusively to the share which the testator must have supposed that he had appointed under the early part of the clause or whether it extends to the share of such child under the settlement in default of appointment. It is not, perhaps, immaterial to observe that there is a very remarkable principle that, where an appointment is made, the appointed share is held not under the settlement which creates the power, but under the deed of appointment. That has sometimes arisen in this way. Where an assignment is made of the assignor's share under a settlement, it has been held that the assignment does not apply to, or affect, the share which the assignor subsequently acquires under a deed of appointment. There is a distinction drawn between a share which is taken under the original document in default of appointment and the share which is taken by the appointee under the appointment itself. In *Sweetapple v. Horlock* (7), which is usually cited in this connection, it was held, in effect, that the appointees took new estates under the appointment and did not take any estate directly under the settlement itself in default of appointment.

I find this a difficult problem to decide. Strictly speaking, "the share of [a] child under the . . . settlement" is a proper description of the share under the settlement in default of appointment and is not—although I think it is apt to cover it—really an absolutely correct description of the share taken under the appointment itself. If the clause to which I am now referring had been introduced merely by the words "Provided always", I think that there would have been a great deal to be said in favour of it being merely a proviso applicable to the appointed share. As there is, in the events which happened, no appointed share, I think it would have followed necessarily that nothing in the proviso would have had any effect. But the testator does not say merely: "Provided

always that no child shall be entitled to a share of the residuary trust funds". He says: "I declare that no child . . . shall be entitled to a share of the residuary trust funds". On the whole, in my judgment, the direction to bring into settlement the share which the child took in default of appointment is affected by and caught by this proviso. Therefore, I shall declare, in answer to the second question raised in the summons, that the condition requiring the testator's three surviving children to settle as therein mentioned, not the share appointed to him or her of the property subject to the trusts of the settlement, but the share which such child took under the settlement, is valid and binding on them and affects the share which each child took in default of appointment.

Lastly, I have to decide this question. Assuming that the condition is held to be binding on the three surviving children and that all of them will refuse to comply with the condition, what would happen to the residuary trust funds? That depends on the concluding words of cl. 8, which are as follows:

" . . . and in case any child of mine shall after the expiration of such time as my trustees shall determine refuse or neglect to assign to or otherwise vest in my trustees his or her share under the said settlement then the residuary trust fund shall be held on such trusts as would be applicable under this my will if my child so refusing or neglecting as aforesaid had died in my lifetime a bachelor or a spinster."

It is suggested, on the one hand, that that means that the residuary trust funds will go as on an intestacy, in the events which have happened, in equal shares between the three surviving children, or, in the alternative, that it is a direction for the distribution of the estate on the footing that all three children have died in the testator's lifetime without ever having been married. In my view, the first of those alternatives is the correct one. I think the question raised in question 3 of the summons should be answered by declaring that, if all the three children refuse to comply with the condition, the residuary trust funds of the testator "will be held upon trust for the persons entitled thereto" under the relevant provisions of the Administration of Estates Act, 1925, Part IV.

Order accordingly.

Solicitors: *Wilson, Wright & Ascrofts*, Preston (for the plaintiffs and the second, fourth, fifth and sixth defendants); *Warren & Warren* (for the first, third, seventh and eighth defendants); *Winder & Holden*, Bolton (for the ninth defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

TRANS TRUST S.P.R.L. v. DANUBIAN TRADING CO., LTD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), March 10, 11, 12, 28, 1952.]

Damages—Measure of damages—Foreseeable consequences of breach of contract—Sale of goods—Loss of profit—Payment by confirmed letter of credit—Failure to procure confirmation—Knowledge of parties that subject-matter of sale unobtainable by sellers without confirmation.

On Sept. 10, 1950, a Belgian company offered to A. Co. one thousand tons of rolled steel, f.o.b. Antwerp, delivery in December, payment to be against an irrevocable and confirmed letter of credit. A. Co., who were unable to produce the letter of credit themselves, offered the steel to the sellers who in turn offered it to the buyers. On Sept. 20, 1950, the buyers, subject to the requirements as to the provision of a letter of credit, offered the steel to an American company. Both the sellers and the buyers knew that neither of them was in a position to fulfil their contractual obligations unless the American company made the money available through a letter of credit. On Sept. 25 the American company accepted the buyers' offer, and on the same day the buyers agreed with the sellers that they would purchase the steel, stating: "A credit will be opened forthwith". Thereupon the sellers gave a written order to A. Co. The American company failed to open the credit, and, the buyers being unable to do so, the sellers claimed against the buyers for breach of contract and a declaration that the sellers were entitled to be indemnified against any damages payable by them to A. Co. At all material times the market value of the steel was higher than the contract price. On the question of damages,

HELD: the buyers being aware that the sellers could not obtain the goods unless the letter of credit was provided, the sellers were entitled to damages representing the loss of the profit which they would have made on a sale to the buyers, that being a loss which at the time of the contract was foreseeable by the buyers as the probable consequences of their breach, but the buyers were not aware that A. Co. also depended on the credit to obtain the goods, and, therefore, a loss by that company and possible right of recovery against the sellers was not within the contemplation of the parties, but was too remote, and the sellers were not entitled to the declaration sought.

Decision of McNAIR, J. (ante, p. 89), reversed in part.

AS TO REMOTENESS OF DAMAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 103-109, paras. 130-136; and FOR CASES, see DIGEST, Vol. 17, pp. 95-99, Nos. 108-141.

Cases referred to:

- (1) *Hadley v. Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 8 Digest 138, 910.
- (2) *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 2nd Digest Supp.
- (3) *Monarch S.S. Co., Ltd. v. Karlshamns Oljefabriker (A. B.)*, [1949] 1 All E.R. 1; [1949] A.C. 196; [1949] L.J.R. 772; 2nd Digest Supp.
- (4) *Wallis v. Smith*, (1882), 21 Ch.D. 243; 52 L.J.Ch. 145; 47 L.T. 389; 17 Digest 79, 12.
- (5) *Liesbosch, Dredger v. Edison S.S.*, [1933] A.C. 449; 102 L.J.P. 73; *sub nom. The Edison*, 149 L.T. 49; Digest Supp.
- (6) *Muhammad Issa el Sheikh Ahmad v. Ali*, [1947] A.C. 414; 2nd Digest Supp.
- (7) *Household Machines, Ltd. v. Cosmos Exporters, Ltd.*, [1946] 2 All E.R. 622; [1947] K.B. 217; [1947] L.J.R. 578; 176 L.T. 49; 2nd Digest Supp.
- (8) *Pavia & Co., S.P.A. v. Thurmann-Nielsen*, [1952] 1 All E.R. 492.

(9) *London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co.*, [1893] A.C. 429; 63 L.J.Ch. 93; 69 L.T. 637; 58 J.P. 36; 17 Digest 239, 555.

APPEAL by the buyers from an order of McNAIR, J., dated Dec. 13, 1951, and reported ante, p. 89.

The sellers claimed that in September, 1950, by a contract partly verbal and partly in writing they agreed to sell to the buyers, who agreed to buy from them, **A** one thousand tons of rolled steel sheets from S. A. Metallurgique d'Esperance Londoze (the manufacturers), price 8,025 Belgian francs per one thousand kilos, f.o.b. Antwerp, delivery in December, 1950. Payment was to be cash against shipping documents from a confirmed letter of credit to be opened by an American company to whom the buyers had re-sold or were proposing to re-sell the goods, such credit to be provided at the Krediet Bank in Brussels in favour **B** of S.A. Azur from whom the sellers were buying the goods. The sellers alleged that it was a term of the contract that the buyers would cause the letter of credit to be opened and confirmed forthwith; that no such letter of credit was opened, and that by a letter dated Oct. 16, 1950, the buyers refused to take any steps to have the same opened; and that thereby the buyers had broken their contract and the sellers had suffered damage. The buyers alleged that the contract was **C** conditional on a letter of credit being provided by the American buyers, and that, if no such letter was provided, no obligation was to be assumed by the buyers. McNAIR, J., found that there had been a binding agreement between the parties, that a term of that agreement was that the buyers would see that a credit was opened forthwith and that the buyers were in breach of that agreement, and he awarded the sellers £3,214 5s. 8d., damages, being the loss of profit suffered by **D** the sellers based on the difference between the price at which the sellers had agreed to buy from S.A. Azur and the price which they would have received had the contract been performed. The learned judge also granted the sellers a declaration that they were entitled to be indemnified by the buyers to the extent that the sellers might be held liable to S.A. Azur for the sellers' breach of contract with that company.

E Winn for the buyers.
Mocatta, Q.C., and T. G. Roche for the sellers.

Cur. adv. vult.

Mar. 28. The following judgments were read.

SOMERVELL, L.J.: In this case the sellers claimed and were held entitled **F** by McNAIR, J., to damages for breach of contract and a declaration covering prospective further damage. The buyers appeal.

On Sept. 1, 1950, steel manufacturers in Belgium offered to a Belgian company, Fabema, one thousand tons of rolled steel in approximately equal quantities of three gauges, separate prices for each gauge, the mean price being 7,085 Belgian francs per ton, f.o.b. Antwerp, delivery in December. According to what was **G** a normal requirement in contracts of this kind in Belgium at the time, payment was to be against an irrevocable credit to be opened at the same time as the order. That offer was accepted on Sept. 9. Fabema offered the steel to a company, Azur, and after some negotiations Azur were given an option up to the end of September. Azur notified the sellers, also a Belgian company, who notified the buyers. The prices quoted increased as the offer passed down the **H** chain. The individuals concerned were, on behalf of the sellers, Mr. Wilhelm, and, on the part of the buyers, Mr. Schindler. The agreement sued on was alleged by the sellers to have been made orally in telephone conversations between Sept. 21 and 25 and at an interview in Brussels on Sept. 26, 1950, confirmed by a written order sent by the buyers on Oct. 2. Neither the sellers nor the buyers had the financial resources to obtain the credit which was known to be required forthwith. The buyers, through Mr. Schindler, after he had been notified of the offer, got in touch on Sept. 20 with a Mr. Trup, who was vice-president of the

Leland Corporation of Illinois, who happened to be in London. Mr. Schindler made clear to Mr. Trup the necessity for the immediate opening of the credit. The learned judge found that Mr. Trup informed Mr. Schindler of his acceptance on behalf of the Leland Corporation on Sept. 24, and the buyers received a written order from the Leland Corporation on Sept. 25. On that day the buyers wrote a letter which I will read with an order, the material parts of which I will also read.

"To Messrs. Trans Trust Ltd., Brussels. Dear Sirs, we beg to hand you herewith our order No. 257 for one thousand tons hot rolled sheets as per your offer of Sept. 19. This order has been given to us on an official form of the Leland Corporation of Chicago, Ill., by their vice-president who is here in London. A credit will be opened forthwith, but we have been asked to send as soon as possible one sheet as a sample as they want to make trials with that quality. Yours faithfully, for and on behalf of Danubian Trading Co. Ltd."

Then the order gives the quantity and the price of the goods, giving only one gauge. The price is 8,025 francs, and then there is the analysis, the description of the sheets and packing, and then

"Terms: Cash against documents from confirmed letter of credit. Special Instructions: As the letter of credit will be opened in dollars at the rate of 7.55 per 100 lb. which is our selling price, we must have a confirmation from you that the difference between the purchase price and the aforementioned price will be placed immediately at our disposal. For and on behalf of Danubian Trading Co. Ltd."

The letter makes it clear that the buyers realised that the credit had to be opened forthwith, and indicates that that had been accepted by the Leland Corporation. There is admittedly a variation between the order and the offer as passed on to the buyers. The offer was for three gauges, 18, 20, and 22. The order is for one gauge only, 20. Time was running out and it is clear that Mr. Wilhelm, who knew of Mr. Schindler's negotiations with Mr. Trup, had been expecting or hoping for notifications of the credit with the order. He telephoned on Sept. 25 and was told by Mr. Schindler that the credit was on its way. He telephoned again on Sept. 26 and Mr. Schindler accelerated a visit to Brussels where he arrived later on Sept. 26. At this stage, Mr. Wilhelm had not received the buyers' letter and order. It was obtained during the interview which was at the office of Fabema whose representative was Mr. Cannio. When the documents arrived Mr. Wilhelm noticed the variation in the gauges. There was some conflict of evidence as to this on which the learned judge accepted, as on other matters, the evidence of Mr. Wilhelm. I do not think it affects the issue, but it is clear that Mr. Schindler agreed he would put the matter right with Mr. Trup and took back the order. There was also discussion as to date of shipment and whether the steel would be ready before January. After the interview, or possibly on Sept. 27, Mr. Schindler informed Mr. Wilhelm that Mr. Trup agreed to the three gauges.

I will now read the learned judge's finding. It was not disputed that the judge's references to Mr. Wilhelm and Mr. Schindler are to be treated as meaning sellers and buyers. In all the conversations they were, of course, acting on behalf of their companies.

"The result of all that is that I am satisfied that at latest by the 27th a firm agreement was made between Mr. Schindler and Mr. Wilhelm, that Mr. Schindler's firm should purchase the one thousand tons of steel as specified, in three gauges in approximately equal quantities, at a mean price of 8,025 Belgian francs, and that it was part of that agreement that Mr. Schindler undertook a personal obligation to procure that the Leland Corporation would make available forthwith a letter of credit in favour of Messrs. Azur, the sellers to the plaintiffs, and that Mr. Wilhelm would

account to Mr. Schindler for the difference between 7.55 U.S. dollars a ton and 8,025 Belgian francs, and I am also satisfied that by that date it had been agreed between the parties that no objection would be taken to January delivery, if necessary."

Subject to the submission of counsel for the buyers that this was a contract solely in writing which cannot be varied or contradicted by oral evidence, this is, of course, a finding of fact. The learned judge accepted Mr. Wilhelm as an honest and accurate witness, and the evidence clearly supports the finding. Mr. Schindler's main case, which he sought unsuccessfully to support by evidence, was that any agreement between the parties was either subject to the opening of the credit by Leland or was dissolved if, as happened, the credit was not opened, or, put as counsel for the buyers sought to put it, the buyers did not undertake that the credit would be opened forthwith. They made an innocent misrepresentation with regard to it which induced the contract, but it was not a term of the contract. This might give a right to rescission, but under the contract, on this view, the credit did not have to be opened until or shortly before the shipment period. Reliance was placed on the absence in the "order" as distinct from the letter of any reference to the immediate opening of the credit. Whether either of these was the basis of the relationship, assuming the contract to be oral, depends on what was said. We could not possibly interfere with the learned judge's finding unless, perhaps, it could be shown that there were statements in the letters which showed it was wrong. I do not propose to refer in detail to the letters. I agree with the learned judge that on the whole they are more consistent with the agreement as found by him than with the buyers' case. I will complete the narrative before coming to the submissions of counsel for the buyers. A renewal of the option was obtained by Azur ultimately, in effect, till Oct. 17, and on Oct. 1 the sellers put their order, previously given and accepted orally, in writing to Azur. On Oct. 2 the buyers sent their order corrected as to gauges. In the covering letter the buyers refer to the "fact that the credit has not been opened as it should have been." They refer to protests they had made and assurances they had received from Mr. Trup. On the same day the buyers wrote to Mr. Trup. There were further communications. On Oct. 14, a Saturday, the sellers cabled to the buyers giving Oct. 17, Tuesday, as the latest day by which the credit must be opened. This was confirmed by a letter. The credit was not opened. The sellers claimed against the buyers for breach of contract, and on the contract as found by the learned judge there clearly was a breach.

The first point of counsel for the buyers before us was that the learned judge was wrong in law in admitting oral evidence to contradict or vary a written agreement. There are letters prior to Sept. 26 referring to telephone conversations and the offer which make it quite clear that the parties were not *ad idem* up to and including Sept. 25. It was on that day that the buyers wrote out and sent the order and covering letter which I have read. This was for one thousand tons of gauge 20, whereas the sellers' offer was in respect of three gauges. Regarded as a counter offer it was not accepted, nor as a document was it amended till Oct. 2. No point is taken in this case as to unenforceability under s. 4 (1) of the Sale of Goods Act, 1893. There is no document signed by the sellers said to constitute the agreement. There would have, therefore, to be oral evidence to show that the sellers had accepted some document as embodying the terms of the contract. The evidence as to the interview of Sept. 26 as accepted by the learned judge seems to me to negative any such conclusion. The letter and order arrived in the course of the interview. Mr. Wilhelm noticed that there was only one gauge, and this was of vital importance as the Leland Corporation order had to correspond with the steel to be supplied by the mill. Apart from that, as it seems to me, the learned judge came to the right conclusion, namely, that the parties were orally agreeing the contractual position as between themselves

and were not embodying them in a document. It was common ground that the credit had to be opened before the option expired. The learned judge has found that as between sellers and buyers, Mr. Schindler agreed to the possibility of January shipment. When Mr. Schindler obtained, as he did on Sept. 26 or 27, while still in Brussels, Mr. Trup's agreement to the three gauges, no amendment was then made to the written order. If the credit had been opened by Leland before Oct. 2 when the buyers amended the order and the sellers had sought to say that the parties were not *ad idem* because the written order of Sept. 25 was for one gauge only, they would have been in a hopeless position because Mr. Schindler had orally agreed to accept the offer as originally made, namely, for three gauges. This seems to me to show clearly that the parties were proceeding on the basis of the spoken and not the written word. This point, therefore, in my opinion, fails.

Before the learned judge and before us a further point was taken, namely, that the sellers' cable of Oct. 14 received by the buyers on Oct. 16, giving Oct. 17 as the last day on which the credit should be opened, was a breach of contract by the sellers. This was based on the principle that a party who allows time for an act to be extended must give reasonable notice as to the time when he will regard failure to fulfil the conditions as a breach. In the circumstances of this case, and having regard to modern facilities for rapid communication, I agree with the learned judge that this was not inadequate notice. I also agree with him that the buyers' letter of Oct. 16, in which they indicated that they were going to take no further steps to obtain the letter of credit makes it impossible for them to rely on this point.

With regard to the measure of damages, the sellers claimed, and the learned judge awarded them, a sum equal to the profit which they would have made if the credit had been opened and the successive sales had gone through. This was £3,214 5s. 8d. It was not disputed before us that at the date of the breach the market price of steel was higher than the contract price. I agree, of course, with counsel for the buyers that, *prima facie*, in these circumstances, on a repudiation by the buyer, the seller can claim nominal damages only. The two rules in *Hadley v. Baxendale* (1) were recently considered by this court and their operation was analysed by ASQUITH, L.J., in *Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.* (2) ([1949] 1 All E.R. 1002). There is also, if I may say so, a helpful sentence which I will cite from LORD WRIGHT's speech ([1949] 1 All E.R. 14) in *Monarch S.S. Co., Ltd. v. Karlshamns Oljefabriker (A.B.)* (3):

"These general statements could be multiplied, but the question in a case like the present must always be what reasonable business men must be taken to have contemplated as the natural or probable result if the contract was broken."

The learned judge found, and on this point the evidence wholly supports his finding, that sellers and buyers knew that neither of them was in a position to open the necessary credit. Their role was that of intermediaries making a profit if the buyers had been able to perform their undertaking to procure the opening forthwith by the Leland Corporation of the necessary credit. This, then, was, it is said, the contemplated loss if the buyers failed to carry out their undertaking. The learned judge summarises the issue in this way (*ante*, p. 90):

"It was established that at all material times the market value of the steel, in the hands of anyone in a financial position to obtain it from the suppliers, was in excess of the contract price as between the sellers and the buyers, but it was also established that both the sellers and the buyers knew that neither of them was in a position to put up the necessary Belgian francs to satisfy their purchase obligations unless the American buyers made the money available through their letter of credit. Accordingly, it would be within the reasonable contemplation of both of them that failure to put up the letter of credit would mean that the contract could not be executed."

In the present case the seller would get only nominal damages if the prima facie measure as laid down in s. 50 (3) of the Sale of Goods Act, 1893, was applicable. He gets more than the prima facie measure. One can imagine cases in which the principle as applied by the learned judge would give him less. If the market price had fallen so that the prima facie measure gave a larger sum than the loss of profit, the seller might find himself restricted to his loss of profit on the deal if that was the loss contemplated in the circumstances by the parties.

The first submission of counsel for the buyers was that the buyers' breach was a failure to pay money and that the only damage recoverable in such a case is interest: *Wallis v. Smith* (4). The learned judge regarded the principle as inapplicable to a failure to procure the provision of a letter of credit. There is, I think, a further difficulty. If on a sale of goods the buyer fails to open a credit or to provide the purchase price, and this can be, and is, accepted as a repudiation of the contract, the principle clearly has no application. The seller is entitled, not merely to interest, but to damages to be assessed according to the prima facie measure or having regard to the special circumstances, if any. This seems to show that the principle relied on by counsel for the buyers is inapplicable in the present case even if one treats the failure to open the credit as a failure to pay money. Counsel further submitted that the loss here was due to the sellers' impecuniosity and that such loss is in law too remote. We were referred to *Liesbosch, Dredger v. Edison S.S.* (5), and *Muhammad Issa el Sheikh Ahmad v. Ali* (6). The result is stated by LORD WRIGHT ([1949] 1 All E.R. 14) in *Monarch S.S. Co., Ltd. v. Karlshamns Oljefabriker (A.B.)* (3), namely, that damages due to impecuniosity may not be too remote if the loss might reasonably be expected to be in the contemplation of the parties. The learned judge stated his conclusion as follows (ante, p. 91):

"Here I have reached the conclusion, on the facts of this case, that the loss of profit claimed by the sellers is not too remote although consequent on the sellers' impecuniosity because the loss was such as might reasonably be expected to be in the contemplation of the parties as likely to flow from the breach of the obligation undertaken by the buyers."

I agree with the conclusion and have only one comment to make on it. The real question is what was the loss contemplated by the parties rather than the reason for it. Even if the sellers had been very rich, it might still have been "contemplated" that, if the buyers did not procure the obtaining of the credit, the sellers could not and would not themselves have used their resources for the opening of a credit for this steel.

The learned judge, as I have said, ordered a declaration that the sellers were entitled to recover from the buyers such damages as in law may be due from them to Azur and which they may be adjudged liable to pay. The question whether this damage was too remote was, I think, argued more fully before us than before the learned judge. The buyers, undoubtedly, knew that Azur were sellers to the sellers. The credit was to be opened in their name. Prior to Oct. 1, and, therefore, at the time of the contract between sellers and buyers, the matter as between the sellers and Azur appeared to have been conducted orally. There is no evidence that the buyers were aware either of Azur's "impecuniosity" or their position vis-à-vis the manufacturers, except that they had an option. As the credit, although transferable, was to be opened in their name, the buyers might, if they had considered the matter, have assumed their relationship with the manufacturers was a close one, and that they might still be parties to the sale of the steel, perhaps at a higher price and profit, if the buyers failed in their obligations to the sellers.

I have come, with respect, to the conclusion that there is not sufficient evidence, applying the learned judge's principle as between sellers and buyers which I have quoted, to justify the extension of that principle to any claim Azur may have against the sellers. I think it is too remote. The learned judge, in making

the declaration which he did, followed with modification a declaration made in somewhat similar circumstances by LEWIS, J., in *Household Machines, Ltd. v. Cosmos Exporters, Ltd.* (7). The problem can be shortly stated. B sues C for breach of contract. The court holds that B is entitled as against C to recover damages in respect of B's liability to A arising out of C's breach of contract. At the time of the hearing, B is not in a position to call evidence to quantify this damage. There may be some cases in which the court can state a principle which makes the subsequent quantification of this damage simple. On the other hand, difficult questions may arise, depending for example (i) on any variation of the terms of the contract between B and C as between B and A, (ii) on the question whether A took the steps which should have been taken to mitigate damage. No declarations ought to prejudice or preclude a proper determination of these issues, on which the defendant should be entitled to be heard. It might, as it seems to me, be more satisfactory if there were liberty to apply for directions as to the determination of these issues, if any, and quantification of damages under this head as between sellers and buyers, should disputes arise. Some order in this form, at any rate, in some cases, might be more satisfactory than a declaration in the form ordered. I think the appeal should be allowed to the extent I have stated.

DENNING, L.J.: This is another case concerned with the modern practice whereby a buyer agrees to provide a banker's confirmed credit in favour of the seller. This credit is an irrevocable promise by a banker to pay money to the seller in return for the shipping documents. One reason for this practice is because the seller wishes to be assured in advance, not only that the buyer is in earnest, but also that he, the seller, will get his money when he delivers the goods. Another reason is because the seller often has expenses to pay in connection with the goods and he wishes to use the credit to pay those expenses. He may, for instance, be himself a merchant, who is buying the goods from the growers or the manufacturers and has to pay for them before he can get delivery, and his own bank may only grant him facilities for the purpose if he has the backing of a letter of credit. The ability of the seller to carry out the transaction is, therefore, dependent on the buyer's providing the letter of credit, and for this reason the seller stipulates that the credit should be provided at a specified time well in advance of the time for delivery of the goods.

What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation "subject to the opening of a letter of credit" is rather like a stipulation "subject to contract". If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.

The first question is: What was the nature of the stipulation in this case? When the buyers sent their order, they stated in writing on Sept. 25, 1950, that "a credit will be opened forthwith". It was suggested that the buyers were not making any firm promise on their own account, but were only passing on information which had been given to them by their American buyers. The judge did not accept that suggestion and I agree with him. The statement was a firm promise by the buyers by which they gave their personal assurance that a credit would be opened forthwith. At that time there were some discrepancies about gauges and dates of delivery which had to be cleared up, but these were all resolved at the meetings in Brussels, and there was then, as the judge found, a concluded contract by the sellers to sell, and the buyers to buy, the steel for

December/January delivery, and it was a part of that contract that the buyers would be personally responsible for seeing that a credit should be opened forthwith. On those findings it is clear that the stipulation for a credit was not a condition precedent to the formation of any contract at all. It was a condition which was an essential term of a contract actually made. That condition was not fulfilled. The sellers extended the time for the credit, but it never came, not even after reasonable notice. The sellers were, therefore, discharged from any further performance on their side, and are entitled to claim damages.

But what is the measure of damages? That is the important question in the case. The price of the goods had steadily risen from the date of the contract onwards and the buyers say that the sellers could at any time have re-sold the goods for more than the contract price, and are, therefore, only entitled to nominal damages. If the claim of the sellers had been for damages for non-acceptance of goods or for repudiation of the obligation to take delivery, then the damages would, no doubt, be nominal. But it is none of those things. It is a claim for damages for not providing a letter of credit. The buyers say that, even so, the credit is only a way of paying the price, and that the damages recoverable on that score are only nominal because the seller could re-sell the goods at a profit. This argument reminds me of the argument we heard in *Pavia & Co., S.P.A. v. Thurmann-Nielsen* (8). It treats the obligation to provide a credit as the same thing as the obligation to pay the price. That is, I think, a mistake. A banker's confirmed credit is a different thing from payment. It is an assurance in advance that the seller will get paid. It is even more than that. It is a chose in action which is of immediate benefit to the seller. It is irrevocable by the banker, and it is often expressly made transferable by the seller. The seller may be relying on it to get the goods himself. If it is not provided, the seller may be prevented from getting the goods at all. The damages he will then suffer will not, in fact, be nominal. Even if the market price of the goods has risen, he will not be able to take advantage of the rise because he will not have any goods to re-sell. His loss will be the profit which he would have made if the credit had been provided. Is he entitled to recover that loss? I think he is, if he can show that such a loss was at the time of the contract foreseeable by the buyer as the probable consequence of a breach: see the *Victoria Laundry* case (2). That was clearly the case here. The buyers knew that the sellers could not get the goods at all unless the credit was provided. The foreseeable loss was the loss of profit, no matter whether the market price of the goods went up or down. It is, therefore, the proper measure of damages.

It was said that the breach here was a failure to pay money and that the law has never allowed any damages on that account. I do not think that the law has ever taken up such a rigid standpoint. It did undoubtedly refuse to award interest until the introduction of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3 (1): see *London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co.* (9); but the ground was that interest was "generally presumed not to be within the contemplation of the parties": see BULLEN & LEAKE, 3rd ed., p. 51, note (a). That is, I think, the only real ground on which damages can be refused for non-payment of money. It is because the consequences are as a rule too remote. But when the circumstances are such that there is a special loss foreseeable at the time of the contract as the consequence of non-payment, then I think such loss may well be recoverable. It is not necessary, however, to come to a firm conclusion on this point, because I regard the provision of a credit as different from the payment of money and not subject to the special rules, if any there are, relating thereto.

It was also said that the damage was the result of the impecuniosity of the sellers and that it was a rule of law that such damage is too remote. I do not think there is any such rule. In the case of a breach of contract, it depends on whether the damage was reasonably foreseeable or not. In the present case it clearly was.

There is one way, however, in which the buyer might be able to rely on the rise in price. It might be a ground for mitigation of damages. I can well understand that the buyer might in some cases be able to say that the seller ought to have offered the goods elsewhere and got some one else to provide a letter of credit. But no such case can be made here. The sellers acted very reasonably throughout. They kept the matter open for the buyers in the hope and expectation that the credit would be provided, and eventually lost their own option because the credit was not provided. They have, therefore, lost their profit without any fault on their part and are entitled to recover it from the buyers as damages.

The only remaining question is whether the sellers are entitled to be indemnified for any damages they may have to pay the Azur company who were selling to them. I think not. That is a special loss which was not within the contemplation of the parties to this contract. The buyers did not know that the Azur company depended on the credit in order to get the goods themselves. The buyers had no reason to suppose that, on a rising market, the Azur company would have any claim against the sellers. This head of damage is, therefore, not recoverable. I would only add that I agree with my Lord that, even if this head of damages was recoverable, it is not correct to make a declaration of indemnity. If the liability of the sellers to a third party was within the contemplation of the parties, but has not yet been assessed, then the proper course for the judge is to reserve that head of damages. Judgment can be entered for the damages already ascertained leaving the rest to be ascertained later by the same or another judge.

I agree with my Lord that the appeal should be allowed as to the declaration but dismissed as to the money award.

ROMER, L.J.: I agree with the judgments which have been delivered and with the proposed order. I only desire to make two observations. First, I am not, as at present advised, prepared to subscribe to the view that in no case can damages be recovered for non-payment of money. I agree with DENNING, L.J., that in certain circumstances such damages might well be recoverable provided that the loss occasioned to the plaintiff by the defendant's default was reasonably within the contemplation of the parties when the bargain between them was made. Secondly, I am also in agreement with my brethren that there is no rigid rule that damage suffered by a plaintiff and resulting from his own impecuniosity is in all cases too remote to be recoverable in an action based on breach of contract.

Appeal allowed in part.

Solicitors: *A. & G. Tooth* (for the buyers); *Hardman, Phillips & Mann* (for the sellers).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

WILBRAHAM v. COLCLOUGH AND OTHERS.

[BIRMINGHAM WINTER ASSIZES (Jones, J.), March 13, 14, 26, 1952.]

Agriculture—Agricultural holding—Notice to quit—Service—Service on agent of tenant—Person responsible for farming in occupation with knowledge of tenant—Agricultural Holdings Act, 1948 (c. 63), s. 92 (3).

A In 1914 the tenant of a farm under a tenancy from year to year died, having by his will appointed his widow and his elder son, W., his executors. The widow remained in possession of the farm and farmed it with the help of her second son, R. On July 7, 1949, the widow died, having by her will appointed W. and R. her executors. On July 19, in the belief that the widow had been the tenant of the farm, the landlord's agent sent a notice to quit the farm addressed to W. and R. as the widow's executors.

B HELD: when the notice to quit was served W. was the tenant of the farm as sole surviving executor under his father's will, but, as W. and R. had been in possession of the farm with W.'s knowledge and were responsible for the farming, they were to be regarded as W.'s agents within s. 92 (3) of the Agricultural Holdings Act, 1948, and, therefore, the notice to quit served on them was duly served under the sub-section and was effective to determine the tenancy.

C FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 92, see HALSBURY'S STATUTES, Second Edn., Vol. 28, p. 92.

Cases referred to:

(1) *Egerton v. Rutter*, [1951] 1 K.B. 472.

D (2) *Phipps (P.) & Co. (Northampton & Towcester Breweries), Ltd. v. Rogers*, [1925] 1 K.B. 14; 93 L.J.K.B. 1009; 132 L.T. 240; 89 J.P. 1; 31 Digest, Replacement, 496, 6221.

(3) *Re Bebington's Tenancy*, [1921] 1 Ch. 559; 90 L.J.Ch. 269; 124 L.T. 661; 31 Digest, Replacement, 500, 6256.

E ACTION for possession of a farm at Alsager, Cheshire.

From 1897 to his death in 1914 James Colclough, the father of the three defendants, was tenant of the farm from year to year under a tenancy agreement running from Feb. 2 to Feb. 2. By his will he appointed his widow, his eldest son (William Colclough, the first defendant), and one, Barker, his executors and trustees. The widow continued to live in the farm house and to farm the land. F After a time William Colclough became tenant of an adjoining farm, but another brother, Reginald Colclough (also a defendant), remained to help the widow on the farm. Until 1939 the agent of the landlord (the plaintiff), sent demands for rent addressed to the executors of James Colclough, but in that year, being under the impression that the widow was herself the tenant, he gave instructions that future demands should be sent to her. On July 7, 1949, the widow died. On G July 13 the landlord's agent wrote to Reginald Colclough asking if the widow had made a will, and, if so, to be informed of the names of her executors. A solicitor instructed by Reginald Colclough replied to that letter on the assumption that the widow had been the tenant and asked for a grant of the tenancy of the farm to Reginald Colclough and his sister. On July 17 Barker, James Colclough's third executor, died, and William Colclough became the sole surviving trustee of his father's estate. On July 19 the landlord's agent wrote to the solicitor H enclosing a notice to quit addressed to William Colclough and Reginald Colclough as executors of the widow. In that notice the widow was referred to as the tenant, and it was stated that the notice to quit had been given because of her death. The defendants contended that the notice to quit was invalid.

L. A. Blundell for the landlord.

Mynett for the defendants.

Cur. adv. vult.

Mar. 26. JONES, J., stated the facts and continued: I hold that, when the notice to quit was sent on July 19, 1949, the tenant of the farm was William Colclough as sole surviving executor and trustee under his father's will. For many years the widow had acted as the tenant of the farm and she was regarded as the tenant by her children as well as by the landlord's agent, though William Colclough, as trustee under his father's will, should have known that she was not the tenant. It is clear that after his mother's death he thought that he and his brother were carrying on the farm as their mother's executors. In these circumstances I think that the widow's executors should be regarded as agents for the real tenant as they were in possession of the farm with his knowledge and were responsible for the farming, and that by virtue of the Agricultural Holdings Act, 1948, s. 92 (3), the notice given to them was a notice duly given to William Colclough. I think that, on the authority of *Egerton v. Rutter* (1), and the cases referred to in the judgment of LORD GODDARD, C.J., the notice was effective to determine the tenancy as it was given to the persons who were, and who claimed to be, in possession of the farm at the time that the notice was served. The notice was given to the real tenant, William Colclough, although it was addressed to him and his brother and was given to his brother as well.

Counsel for the defendants referred to *P. Phipps & Co. (Northampton & Worcester Breweries,) Ltd. v. Rogers* (2), and *Re Bebington's Tenancy* (3), and contended that the notice was uncertain and ambiguous. The notice seems to me to be clear though not addressed to the real tenant. Counsel also submitted that the notice had misled the defendants. It was not the notice, but their own mistake, and, particularly, the mistake of William Colclough, which misled them. It is true that the letter of the landlord's agent may have encouraged that mistake, but it is equally true to say that the agent was encouraged in his mistake by the reply from the solicitor instructed by Reginald Colclough. The defendants allege that they failed to serve a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1), because they were misled by the notice to quit and they seek to blame the plaintiff's agent for that because he referred to the widow as tenant, but, as I have said, William Colclough should have known who was the tenant in view of the fact that he must at some time have done some act as an executor and trustee of his father's will. Therefore, the landlord is entitled to possession of the farm and to mesne profits.

Judgment for plaintiff.

Solicitors: *Walters and Hart* (for the landlord); *Gibson & Weldon*, agents for *Robert Bygött & Sons*, Crewe (for the defendants).

[Reported by MISS GWYNEDD LEWIS, Barrister-at-Law.]

BRATTER & CO. (GREAT BRITAIN), LTD. v. JAMES CLARK
 (BRUSH MATERIALS), LTD.

ed in part. C.A. [1952] 2 All
 197.

[QUEEN'S BENCH DIVISION (Sellers, J.), March 19, April 1, 1952.]

Contract — Non-performance — Excuse — "Force majeure" — Delivery of goods "subject to export licence" — Minimum export prices fixed in excess of contract prices.

A A contract for the shipping of goods from Brazil during February to July, 1951, provided that the contract should be void for any quantity which was not shipped one month after the expiration of the contract period where shipment was prevented by force majeure, and that "this contract is subject to a Brazilian export licence." In June, 1951, the sellers gave the buyers notice that they could not ship the goods on the basis of the contract prices because the Bank of Brazil had stated that the goods could only be shipped at minimum f.o.b. prices which were £28 and £40 a ton respectively higher for the two classes of goods involved than the contract prices. If they had themselves paid the minimum higher prices the sellers could have obtained a licence to export the contract goods and shipped, declared, and tendered them within the contractual period.

B HELD: the sellers were relieved from liability under the contract, not (in the absence of any prohibition or embargo or physical or legal prevention of export) by the "force majeure" clause, but by the clause making it conditional on the grant of an export licence, which meant a licence for the shipping of goods in fulfilment of the contract at the prices specified therein and not at other prices which would have involved another contract.

D Cases referred to:

- (1) *Lebeaupin v. Crispin (R.) & Co.*, [1920] 2 K.B. 714; 89 L.J.K.B. 1024; 124 L.T. 124; 12 Digest, Replacement, 430, 3307.
- (2) *Blythe & Co. v. Richards, Turpin & Co.*, (1916), 85 L.J.K.B. 1425; 114 L.T. 753; 12 Digest, Replacement, 462, 3446.
- E (3) *Re Comptoir Commercial Anversois and Power, Son & Co.*, [1920] 1 K.B. 868; 89 L.J.K.B. 849; 122 L.T. 567; 12 Digest, Replacement, 449, 3389.
- (4) *Tennants (Lancashire), Ltd. v. Wilson (C. S.) & Co., Ltd.*, [1917] A.C. 495; 86 L.J.K.B. 1191; 116 L.T. 780; 12 Digest, Replacement, 449, 3387.

AS TO EXCUSES FOR NON-PERFORMANCE OF CONTRACT, see HALSBURY, F Hailsham Edn., Vol. 7, pp. 197-227, paras. 276-310; and FOR CASES, see DIGEST, Replacement, Vol. 12, pp. 356-495, Nos. 2761-3716.

SPECIAL CASE stated by arbitrators.

G The sellers (the appellants) had given notice that they were unable to ship goods from Brazil in accordance with a c.i.f. contract with the buyers owing to a statement by the Bank of Brazil that the goods could only be shipped at minimum f.o.b. prices £28 and £40 a ton higher than the contract prices. They claimed to be relieved from liability under the contract by a printed force majeure clause and by a typewritten clause making the contract "subject to a Brazilian export licence". The dispute was referred to arbitration in accordance with the conditions of sale, which were those of the Seed, Oil, Cake and General Produce Association. The arbitrators disagreed, but on the appointment of a third arbitrator under the conditions of sale made an award in favour of the buyers. The sellers appealed to the Board of Appeal appointed in accordance with the conditions of sale and requested that the award of the board should be stated in the form of a Special Case for the opinion of the court. Subject to the decision of the court on the question of law the board made an award for £3,000 in favour of the buyers. The questions stated for the opinion of the court were: (i) Did the refusal of the Bank of Brazil or other Brazilian authorities to grant licences for the export of the goods, except at prices higher than the prices

contained in the contract, excuse the sellers from fulfilling the contract by reason of the force majeure clause? (ii) Did it do so by reason of the export licence clause?

E. W. Roskill for the sellers.

T. G. Roche for the buyers.

Cur. adv. vult.

April 1. **SELLERS, J.**, read the following judgment. The sellers under the c.i.f. contract into which they had entered with the buyers were under an obligation to ship the goods specified in the contract (quantities of Bahia piassava) from Salvador, in Brazil, during February to July, 1951, inclusive. On June 20, 1951, the sellers informed the buyers that it was impossible for them to ship the goods on the basis of the contract prices owing to the intervention of a section of the Bank of Brazil. The Bank of Brazil had, apparently, at some date and in some form, not specified, stated that Bahia piassava could only be shipped at the minimum f.o.b. prices of £180 a ton in the cut stiff, and £135 a ton for the seconds, which prices were £28 and £40 respectively higher than the contract prices.

The sellers claimed protection under the force majeure clause in the contract, as their inability to fulfil the contract, they alleged, was due solely to the Brazilian authorities. The buyers were offered three courses:—(a) to cancel the contract, (b) to accept the new prices, (c) to take the matter to arbitration. The buyers went to arbitration and thereby treated the contract as terminated. After a third arbitrator had been appointed, the arbitrators found in favour of the buyers. The Board of Appeal have likewise found in favour of the buyers, subject to the decision of the court.

The sellers were clearly refusing to fulfil their obligation to ship the contractual goods, and were in fundamental, but anticipatory, breach of their contract unless they were excused, as they alleged they were, by an express term in the contract. No frustration is alleged. The sellers rely first on the printed cl. 9:

“Should shipment be prevented or delayed owing to . . . force majeure . . . shipper shall be entitled at the termination of such cause to an extension of time for shipment of as much time as was left for shipment prior to the outbreak of such cause or causes, but such extension shall in no case exceed one month. In case of non-fulfilment under above conditions, the date of default shall be similarly dealt with. Shipper shall give notice by cable within two days after the last day for shipment if he claims an extension of time for shipment. If, from any of the above causes, shipment be not completed within one month after the expiration of the original contract period then this contract is to be void for any unfulfilled quantity.”

The sellers rely secondly on an added typewritten clause:

“This contract is subject to a Brazilian export licence.”

On behalf of the buyers, it was submitted that this was not a case of force majeure, but, even if it were, the sellers did not act in accordance with cl. 9 and seek an extension and endeavour to fulfil their obligation to ship within the extended period. The sellers did not wait to see if the restriction was removed before the latest time for shipment expired, and there is no indication in the Case that the position altered in any way or that there was a termination of the cause which would have entitled the sellers to a further month for shipment under the contract. In the circumstances, if the shipment was prevented by force majeure, the whole contract would be void under cl. 9.

The phrase “force majeure” and its use in English commercial contracts was the subject of a review of the authorities by McCARDIE, J., in *Lebeaupin v. R. Crispin & Co.* (1). He said ([1920] 2 K.B. 720):

“I take it that a ‘force majeure’ clause should be construed in each case with a close attention to the words which precede or follow it, and with

a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument."

And in another sentence on which the sellers' argument relied he held that (*ibid.*, 719):

"Any direct legislative or administrative interference would of course come within the term: for example, an embargo."

A The buyers relied on the authorities which established that "prevention" in such circumstances means physical or legal prevention, and that a rise in price would not of itself amount to a "prevention" of delivery: *Blythe & Co. v. Richards, Turpin & Co.* (2), *Re Comptoir Commercial Anversoix and Power, Son & Co.* (3), and *Tennants (Lancashire), Ltd. v. C. S. Wilson & Co., Ltd.* (4).

B It would have been difficult for this court to decide the question of force majeure without the precise terms of the Brazilian government's order and instruction to the bank requiring a minimum f.o.b. price before export of the commodities in question would be allowed, and these are not disclosed. The object of the government's intervention would appear to be to bring more foreign exchange into Brazil for the goods which the country exported. That it should
C be done peremptorily and without protecting existing contracts is, indeed, an interference with private trading which is calculated to create dissatisfaction and to give rise to litigation.

In the circumstances, however, I do not feel able to embark on a further investigation of this ground on which the sellers relied originally, and before me. The award finds under (g) that the sellers admitted before the Appeal Committee
D that they could have shipped, declared and tendered the contract goods within the contractual date if they had paid the minimum price. On this admission, the sellers cannot, in my opinion, rely on force majeure. There was no prohibition, no embargo, no physical or legal prevention. The goods could have been exported.

The sellers also rely on the typewritten clause: "Subject to a Brazilian export licence". This clause has to be read, I think, in the light of the printed cl. 9
E which clearly gave protection to the sellers if shipment were prevented and delayed owing to prohibition of export and force majeure amongst other causes. The clause must be read in reference to the contract the parties were making and no other, and, therefore, in my opinion, the clause must be read as subject to a Brazilian export licence for the fulfilment of this contract. If the sellers could not, with due diligence, obtain a licence to export the goods to fulfil the contract

F into which they had entered, they are excused. In finding (h) in the Case, it appears that the sellers admitted that a licence would have been granted on or about June 20, 1951, for the shipment of the goods if the sellers had paid the minimum higher prices, but that is a licence for the performance of another contract, not the one into which the parties had entered. There is no indication of what the machinery was for obtaining a licence. One might surmise that the

G authorities would require to see the contract and the price the foreign buyers had agreed to pay, and that it would not be complying with the letter of the law for the sellers to pay any balance so as to bring the price up to the minimum price. If the sellers were resident in Brazil, and there were no London agents or associates, as here, any additional payment by the sellers in respect of goods of their own supply or manufacture, or of goods purchased locally to fulfil the
H contract, would not bring in any additional foreign currency. The foreign buyers would still pay their contract price and no more.

If the clause does not protect the sellers in this case, one asks whether it could protect them if the minimum price f.o.b. for an export licence to be granted were raised to the extent of one hundred times the contract price, so that a contract, for instance, at £10 a ton had to be met by the sellers at a price of £1,000 a ton. I do not think any such obligation was in contemplation of the parties. What they contemplated was that the sellers would use due diligence to obtain an

April licence to fulfil a contract into which they had entered. As it chanced, the restriction was directed against a price less than a specified minimum. It was no different in essence from a restriction against, for instance, exporting to London. The sellers had to run the risks of the market in respect of goods and freight, and cannot complain that prices have gone against them so that to fulfil the contract would be unprofitable. But I see no reason to place on the sellers a burden of loss which, on the buyers' argument, would be imposed on them, even to an unlimited extent, at the whim of the government when they have provided in their contract the clause on which they now rely. So to hold would, I am inclined to think, wholly limit the effect of the clause to a case of embargo or complete prohibition, and that is already provided for in the contract. In my judgment, the Board of Appeal have erred in law in their view of this clause. The answer of the court to question (i) is No, and to question (ii) Yes.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Bartlett & Son*, Liverpool (for the sellers); *Layton & Co.* (for the buyers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

ROYAL COLLEGE OF SURGEONS OF ENGLAND v. NATIONAL PROVINCIAL BANK, LTD., AND OTHERS.

[HOUSE OF LORDS (Lord Normand, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Cohen), February 20, 21, 26, 27, 28, April 3, 1952.]

Charity—Benefit to community—Promotion of surgery—Incidental benefits to individuals—Gift to Royal College of Surgeons.

Perpetuities—Rule against perpetuities—Gift over from one charity to another—Second charity incorporated by royal charter.

Will—Gift to medical school of hospital—Gift over if hospital nationalised or passes into public ownership—Medical school not nationalised.

By her will, dated Jan. 13, 1943, a testatrix, who died on Feb. 10, 1943, gave her residuary real and personal estate on the usual trusts for conversion and directed that the resulting "endowment fund" should be held on "the following charitable trusts" which were, inter alia, "to pay the residue of the income of the endowment fund in each year to the treasurer . . . of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the said hospital . . . Provided always that should the . . . Middlesex Hospital become nationalised or by any means pass into public ownership or should the [trustees] at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid then and in any of the said events the [trustees] shall thereupon pay and transfer the endowment fund . . . to the Royal College of Surgeons . . ." The Middlesex Hospital was founded in or about 1745. A medical school was founded in 1835, but the school did not form part of the hospital until 1896. The Bland-Sutton Institute was a department of the medical school. On July 5, 1948, under the National Health Service Act, 1946, s. 11 (8), the hospital was designated a teaching hospital, and, by virtue of s. 6 (1) of the Act, the property and liabilities of the hospital were transferred to and vested in the Minister of Health, but the medical school became a separate legal entity with a governing body constituted under s. 15 (1) of the Act. The Royal College of Surgeons claimed that, by reason of the changes brought about by the Act, the gift over took effect.

HELD: (i) notwithstanding that the medical school of the Middlesex Hospital had not been nationalised, the institution known and referred to in the will as "the Middlesex Hospital" had become nationalised within

the meaning of the will, and, therefore, the defeasance clause took effect;

(ii) (LORD COHEN dissentiente) on the true construction of the royal charter, granted in 1800, by which the Royal College of Surgeons was incorporated the objects of the college were "the due promotion and encouragement of the study and practice of the art and science of surgery" and were directed to the relief of human suffering or to the advancement of education or science and not to the promotion of the interests of individuals, although incidentally individuals carrying on their profession as surgeons did derive certain benefits from the college;

(iii) for the present purpose there was no distinction between a charity incorporated by royal charter and one incorporated by any other means; and, therefore, the college was a charity, and the gift over to it was not bad for perpetuity.

Re Royal College of Surgeons of England ([1899] 1 Q.B. 871), explained and criticised.

Christ's Hospital v. Grainger (1849) (1 Mac. & G. 460), applied.

Decision of the COURT OF APPEAL, sub nom. *Re Bland-Sutton's Will Trusts* ([1951] 1 All E.R. 494), reversed.

AS TO GIFTS FOR EDUCATIONAL PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 116-118, paras. 153, 154; and FOR CASES, see DIGEST, Vol. 8, pp. 245-248, Nos. 51-73.

Cases referred to:

- (1) *Re Royal College of Surgeons of England, Re*, [1899] 1 Q.B. 871; 68 L.J.Q.B. 613; 80 L.T. 611; sub nom. *Royal College of Surgeons of England v. Inland Revenue Comrs.*, 4 Tax Cas. 344; 39 Digest 299, 1781.
- (2) *Institution of Civil Engineers v. Inland Revenue Comrs.*, [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553; 16 Tax Cas. 158; Digest Supp.
- (3) *Christ's Hospital v. Grainger*, (1849), 1 Mac. & G. 460; 19 L.J.Ch. 33; 15 L.T.O.S. 497; 13 J.P. 778; 41 E.R. 1343; 8 Digest 324, 1060.
- (4) *Young v. Bristol Aeroplane Co.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; 37 B.W.C.C. 51; *affd.* H.L., [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 38 B.W.C.C. 48; 2nd Digest Supp.
- (5) *Hancock v. Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 43 Digest 644, 792.
- (6) *Re Tyler*, [1891] 3 Ch. 252; 60 L.J.Ch. 686; 65 L.T. 367; 8 Digest 327, 1100.
- (7) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, 1.
- (8) *Inland Revenue Comrs. v. Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 39 Digest 299, 780.
- (9) *Society of Writers to the Signet v. Inland Revenue Comrs.*, (1886), 14 R. (Ct. of Sess.) 34; 28 Digest 13, m.
- (10) *Sulley v. Royal College of Surgeons, Edinburgh*, (1892), 29 S.L.R. 620; 3 Tax Cas. 173; 28 Digest 13, o.
- (11) *Miley v. A.-G.*, [1918] 1 I.R. 455.
- (12) *Inland Revenue Comrs. v. Scott*, [1892] 2 Q.B. 152; 61 L.J.Q.B. 432; 67 L.T. 173; 56 J.P. 632; 3 Tax Cas. 134; 8 Digest 264, 265.
- (13) *Wenlock (Baroness) v. River Dee Co.*, (1883), 36 Ch.D. 675, n.; 57 L.T. 402, n.; *affd.* H.L., (1885), 10 App. Cas. 354; 54 L.J.Q.B. 577; 53 L.T. 62; 49 J.P. 773; 13 Digest 367, 1002.
- (14) *Re Lopes*, [1931] 2 Ch. 130; 100 L.J.Ch. 295; 146 L.T. 8; Digest Supp.
- (15) *Jenkin v. Pharmaceutical Society of Great Britain*, [1921] 1 Ch. 392; 90 L.J.Ch. 47; 124 L.T. 309; 13 Digest 359, 944.

APPEAL by the Royal College of Surgeons of England against an order of the Court of Appeal dated Feb. 2, 1951, and reported [1951] 1 All E.R. 494,

affirming (on different grounds) an order of DANCKWERTS, J., dated July 7, 1950, and reported [1950] 2 All E.R. 466.

DANCKWERTS, J., held that the coming into operation of the National Health Service Act, 1946, had not caused the Middlesex Hospital to become "nationalised" within the meaning of that term as employed in the will of Lady (Edith Goff) Bland-Sutton, and that, accordingly, the defeasance clause in the said will did not defeat the gift therein to the Middlesex Hospital for the benefit of a department of the medical school. He also held that the Royal College of Surgeons was a charity, so that, if the defeasance clause had operated, the ultimate gift to the college would have been capable of taking effect.

The Court of Appeal held that the defeasance clause did operate, but that the college was not a charity. Having regard to the rule in *Hancock v. Watson* (5), the court further held that the gift to the medical school was absolute.

Cross, Q.C., and *L. J. M. Smith* for the Royal College of Surgeons of England.
N. S. S. Warren for the executors and trustees of the will.

S. Pascoe Hayward, Q.C., and *R. W. Goff* for the Council of the Middlesex Hospital Medical School.

The House took time for consideration.

Apr. 3. The following opinions were read.

LORD NORMAND: My Lords, I have had the advantage of reading the opinion about to be delivered by my noble and learned friend, LORD MORTON OF HENRYTON, and I agree with it. I propose, therefore, only to discuss the single question on which there is a difference of opinion among your Lordships who heard the appeal—the question whether the Royal College is in law a charity. The question as it is now presented was not, as has been explained by my noble and learned friend, LORD MORTON OF HENRYTON, before the Court of Appeal when it decided that the Royal College was not entitled to exemption from the duty imposed by the Customs and Inland Revenue Act, 1885, s. 11: *Re Royal College of Surgeons of England* (1).

The decision in this case depends primarily on the construction of the constituent documents of the college, and, particularly, the charter granted by King George III in 1800, for it is to these documents that we naturally look in order to discover what are the objects for which the college was instituted. The peculiarity of the charter of 1800 is that the objects are nowhere set out or described *eo nomine*. The operative part of this document confers powers and imposes duties and provides for the appointment of officers of the college and generally for the carrying on of the college as a body independent of the corporation of the City of London. But it nowhere states or even refers to the objects which the college exists to fulfil. In one of the recitals, however, it is said:

"It appears to us that the establishment of a college of surgeons will be expedient for the due promotion and encouragement of the study and practice of the said art and science"

of surgery. These words give the reasons moving the Crown to grant the charter, and, if there were elsewhere in the document a statement of the objects of the college incorporated by the charter, it would prevail over the recital. But, in the absence of any other clarification of the objects, the Crown's motive for making the grant may legitimately be regarded as coinciding with the objects of the college which the charter incorporated. That appears at least to be a more satisfactory way of arriving at a definition of the objects than by attempting to infer the objects from the powers, duties and machinery created to enable the college to carry them out. I am, therefore, prepared to hold that the objects are to be found in the recital which I have quoted.

If that be so, the next step is to construe that recital. The words "the study and practice of the . . . art and science" of surgery do not, in my opinion, mean

“ the academic study and professional practice of the art and science of surgery ”. They signify rather the acquisition of knowledge and skill in surgery both by abstract study and by the exercise of the art in the dissecting room and the anatomy theatre, and they are capable of covering both the discovery of new knowledge which is the fruit of research, and the learning of existing knowledge either by students who are qualifying or by qualified surgeons desirous of improving their knowledge and skill. On that construction, the professed objects of the college all fall into the categories of the advancement of science or of the advancement of education, and are charitable. Nothing in the later part of the charter or the later charters induces me to modify that construction. A clause is inserted to exclude the jurisdiction of the corporation of the City of London. The reason for that is that the Corporation of Surgeons which had been created by Act of Parliament in the reign of George II, and which had been dissolved for some time before 1800, was a trade guild subject to the civic jurisdiction, and in 1800 it was intended that the new college should have an independent and a higher status. If the present Royal College were a successor of a trade guild carrying on the objects of such a guild, I doubt whether it could make good its claim to be a charity. But the clauses of the charter are not so conceived as to re-constitute the dissolved trade guild. They leave no doubt that a new and different body was being established, though there are provisions vesting in the new body the gifts, grants, liberties, privileges, immunities and possessions of the old body and giving its officers the same powers to transact business as were possessed by the officers of the old body. All of these provisions are, I think, to be interpreted as machinery provisions subserving the ends or objects of the new college as defined by the recital.

There is also a power to make bye-laws for the regulation, government and advantage of the college. It was said that this power had been used in order to further the professional interests of the members of the college. I shall assume that such a use, even if it were a misuse of the power, would be evidence on which it would be proper to hold that the college was not, or was no longer, a charity. By bye-law 15, the council of the college undertakes at all times to protect and defend every fellow, fellow in dental surgery, member and licentiate in dental surgery, of the college in the exercise and enjoyment of the rights and privileges acquired by him as a diplomate of the college. Bye-law 16 gives the college power to discipline members adjudged guilty of professional misconduct or convicted of a crime. In my opinion, these bye-laws are in the strictest sense bye-laws for the regulation, government and advantage of the college. The professional advantage which might accrue to individuals from the protection promised them in the exercise and enjoyment of the rights and privileges acquired by them as diplomates of the college is but the inevitable and incidental result of a provision intended to secure the dignity and honour of the college to which they owe their diploma. So, also, the disciplinary power is a power necessary for the success and good name of the college, and only incidentally advantageous to the individual diplomates. To hold that these bye-laws negative the claim of the college to be a charitable institution would be inconsistent with the decision in *Institution of Civil Engineers v. Inland Revenue Comrs.* (2), for the rights and privileges of members of the institution and its powers of discipline over them seem to me to be entirely comparable to the corresponding rights, privileges and powers in this case. I, therefore, concur with my noble and learned friend in the motions which he will propose.

LORD MORTON OF HENRYTON: My Lords, the appellant, the Royal College of Surgeons of England (hereafter referred to as “ the college ”) claims that on July 5, 1948, it became absolutely entitled to the “ endowment fund ” created by the will of the testatrix, Lady Bland-Sutton. This claim is resisted by the second respondent, hereafter referred to as “ the medical school ”.

The testatrix made her will on Jan. 13, 1943, and died on Feb. 10, 1943. The

only relevant clauses of her will are cl. 2, cl. 10 and cl. 11. By cl. 2 the testatrix appointed National Provincial Bank, Ltd. (the first respondent to this appeal) to be the executor and trustee of her will. By cl. 10 the testatrix gave all the residue of her real and personal estate to the bank on the usual trusts for sale and conversion and directed the bank to hold the net proceeds of such sale and conversion and the investments for the time being representing the same (which she called "the endowment fund") "upon the following charitable trusts for so long as the law shall permit". By sub-cl. (1) of cl. 10 the testatrix directed the bank to pay the annual sum therein mentioned to the college for the purpose of maintaining a Bland-Sutton Research Scholarship in the Bernard Baron Laboratories at the college on the terms and conditions therein mentioned. By sub-cl. (2) she directed the bank

"to pay the residue of the income of the endowment fund in each year to the treasurer or other proper officer of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the said hospital."

Clause 11 of the will is as follows:

"Provided always that should the said Bland-Sutton Institute of Pathology cease to be carried on as a pathological research institution or should its name be changed or should the Middlesex Hospital become nationalised or by any means pass into public ownership or should the bank at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid then and in any of the said events the bank shall thereupon pay and transfer the endowment fund (both as to the capital and the income thereof) to the said Royal College of Surgeons absolutely for the general purposes of the said college and the receipt of the treasurer or other proper officer thereof shall be a full and sufficient discharge to the bank therefor."

It will at once be apparent that one or other of the events specified in cl. 11 of the will might happen at any time in the future, however remote. Accordingly, the gift over to the college is void as offending the rule against perpetuities unless the college can establish that it is a charity and comes within the exception to that rule which was established by the well-known case of *Christ's Hospital v. Grainger* (3).

Down to July 5, 1948, the "appointed day" under the National Health Service Act, 1946, no difficulty arose as to the effect of the will, but doubts then arose as to the effect of the provisions of that Act on the trusts declared by the will, and the bank took out an originating summons to have the matters of doubt determined. The case came first before DANCKWERTS, J. He held that the college was a charity and that, for this reason, the gift over to the college was not rendered invalid by the rule against perpetuities. He held, however, that no one of the events mentioned in cl. 11 of the will had so far occurred. The Court of Appeal differed from DANCKWERTS, J., on each of these points. All the members of that court were of opinion that the Middlesex Hospital had been nationalised, within the meaning of cl. 11 of the will. They then considered the question whether the gift over to the college was valid, notwithstanding the rule against perpetuities, on the ground that the college is a charity. SIR RAYMOND EVERSHED, M.R., expressed himself as follows ([1951] 1 All E.R. 500):

"For, sympathising, as I am strongly inclined to do, with DANCKWERTS, J.'s own opinion of the nature of the purposes of the college, I am unable to escape the conclusion that, in conformity with the principles recently expounded in *Young v. Bristol Aeroplane Co.* (4), the court is bound by the decision of the Court of Appeal in *Re Royal College of Surgeons of England* (1) to conclude that the college fails to qualify as a charity."

JENKINS, L.J., said (*ibid.*, 513):

“Having regard to the decision of this court in the 1899 case [i.e., *Re Royal College of Surgeons of England* (1)] as to the nature of the college’s objects, I do not think it was open to the learned judge or is now open to this court to deal with the matter in that way.”

A And HODSON, L.J. (*ibid.*, 517) was of opinion that

“... the court ought to consider itself bound in the circumstances of this case by the opinion expressed by the court in 1899 in *Re Royal College of Surgeons of England* (1).”

It will be convenient to refer to the case by which the members of the Court of Appeal considered themselves bound as “the 1899 case”. The result was that the Court of Appeal held the gift over to be void for remoteness, as that court felt bound to hold that the college was not a charity. It was conceded that on this footing the gift of income contained in cl. 10 (2) of the will would continue on foot as a gift of income for charitable purposes for an indefinite period, in accordance with the principle laid down in *Hancock v. Watson* (5). The college now appeals, and submits that the Middlesex Hospital was nationalised on July 5, 1948, within the meaning of cl. 11 of the will; that the college is a charity; and that the gift over in favour of the college is, therefore, valid and effective.

My Lords, I propose first to consider whether the Middlesex Hospital has become nationalised, within the meaning of cl. 11 of the will. It is not now suggested that any one of the other events mentioned in that clause has occurred. The relevant facts in regard to the Middlesex Hospital, the Medical School, and the Bland-Sutton Institute of Pathology referred to in the testatrix’ will have been so admirably summarised by JENKINS, L.J., that I shall take the liberty of quoting the portion of his judgment which deals with these matters (*ibid.*, 505):

“The Middlesex Hospital was incorporated by Act of Parliament in 1836, but had then already been in existence for more than ninety years. Teaching in the wards of the hospital had begun in 1745, but the medical school associated with it was not founded until 1835. Down to 1896 the school, though associated with, did not form part of, the hospital. In that year it became part of the hospital under a scheme of amalgamation which was adopted by the weekly board of governors of the hospital on July 28, 1896. Under this scheme the hospital took over the property and liabilities of the school and the school became and thereafter down to July 5, 1948 (being the appointed day under the National Health Service Act, 1946), remained a department of the hospital, though in practice it enjoyed a considerable degree of autonomy in the management of its affairs (through a council constituted for the purpose under the scheme), and its accounts were kept separate from those of the hospital. In 1900, on the reconstitution of the University of London, the school became a school of the university. This did not affect the legal position of the school as a department of the hospital, but involved recognition of the school by the university as one where London University medical students might take their training, and the university became the examining body of the school to which it also made grants. The Bland-Sutton Institute of Pathology referred to in the testatrix’s will was opened in 1914 as part of the school in a building for which a sum of money had been provided by Sir John Bland-Sutton in 1913. The school has always been housed on the same site as the hospital, and the buildings devoted to the purposes of the school (including the institute building) are physically connected, and one might say intermixed, with those of the hospital as distinct from the school.”

The learned lord justice went on to set out the relevant provisions of the National Health Service Act, 1946, in order to show what was the effect of that Act on

the hospital and the medical school. I am relieved from the necessity of embarking on this task because it is now common ground that the hospital, divested of the assets and liabilities of the school, was "nationalised" on July 5, 1948, while the medical school, which was an important department of the hospital down to July 5, 1948, has not been nationalised.

In these circumstances, has the event happened which the testatrix expressed in the words "should the Middlesex Hospital become nationalised"? I would answer this question in the affirmative, and I can state my reasons very shortly as I am in agreement with the reasoning and the conclusion of the Court of Appeal. I think the test to be applied is: Has the institution to which the testatrix referred as "the Middlesex Hospital" ceased to exist? If it is still in existence, there is no doubt that it has been nationalised. The argument of counsel for the second respondent involves the proposition that, if any part of the property of the hospital, as it existed prior to the appointed day, were exempted from the process of nationalisation, the institution which became nationalised on the appointed day would not be "the Middlesex Hospital" within the meaning of cl. 11 of the will. In my view, this contention gives a very artificial meaning to cl. 11 and I cannot accept it. Moreover, I agree with the Court of Appeal that there are indications in the will which support the view taken by that court. Each member of the court relied on these indications and the matter is dealt with most fully by JENKINS, L.J., who said (*ibid.*, 510):

"Apart from the natural meaning of the testatrix's reference to 'the Middlesex Hospital' there are indications in cl. 10 (2) and cl. 11 which seem to me on the whole to support the conclusion to which I have come. She refers, in cl. 10 (2), to 'the Bland-Sutton Institution of Pathology now carried on in connection with the Middlesex Hospital'. That form of words seems to me to suggest that she regarded the institute as connected with, but distinct from, the hospital itself; and I think the word 'now' in the phrase 'now carried on' also holds a suggestion that the institution referred to as 'the Middlesex Hospital' had existed, and might continue to exist, as such without the Bland-Sutton Institute—and inferentially without the school of which the institute formed part. Further, cl. 11 contains no reference to the nationalisation of the institute. The relevant event contemplated is the nationalisation of the hospital. If the testatrix's concept of nationalisation of the hospital had been such as the learned judge has held it to be, it would surely have been more natural for her to refer to nationalisation of the institute itself. As it is, the language she has used seems to contemplate the possibility of the hospital becoming nationalised in the sense in which she uses that expression without nationalisation of the institute 'carried on in connection' with it, or inferentially of the school of which the institute formed part."

The result is that the gift over in cl. 11 of the will has taken effect in favour of the college, unless that gift over is rendered invalid by the rule against perpetuities. Counsel for the college contends that his client is a charity, in the legal sense of the word, and that the rule against perpetuities has no application to a gift over from one charity to another. In support of the latter proposition he relies on *Christ's Hospital v. Grainger* (3). Counsel for the medical school contends, first, that the college is not a charity, and, secondly, that, even if the college is a charity, the rule in *Christ's Hospital v. Grainger* (3) does not apply to a case where the charity designated to take under the gift over is a body incorporated by royal charter.

My Lords, it will, I think, be convenient to deal with this latter submission before coming to the only question which was argued at any length in your Lordships' House, viz.: Is the college a charity? The submission is a novel one, for the industry of counsel could not discover any case in which it had been put forward in the 103 years which have elapsed since the decision in *Christ's*

Hospital v. Grainger (3). In that case, the Corporation of London, as governors of Christ's Hospital, claimed certain property which had been left by the testator, John Hendricke, in 1624, to the corporation of Reading, for certain charitable purposes in that town, with a direction that if the donees should for a year neglect, omit, or fail to perform the directions of his will, such gift should be utterly void, and should forthwith be paid and transferred to the Corporation of London for the benefit of Christ's Hospital. The strict execution of the directions of the will having been found inconvenient, an information was filed by the Attorney-General in the Court of Exchequer against the Corporations of London and Reading, which led to a decree in 1639, varying the purposes and application of the charity, but still confined to Reading, and providing, as in the will, that if the Corporation of Reading should neglect to perform the directions of the decree, or should misemploy the trust property, and such neglect and misemployment should continue for a year, the legacy should be void and of no effect as to Reading, and that the property should be forthwith paid and transferred to the Corporation of London for the benefit of Christ's Hospital. It was clearly established that the directions of the decree, as well as those of the will, had been neglected for the period of far more than one year. It was argued that the gift over was void, as contrary to the rule against perpetuities, but the Lord Chancellor (LORD COTTENHAM) rejected this argument, saying (1 Mac. & G. 464):

"If the Corporation of Reading might hold the property for certain charities in Reading, why may not the Corporation of London hold it for the charity of Christ's Hospital in London?"

Certain portions of the reasoning of the Lord Chancellor in that case may be open to criticism, but his decision has always been treated as good law.

In *Re Tyler* (6) the testator had made a bequest in the following terms:

"I give to the trustees for the time being of the London Missionary Society the sum of £42,000 Russian 5 per cent. stock, with a rentcharge to my brother, Charles Tyler, Esq., of £1,000 a year for life. Also I commit to their keeping of the keys of my family vault at Highgate Cemetery, to the (sic) care and charge, my brothers to be buried in the vault if they wish, and to use the same, if they wish, for any member of the family, the same to be kept in good repair and name legible, and to rebuild when it shall require: failing to comply with this request, the money left to go to the Blue Coat School, Newgate Street, London."

STIRLING, J., said ([1891] 3 Ch. 254):

"The rule against perpetuities has no application to a transfer in a certain event from one charity to another, as is expressly laid down by LORD COTTENHAM in the case of *Christ's Hospital v. Grainger* (3)",

and held that the condition and gift over were good. An appeal from his decision was dismissed, and LINDLEY, L.J., said (*ibid.*, 258):

"What is this gift when you come to look at it? It is a gift of £42,000 Russian 5 per cent. stock to the London Missionary Society. What for? It is for their charitable purposes. It is a gift to them for the purposes for which they exist. Then there is a gift over to another charity in a given event—that is to say, the non-repair of the testator's vault. It seems to me to fall precisely within the principle on which *Christ's Hospital v. Grainger* (3) was decided. A gift to a charity for charitable purposes, with a gift over on an event which may be beyond the ordinary limit of perpetuities to another charity—I cannot see that there is anything illegal in this."

FRY, L.J., said (*ibid.*, 259):

"In as much as both the donees of this fund, the first donee and the second, are charitable bodies, and are created for the purposes of charity,

the rule of law against perpetuities has nothing whatever to do with the donees."

LOPES, L.J., concurred.

My Lords, there is not the slightest indication in *Re Tyler* (6), or in any other case cited by counsel, that any distinction is to be drawn between a charity incorporated by royal charter and any other charity, and text-book writers, down to the most modern editions, repeat the rule in general terms—see, for example, TUDOR ON CHARITIES, 5th ed., p. 81: "A gift over from one charity to another is never void for remoteness"; GRAY ON THE RULE AGAINST PERPETUITIES, 4th ed., p. 572; THEOBALD ON WILLS, 10th ed., pp. 280-1; JARMAN ON WILLS, 8th ed., p. 226; HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 25, p. 119. It cannot be doubted that many estates must have been distributed, within the last hundred years, on the footing that the rule as to a gift over from one charity to another is a general rule, as stated in *Re Tyler* (6) and in the text-books. In these circumstances, I apprehend that your Lordships would be most reluctant to introduce into the rule the new qualification suggested by counsel. Further, I am of opinion that there is no logical ground for this qualification. The reason why a gift to charity is not subject to the rule against perpetuities is stated by LORD MACNAGHTEN in *Income Tax Special Purposes Comrs. v. Pemsel* (7) ([1891] A.C. 580):

"The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the court derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void."

My Lords, if the reason for upholding a gift to a charity for an indefinite period is that a charity in its nature is not obnoxious to the rule against perpetuities, I fail to see why the same reason should not apply to a gift over from any one charity to any other charity. For these reasons I reject the novel submission by counsel for the medical school which I have already set out.

My Lords, I now come to the last, and, in my view, the most important of the questions which arise on this appeal, viz., the question whether or not the college is a charity in the sense in which that word is used in English law. It is, in my view, regrettable that in order to find out what is or is not a charity according to English law, it is still necessary to refer to the preamble to a statute passed in the reign of Queen Elizabeth. That statute (43 Eliz., c. 4) was not passed for the purpose of giving a definition of "charity", but was directed to providing for the reformation of abuses in the application of property devoted to charitable uses, and the whole of the Act, except the preamble, was repealed by the Mortmain and Charitable Uses Act, 1888, yet, in order to find a comprehensive definition of "charity", it is still necessary, first to turn to that Act, and then to consider a series of decisions in your Lordships' House and elsewhere, including *Income Tax Special Purposes Comrs. v. Pemsel* (7). I take this opportunity of saying that I hope the legislature will soon embark on the task of giving a comprehensive statutory definition of "charity". In the present case, however, I do not think that a prolonged study of the statute of Elizabeth or of the subsequent cases on the meaning of the word "charity" is necessary and I turn at once to the charter granted by King George III on Mar. 22, 1800, by which the college was established, in order to discover what were the objects with which the college was established.

The charter first recites certain letters patent of King Edward IV, an Act of the reign of King Henry VIII, and certain letters patent of King Charles I, and then continues:

"And whereas by an Act of Parliament made and passed in the eighteenth

year of the reign of our late Royal Grandfather King George II, intituled 'An Act for making the surgeons of London, and the barbers of London, two separate and distinct corporations,' It was enacted, that the said union and incorporation of the barbers and surgeons of London, made and effected by the aforesaid Act of the thirty-second year of King Henry VIII, should, from and after June 24, 1745, be dissolved and declared void and of no effect; and that such of the members of the said united company who were freemen of the said company, and admitted and approved surgeons, within the rules of the said company, and their successors, should from thenceforth be made, and they were thereby made and constituted, a separate and distinct body corporate and commonalty perpetual, which at all times thereafter were to be called by the name of Master, Governors and Commonalty of the art and science of Surgeons of London, and by the same name might implead and be impleaded before all manner of justices, in all courts, and in all manner of actions and suits, and take to them and their successors, lands, tenements, rents, or hereditaments, not exceeding the yearly value of £200 in the whole."

Now follow recitals which seem to me to be of the greatest importance:

"And whereas we are informed that the said Corporation of Master, Governors and Commonalty of the art and science of Surgeons of London hath become and now is dissolved: And whereas it is of great consequence to the commonweal of this kingdom that the art and science of surgeons should be duly promoted: And whereas it appears to us that the establishment of a college of surgeons will be expedient for the due promotion and encouragement of the study and practice of the said art and science . . ."

Then begins the operative part of the charter:

"Now we . . . by these presents . . . do will, ordain, constitute and declare, give and grant unto the aforesaid James Earle and unto all the members of the said late Company or Corporation of Master, Governors and Commonalty of the art and science of Surgeons of London; having been admitted and approved surgeons within the rules of the said company; and also unto all such persons who upon or since the dissolution of the said corporation shall have obtained letters testimonial under a seal purporting to be the seal of the late dissolved corporation, authorising them to practice the art and science of surgery; and they from henceforth forever hereafter shall be and remain by virtue of these presents one body corporate and politic by the name of the Royal College of Surgeons in London and by the same name shall and may have perpetual succession and a common seal."

Then come powers for the college to acquire and use a hall or council house and other lands for the purposes of the college without incurring any of the penalties in any statutes of mortmain. The charter then goes on to sever the college from the City of London in the following terms:

"And it is our further will and pleasure that nothing in these presents shall be construed to give the Corporation of the City of London any power or jurisdiction over the said college hereby established and incorporated and that no person by virtue of these our letters patent, constituted or ordained or hereafter to be admitted a member of the said college shall be thereby entitled to any franchise belonging to the freemen of the City of London."

It is then provided that the college

"shall and may exercise and enjoy all and singular other gifts, grants, liberties, privileges and immunities, possessions real and personal . . . by any Act or Acts of Parliament or by any letters patent . . . given, granted and confirmed unto or otherwise lawfully acquired by and belonging to the said late Master, Governors and Commonalty of the art and science of

Surgeons or any of them and not hereby altered, taken away, changed, or abridged, made void or annulled."

It is later provided that the college may elect twenty-one persons to be the Court of Assistants, ten of whom are to be examiners of surgeons for the college; and of these ten persons, one is to be principal master, and two others are to be governors. Power is given to the master and governors, together with ten or more of the members of the Court of Assistants, to hold courts and assemblies and

"to make, ordain, confirm, annul or revoke from time to time such bye-laws, ordinances, rules, and constitutions as to them shall seem requisite and convenient for the regulation, government and advantage of the said college: so as such bye-laws, ordinances, rules, and constitutions be not contrary to law: and in all such cases as shall be necessary, be examined, approved of, and allowed, as by the laws and statutes of this realm is provided and required: and also to transact and ordain all such other matters and things as the master, governors, and Court of Assistants of the late dissolved Company or Corporation of the Master, Governors, and Commonalty of the art and science of Surgeons of London might heretofore lawfully do, transact or ordain."

Then follows an appointment of the first master, governors, examiners, and court of assistants, and provision is made for the election of successors in these offices from time to time. The conditions of membership are stated as follows:

"And it is our further will and pleasure that after the day of the date of these presents no person except those who before the day of the date of these presents were members of the late Corporation of Surgeons established by the said Act made and passed in the eighteenth year of the reign of our Royal Grandfather, King George II; and also excepting such persons as shall have received such letters testimonial as aforesaid under seal purporting to be the seal of the late dissolved company or corporation of surgeons, shall be capable of becoming a member of the said college hereby established, unless he shall have obtained letters testimonial of his qualification to practise the art and science of surgery under the common seal of the college hereby established; but every person who shall hereafter obtain such letters testimonial under the common seal of the college aforesaid, shall thereby, by virtue of such letters testimonial, become and be constituted a member of the said college, subject to all the regulations, provisions, and bye-laws of the said college."

The charter goes on to require the examiners of the college to examine candidates for the post of surgeon or assistant surgeon in the army or surgeon or surgeon's mate in the navy, and also to examine all surgeons' instruments to be used in the King's service, and proceeds:

"And further, we will that no court or courts for the examination of any person or persons touching their skill in surgery shall ever be held but in the presence of the master or one of the governors and five of the members at least of the Court of Examiners of the said college hereby established and incorporated as aforesaid."

The rest of the charter need not be quoted for the present purpose.

Your Lordships have heard much argument on the question where, in this charter, the object or objects of the college is or are set out. It is submitted on behalf of the medical school that the usual place in which to find the objects stated is in the operative part of a charter and not in the recitals; that the last recital merely states the reason of His Majesty for establishing the college and does not state what are to be the objects of the college when established; and that the recital which immediately precedes it is merely the statement of a

platitude. My Lords, it may well be, that one would expect to find the object or objects stated in the operative part of a royal charter, but I can find no statement of the objects in the operative part of the document now under consideration, although I do find various provisions as to the means by which these objects are to be achieved, and various powers conferred for better enabling the college to achieve these objects. This being so, I have no doubt that the object of this newly created body, the college, is stated in the last recital and is "the due promotion and encouragement of the study and practice of the art and science of surgery". As I read the words "study" and "practice" they embody two ideas, research in the laboratory and that practical experience which can only be gained by using surgical implements on human or other bodies. The object of the college is to promote the art and science of surgery by encouraging each of these activities.

My Lords, if this be the true construction of the original charter, can it be doubted that the college is a charity? The object just stated may be regarded as being directed to the relief of human suffering or to the advancement of education or science or to all of these ends. Each of these is a charitable end and it cannot be doubted that in the present case there is no lack of that element of public benefit which is essential if an institution is to be regarded as a charity. I cannot find in this recital any statement that one of the objects of the new college is to be the promotion of the interests of individuals who are carrying on their profession as surgeons, nor can I find any reference to the promotion of the interests of such individuals in any other part of this charter. I state this at once, in view of the observations of the Court of Appeal in the 1899 case (1), to which I must refer later.

So far, I have considered only the charter of 1800 by which the college was established, but the later charters, in so far as they are relevant, support my view that the object of the college is to be found in the last recital of the charter of 1800. In the charter of 1822 the last recital is:

"And whereas it appears to us to be expedient, in order more effectively to promote and encourage the study and practice of the said art and science of surgery, that further powers and privileges be granted to the said royal college"

and the same words

"in order more effectively to promote and encourage the study and practice of the said art and science of surgery"

appear in the last recital to the charter of 1843. I refrain from any detailed reference to the other charters or to the bye-laws, as I cannot find, either in the charter of 1800, or in any subsequent charter, or in the bye-laws, any statement of the objects of the college, as distinct from the methods by which these objects are to be pursued.

My Lords, for these reasons, had the matter been wholly free from authority, I should have felt no doubt that the college was a charity. I must shortly consider the decision of the Court of Appeal in the 1899 case (1), by which the Court of Appeal has found itself bound, but it will be convenient to turn first to two cases which dealt with the position of the Institution of Civil Engineers. The first is *Inland Revenue Comrs. v. Forrest* (8), a decision of this House. The question which arose in that case was whether the Institution of Civil Engineers was liable to the duty imposed by the Customs and Inland Revenue Act, 1885, s. 11, or came within the exemption granted by sub-s. (3) of that section. Sub-section (3) exempts from the duty in question

"property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

It was contended on behalf of the institution that its property was legally appropriated and applied for the promotion of science, and your Lordships' House accepted this contention. It was argued by counsel for the Inland Revenue Commissioners that the main and primary object of the institution was to promote the interests of the profession of engineers and not to increase scientific knowledge. This argument was rejected by LORD WATSON and LORD MACNAGHTEN, LORD HALSBURY, L.C., dissenting. LORD WATSON said (15 A App. Cas. 351):

"I do not doubt that membership is accompanied with a certain amount of prestige which may prove to be of service to the member in his professional career; but I believe that the same result would attend membership of any society which effectively promoted a branch of science intimately connected with the profession or business in which the member was engaged. That there is a science of civil engineering, and that its development is of the utmost consequence to our national interests, are, to my mind propositions not admitting of dispute."

LORD MACNAGHTEN said (*ibid.*, 354):

"... the question at issue may be stated shortly. Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage? It cannot, I think, be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?"

My Lords, I think that the words of LORD WATSON and LORD MACNAGHTEN may aptly be applied to the present case, with the substitution of "the college", "the science of surgery", and "surgeons" for "the Institution of Civil Engineers", "the science of civil engineering", and "civil engineers".

The matter was carried a stage further, as regards the Institution of Civil Engineers, by the decision of the Court of Appeal in *Institution of Civil Engineers v. Inland Revenue Comrs.* (2). In that case the question was whether the institution was "a body of persons . . . established for charitable purposes only" and was, therefore, exempt from income tax under the Income Tax Act, 1918, s. 37 (1) (b). ROWLATT, J., held that the institution was not established for charitable purposes only. On the charter of the institution and its bye-laws he found that, although one of the objects of the institution was undoubtedly to enlarge the knowledge of mankind in regard to mechanical science, the institution had also as an object the organisation of the profession of civil engineers by giving to those who passed the necessary examination and became members of the institution the exclusive right to affix to their names certain designations. The members became known to the public as persons belonging to the institution, and as members they were required to observe certain rules for the protection of clients. That was collateral to the acquisition or spread of knowledge of mechanical science and was an object which could on no view be called charitable. His decision was reversed by the Court of Appeal, and LORD HANWORTH, after referring to the charter and bye-laws said ([1932] 1 K.B. 163):

"The question of law that arises upon these matters of fact is this: do these other activities represent a collateral or independent purpose, or are they subsidiary and incidental to the main object for which the institution was started and incorporated?"

He held that the latter was the true view, and LAWRENCE, L.J., in agreeing, said (*ibid.*, 171), after referring to *Forrest's* case (8):

"... it follows in my judgment that the institution is established for a charitable purpose only, notwithstanding that it is of advantage to a civil engineer in his profession to be a member of the institution, this result not being a purpose for which the institution was established but being incidental to and consequent upon the way in which the institution carries out the charitable purpose for which alone it was established."

I have referred in detail to this decision of the Court of Appeal, because in *Forrest's* case (8), as LORD MACNAGHTEN pointed out, it was not necessary for this House to consider whether the promotion of science was the *only* purpose for which the property sought to be charged was legally appropriated and applied.

I now come to the 1899 case (1). In that case the Court of Appeal had to consider whether the college was liable to the duty imposed by the Customs and Inland Revenue Act, 1885, s. 11 (the same section which had to be considered by your Lordships' House in *Forrest's* case (8)) or came within the exemption contained in sub-s. (3) of that section. Before the commissioners, the college had relied on the words "for the promotion of education, literature, science, or . . ." which appear in sub-s. (3). When the case came before a Divisional Court of the Queen's Bench Division, it would appear that counsel relied only on the words "legally appropriated and applied . . . for the promotion of science", and this was the only argument put forward when the case came before the Court of Appeal. It is difficult to understand why counsel did not rely on the words "for any charitable purpose" and why they ceased to rely on the words "for the promotion of education", as both of these purposes come within the exemption conferred by sub-s. (3). However, both the argument in the Court of Appeal and the judgment of the court, which was delivered by ROMER, L.J., concentrated on the words "legally appropriated and applied . . . for the promotion of science". ROMER, L.J., said ([1899] 1 Q.B. 876):

"It is contended by the appellants that the property is exempt from duty under sub-s. (3) of s. 11 of the Act as being property which, or the income or profits whereof is . . . legally appropriated and applied for the promotion of science. In order to see whether this contention is correct or not, it is important to ascertain what is the main purpose and object of the college."

After referring to *Forrest's* case (8) he continued (*ibid.*, 877):

"Now the case before us differs essentially from the case . . . of the Institution of Civil Engineers before the House of Lords. That institution had only one main object and purpose. The college has two main objects, each of great importance, in fact, it would be difficult to say which of the two main functions imposed on and discharged by the college is the more important. Neither can be considered as merely subsidiary to the other. The one may be shortly described as the promotion of the science of surgery. The other is the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising, or about to practise, surgery as a profession, and also including the examination of students and others to qualify for practice or honours in surgery or kindred subjects."

My Lords, I need quote no more of the judgment, for these words reveal at once the difference between the view which I hold of the construction of the charters and the view taken by the Court of Appeal in the 1899 case (1). If I understand the judgment aright, that court thought that "the promotion of the interests of those practising, or about to practise, surgery as a profession" was one of the main objects of the college. I do not so read the charters. I think that the promotion of the interests of practising surgeons is "an incidental,

though an important and, perhaps, a necessary consequence" of the work of the college in carrying out its main object, the promotion and encouragement of the study and practice of the art and science of surgery. The distinction between an institution whose main object is the promotion and advancement of a science and an institution whose main object is the protection and advantage of those practising a particular profession is well illustrated by a comparison of the judgments in the two cases, already cited, relating to the Institution of Civil Engineers, with the judgments in the *Society of Writers to the Signet v. Inland Revenue Comrs.* (9), and *Sulley v. Royal College of Surgeons, Edinburgh* (10). Counsel for the medical school relied on *Miley v. A.-G.* (11). In that case the Court of Appeal in Ireland held that the College of Surgeons in Ireland was incorporated with two main objects, the promotion of the science of surgery and the promotion of the interests of those practising the profession of surgery, the latter not being a charitable object. It was accordingly held that a legacy to that college was not a charitable bequest. The language of the charters of the Irish college appears to differ in some respects from the language of the charters now under consideration, and the decision may be justified on that account, but I think that BARTON, J., in the court of first instance, and two at least of the members of the Court of Appeal attached importance to the views on construction which had been expressed by the English Court of Appeal in the 1899 case (1), and I have already expressed my disagreement with these views. The arguments on this point before your Lordships' House ranged over a wide field, and many portions of the charters and bye-laws were relied on as showing that the protection of the interests of the profession was one of the main objects of the college. I have anxiously considered all these arguments, but I have decided not to increase the length of this speech by discussing them in detail. Suffice it to say that, in my view, each and all of the powers conferred on the college and the regulations made by the charters and bye-laws were powers and regulations conferred and made for the purpose only of enabling the college the better to achieve its charitable objects, and any benefit to the profession resulting from the exercise of these powers or the carrying out of these regulations was incidental to the carrying out of the main purpose for which the college was incorporated, as stated in the last recital of the charter of 1800. I have already stated the construction which I place on that recital.

I would add that, in my opinion, your Lordships could not decide against the college in this case without drawing too fine a distinction between the relevant documents in the case of the Institution of Civil Engineers and the relevant documents in the present case. It is true that in the first charter of that institution, dated June 3, 1828, it appears that the institution was the direct successor of a society formed

"for the general advancement of mechanical science and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer"

and the institution is stated to be formed "for the purposes aforesaid". But if I am right in thinking that the last recital to the college's charter of 1800 states the object of the college and that object is charitable, there is no distinction, so far, between the college and the institution, and a general comparison of the charters and bye-laws of these two bodies respectively leads me to think that it would be very difficult to draw a distinction between them in favour of the Institution of Civil Engineers.

I have not referred to the evidence filed in this case, because it is said that the manner in which the college has in fact carried out its functions is irrelevant for the present purpose. I am content to assume that this is so, and I have not relied on that evidence in any way in reaching my conclusion, but it is satisfactory to learn, from the affidavit of Lord Webb-Johnson, how well-founded have been the happy expectations expressed in the charter of 1800. I would

allow the appeal and declare that the proviso contained in cl. 11 of the will of the testatrix is valid and has come into operation and that on July 5, 1948, the endowment fund referred to in cl. 10 of the said will became transferable to the college for the general purposes of the college. In the special circumstances of this case I would leave undisturbed the order of the Court of Appeal as to costs and would direct that the costs of the appeal to this House be taxed as between solicitor and client and paid out of the corpus of the said endowment fund.

LORD REID: My Lords, I agree and I shall only add a few observations on the question whether the college is a charity. I do not think that great precision can be expected in the definition in old charters of the objects of an institution. In the absence of any contemporanea expositio, I think that it is enough that all the indications in the charters point to the object of the college being the advancement of the knowledge and skill necessary for successful surgery and not the advancement of the professional position of its individual members. I do not think that the intention of the charter of 1800 was to make the new college like the old city corporation which had already been dissolved. It is true that the court of assistants was given power to transact and ordain such matters and things as the old corporation might lawfully have done, but this appears to me to have been intended to confer powers of administration and not to have been intended to expand the object set out in the recitals "the due promotion and encouragement of the study and practice of the said art and science" i.e., the art and science of surgery. If there were anything to show that the affairs of the college had been so conducted that the advancement of the interests of its members had become one of its main purposes, it may be that this would disentitle the college from pleading that it is a charity, but I do not find anything of that kind. The bye-laws give disciplinary powers and provide for the protection of fellows and members in the exercise and enjoyment of their rights and privileges as fellows and members, but I do not think that this means that they are to be disciplined, protected or aided as practising surgeons. As I read it, it refers only to their position as fellows and members of the college, and the powers are powers which any college might have for its own protection. And I can find nothing in the affidavit of Lord Webb-Johnson which indicates a departure from the original object of the college.

It is true that in *Re Royal College of Surgeons of England* (1) the Court of Appeal took a somewhat different view. There the case for the college was that its property was legally appropriated and applied for the promotion of science, and the court held, I think rightly, that this was not the only purpose for which the property was held and used. The promotion of science is one way of promoting the study and practice of the art and science of surgery, but it is not the only way. It appears that the college has for long made the examination of students one of its main purposes. I would not regard that as the promotion of science, but I would regard it as the promotion of education and within the general object of the college. For some reason which cannot now be discovered, the college did not maintain in 1899 that in so far as its property was not applied to the promotion of science it was applied to the promotion of education. Had it done so I think that it ought to have succeeded. I do not think that it could have relied on the words "or for any charitable purpose" in s. 11 of the Customs and Inland Revenue Act, 1885, because it had been decided in *Inland Revenue Comrs. v. Scott* (12) that, in that particular statute, those words are used in a narrow sense. The difficulty created by the 1899 case (1) arises from the way in which ROMER, L.J., described the second, non-scientific, object of the college. He referred to it ([1899] 1 Q.B. 877) as including not only the examination of students and others, but also

" . . . the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising or about to practice surgery as a profession ",

It is the last part of the passage I have quoted which I venture to think is going too far. I think that promoting the practice of surgery is a different thing from promoting the interests of those who practise surgery. Surgery obviously has a practical as well as a scientific side: it is an art as well as a science. When the charter speaks of promoting the practice of the art of surgery I think that it refers to promoting the practical side of surgery and not to promoting the interests of those practising surgery, and I think that the evidence in this case shows that the college has carried out the intention of its charter.

LORD TUCKER: My Lords, the Court of Appeal were unanimous in holding that on the true construction of cl. 11 of the will of the late Lady (Edith Goff) Bland-Sutton, the Middlesex Hospital had, in the events which happened, "become nationalised" within the meaning of that clause, with the result that the gift over, if valid, took effect. I agree and have nothing to add on this part of the case.

In your Lordships' House a new point not relied on in the Court of Appeal was advanced by the respondents to the effect that the gift over was not saved from the rule against perpetuities unless both before and after the gift over takes effect the property in question is inalienable because it is held on trust and that the property of the Royal College of Surgeons, a body incorporated by charter, is not impressed with a trust nor is the corporation subject to the doctrine of ultra vires as in the case of statutory corporations. It is said that the language used by LORD COTTENHAM, L.C., in *Christ's Hospital v. Grainger* (3) in 1848 was wider than was necessary for the decision on the facts of that case and that it has ever since been erroneously considered to apply in all cases where the gift over is from one charity to another. On this point I agree with your Lordships that the real reason for this exception to the rule against perpetuities is to be found in the fact that the court leans in favour of charity, and that in any event an interpretation which has been accepted and acted on for more than a hundred years should not now be disturbed.

The last and more difficult question is whether the gift over can in any event take effect in favour of the Royal College of Surgeons—in other words: Are the objects of the college exclusively charitable?, which can for the sake of brevity be expressed as: Is the college a charity? DANCKWERTS, J., held that it is, but the Court of Appeal felt themselves compelled to the contrary view by the construction which had been placed on the charters of the college by the Court of Appeal in *Re Royal College of Surgeons of England* (1) in a judgment delivered by ROMER, L.J., in which it was held that the college had two main objects: (i) the promotion of the science of surgery, and, (ii) the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising or about to practise surgery as a profession, and also including the examination of students and others to qualify for practice in honours in surgery. In that case the court was concerned with an exemption in favour of "property which, or the income or profits whereof, shall be legally appropriated and applied . . . for the promotion of . . . science . . ." under the Customs and Inland Revenue Act, 1885, s. 11. But although the question in issue was different from that in the present case it did necessitate an inquiry into the purposes of the college as shown in its charters and it was held that the college had the two main objects stated above neither of which could be considered as subsidiary to the other. Accordingly, the Court of Appeal in the instant case felt bound to proceed on the basis of the existence of these two main objects with the necessary consequence that the college could not be held to be a charity. My Lords, although I do not question the correctness of the actual decision of the Court of Appeal in the 1899 case (1), I am unable to accept the construction put on the charters by the court. The relevant passage in the first charter of 1800 is in the fifth paragraph of the recitals and is as follows:

"And whereas we are informed that the said Corporation of Master,

Governors and Commonalty of the art and science of Surgeons of London hath become and now is dissolved: And whereas it is of great consequence to the commonweal of this kingdom that the art and science of surgeons shall be duly promoted: And whereas it appears to us that the establishment of a college of surgeons will be expedient for the due promotion and encouragement of the study and practice of the said art and science, now we . . . do will, ordain, constitute and declare, give and grant . . . ”

A Similar language is used in the subsequent charters of 1822 and 1843.

Nowhere in the operative parts of the charters are there to be found any expressed objects, but it is, I think, clear from the language of the charters taken as a whole that the objects of the college in the present case are to be found in the recitals taken in conjunction with what follows in the operative parts, and, indeed, the charters were so construed by the Court of Appeal in the 1899 case (1). In my view, the objects of the college as set out in the charter of 1800, and never thereafter varied, were (i) the promotion of the science of surgery; (ii) the promotion of education in surgery. The latter can only be achieved by practice as well as study and the holding of examinations is an essential step in the educational process. I can find nothing to warrant the view that in this context the word “practice” means the carrying on of their professional activities for pecuniary gain by the members of the college or the profession at large. The remaining provisions of the charters and the bye-laws made pursuant thereto are all governed by the language of the recital and are to be construed as conferring the necessary powers incidental to the previously expressed purposes of the college. The fact that provision is made for some measure of disciplinary control over the members, and that the college undertakes to protect its fellows, members and licentiates in the exercise and enjoyment of the rights and privileges acquired by them as diplomates of the college (bye-law 15) are examples of such incidental powers, there being nothing in the charters to suggest that the college was established to further the interests of the profession or the enforcement of professional discipline.

E It was argued that, whatever is the proper construction to be put on the words in the recital standing by themselves, yet, having regard to the fact that the college was established in place of the dissolved company called “The Master, Governors and Commonalty of the art and science of Surgeons of London” and was expressly given power

F “to transact and ordain all such other matters and things as the master, etc., of the late dissolved company or corporation might heretofore lawfully do, transact, or ordain,”

it was thereby given powers co-extensive with those of the dissolved corporation, the precise objects of which are not known, but whose members enjoyed certain liberties and franchises within the City of London and as to which there are no grounds for presuming it to have been a charity. It does not, however, appear from the charter that the college was in every respect a successor to the previous company. The old company had ceased to exist. We do not know the date. A new body was created. It was expressly provided that the corporation of the City of London should have no jurisdiction over the college and that no member of the college should by virtue of the charter be entitled to any franchise belonging to the freedom of the city of London. The college, however, enjoyed all the other privileges and possessions granted by previous Acts or letters patent or otherwise acquired by the former company. We have, therefore, a new entity divorced from the city—with no guild taint attaching to it—but holding the property of the old company and having expressly conferred on it one of the functions of the old company, viz., the dissecting and anatomising of the bodies of murderers. It is, however, expressly established for the purposes previously stated, and I cannot find anything in the charter to suggest that its objects are intended to be extended by implication beyond the promotion and encouragement of the

study and practice of surgery. No provision is made for a general meeting of the members of the college, but the conduct of its business and the power to make bye-laws, etc., is committed to a court of assistants on whom are conferred the same powers as were vested in the court of assistants of the dissolved company. This is merely the machinery of government and does not extend the powers of the college beyond what is necessary for carrying out the previously expressed purposes for which it had been established. I am, accordingly, of opinion that on the true construction of its charters the Royal College of Surgeons of England is a charity, and that this appeal should succeed. A

LORD COHEN: My Lords, I agree with your Lordships that the event on the occurrence of which the testatrix directed that the gift over in favour of the Royal College of Surgeons (hereinafter sometimes referred to as "the college") should take effect has taken place and I cannot usefully add anything to the reasons given by your Lordships for affirming the decision of the Court of Appeal on that point. B

The gift over may obviously take effect beyond the time allowed by the rule against perpetuities. It can only be valid, therefore, if it can be brought within the exception in favour of charities which was laid down by LORD COTTENHAM, L.C., in *Christ's Hospital v. Grainger* (3) in the following terms (1 Mac. & G. 464): C

"It was then argued that it [a gift over in favour of the corporation of London for the benefit of Christ's Hospital] was void, as contrary to the rules against perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another? If the Corporation of Reading might hold the property for certain charities in Reading, why may not the Corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account." D

Counsel for the medical school said that the college is not a charity which comes within the exception recognised in *Christ's Hospital v. Grainger* (3) for two reasons: (i) that the exception only applies to cases where property is given over to trustees on charitable trusts and not to cases of a gift over direct to a charitable corporation incorporated by Royal Charter; (ii) in any event the Royal College of Surgeons is not a charitable corporation since one of its main objects is in effect the object of a professional protection society and this is not charitable. The first point was taken in the court below, but only in order that it should be reserved for this House. We have not the assistance of the Court of Appeal on it. It derives support from the judgment of RONAN, L.J., in the Irish case of *Miley v. A.-G.* (11) and is based on the passage in LORD COTTENHAM's judgment in which he gave as the reason for his decision that the property did not become more or less inalienable by reason of a gift over from one charity to another. This, said counsel, cannot apply to a gift over from a charity created by declaration of trust to a corporation incorporated by royal charter since such a corporation has all the powers of an individual: see *Baroness Wenlock v. River Dee Co.* (13). If it disregards some expressed limitation in its charter, it is not acting ultra vires. It cannot be restrained by injunction if it disregards the limitation; it only runs the risk that on an application by the Attorney-General by writ of scire facias its charter may be rescinded. A gift over to a chartered corporation cannot, therefore, be said to fulfil the condition that the property should be neither more nor less inalienable. E F G

In my opinion, this argument is not well founded. In the first place, the exception has always been regarded by text-book writers in the hundred years that have elapsed since the case was decided as applying to all charities whether their charitable character was derived from a document creating a trust or from the terms of a charter. Secondly, although there is no direct decision on the H

point, the decision in *Re Tyler* (6) proceeded on the basis that a gift over from the trustees of charity A to charity B, a charitable corporation incorporated by royal charter, is valid. In *Re Lopes* (14) it was admitted by counsel ([1931] 2 Ch. 133) that such a gift over was valid. Thirdly, even if the decision in *Christ's Hospital v. Grainger* (3) is, as suggested in GRAY ON THE RULE AGAINST PERPETUITIES, 4th ed., pp. 572-578, illogical, we should make matters worse if we were to accept the argument of counsel for the medical school on this point. The policy behind the decision in *Christ's Hospital v. Grainger* (3) was, in my opinion, the leaning of the court in favour of charity. I can see no reason why that leaning should prevail in favour of charitable trusts declared by a will or trust instrument and yet be disregarded when the gift over takes the form of a direct gift to a charitable corporation.

Before parting with this branch of the case, I would add that the statement by counsel for the medical school that a corporation incorporated by royal charter cannot be restrained by injunction from disregarding a restriction imposed by its charter is too wide. It has been held that such an injunction will be granted at the instance of a member since a member should be allowed to prevent his rights being defeated by an application by the Attorney-General to rescind the charter: see *Jenkin v. Pharmaceutical Society of Great Britain* (15). Moreover, in some cases, at any rate, charitable corporations are by reason of their charitable objects necessarily trustees of their corporate property and are, therefore, like other trustees, subject to the jurisdiction of the Court of Chancery: see HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 4, p. 336, para. 566.

The second point, to my mind, presents much greater difficulty. Counsel for the medical school suggested that we could not decide against him unless we were prepared to overrule the decision of the Court of Appeal in *Re Royal College of Surgeons of England* (1). That was a step which the Court of Appeal in the present case did not consider themselves at liberty to take, and there are undoubtedly dicta in the judgment of the court which lend support to their view. I agree, however, with DANCKWERTS, J., that the question which we have to decide was not really before the Court of Appeal in the 1899 case (1). That was a decision on the Customs and Inland Revenue Act, 1885, s. 11, which granted exemption from corporation duty *inter alia* on

"property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

In the 1899 case (1) the college did not rely on the words "for any charitable purpose", nor on the word "education". An issue, and the only relevant issue, argued and decided was whether or not the income or profits derived from the property of the college was legally appropriated and applied for the promotion of science. The Court of Appeal decided this question against the college.

ROMER, L.J., who delivered the judgment of the court, relied very largely on those provisions of the charter which dealt with the examining functions of the college. These were, undoubtedly, important functions and could hardly be said to be purely ancillary to its other objects. It may well be that they cannot be said to be purposes connected with the promotion of science, but we are concerned with the wider question of charitable objects in general, one of which is education. In my opinion, the examining functions of the college are so much connected with education that I do not think they deprive the college of any charitable character which it might otherwise possess. I have not overlooked that in the 1899 case (1) ROMER, L.J., said ([1899] 1 Q.B. 877):

"It was finally determined by the House of Lords in the case of *Inland Revenue Comrs. v. Forrest* (8), that if the main purpose and object of an institution be the promotion of science, though there may be some subsidiary purposes or objects, then its property, having to be applied and being

applied for the purposes of the institution, is legally appropriated and applied for the promotion of science within the meaning of these words as used in the Act, and is accordingly exempt from duty. Now the case before us differs essentially from the case . . . of the Institution of Civil Engineers before the House of Lords. That institution had only one main object and purpose. The college has two main objects, each of great importance, in fact, it would be difficult to say which of the two main functions imposed on and discharged by the college is the more important. Neither can be considered as merely subsidiary to the other. The one may be shortly described as the promotion of the science of surgery. The other is the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising, or about to practise, surgery as a profession, and also including the examination of students and others to qualify for practice or honours in surgery or kindred subjects."

I can well understand that the Court of Appeal felt a difficulty in view of those observations in deciding the present case against the respondent, but the observations should be read in the light of the point to which the Court of Appeal was then directing its attention. I think, therefore, that even if we now decide in favour of the college, it does not necessarily follow that the decision in the 1899 case (1) was wrong on the question then decided in the light of the evidence then before the court.

Our attention was also directed to cases in which the character of the bodies in Scotland and Ireland corresponding to the Royal College of Surgeons in England arose for consideration. In the Scottish case (*Sulley v. Royal College of Surgeons, Edinburgh* (10)) the question was whether the defendants could claim exemption from income tax under sched. A [of the Income Tax Act, 1842] in respect of a building on the ground that it was

"property of [a] literary or scientific institution . . . used solely for the purposes of such institution, and in which no payment is made . . . for any instruction there afforded, by lectures or otherwise."

It was held that the defendants were not a scientific institution and, therefore, not entitled to exemption. The court came to the conclusion on the evidence in that case that the defendants' primary and proximate objects were professional, that its methods squared with the requirements of the profession, and that, if it furthered research, it did so only incidentally and indirectly: see per the Lord President (29 S.L.R. 623). Both the facts in that case and the question for decision differed so much from the case before us that I do not get any assistance from it in deciding the present case. In the Irish case (*Miley v. A.-G.* (11)), the question for decision was similar to that before us. The court held that the Royal College of Surgeons in Ireland had been incorporated with two main objects, the promotion of the science of surgery and the promotion of the interests of those practising the profession of surgery, and that the latter was not a charitable object. The only evidence before the court were the charter and the bye-laws of the college, and it appears from the judgment of SIR IGNATIUS O'BRIEN, C. ([1918] 1 I.R. 462) and of MOLONY, L.J. (*ibid.*, 475) that the charter itself contained elaborate provisions for disciplining the members of the Irish college and others connected with the profession, and that the oath required of licentiates was of a more professional character than that required of the governors and examiners of the college. The Chancellor said (*ibid.*, 462-3):

"I am satisfied from a consideration of these and other clauses to be found in the charters that by the incorporation of this body with such great powers there was to be effected the second great object I have mentioned—that of keeping the profession of surgeons honourable in its conduct, and of ensuring its discipline, so that anything in the nature of unprofessional conduct could be punished by the corporate body. It was further pointed out in the course

of the argument that until comparatively recent times the system of apprenticeship prevailed, under which a youth was apprenticed to a member of the body in the same manner as to a land agent or stockbroker. This apprenticeship might be either indoor or external; it was open to the body to regulate the fees and emoluments of the member to whom an apprentice was bound, and it might also insist that no one should be admitted as a licentiate unless he had been previously apprenticed to a member of the body. It would also be open and legitimate to the body to expend money on providing the necessary machinery for the detection or prevention of anything which might be regarded as casting a slur on the honour and character of the profession."

MOLONY, L.J., referred also to the bye-laws which contained strong indications—particular in defining the duties of the general purposes committee—of a professional objective. He said (*ibid.*, 478):

"It is clear, therefore, that one of the objects of the college is to become acquainted with all intended legislation, and to take all proper steps to safeguard the interests of the profession, and in furtherance of this object, if need be, to send deputations to London or elsewhere on the business of the college, and to pay the expense of such deputations out of the corporate funds. This object is, no doubt, very useful, but in no sense can it be regarded as charitable."

The differences between the charters and bye-laws of the Irish college and those of the Royal College of Surgeons in England are, however, such that I cannot regard the decision of the Court of Appeal in Ireland as a decision of the question we have to consider.

Counsel for the medical school said that it was clear from the charters of the college and its bye-laws that it had objects which were not exclusively charitable, and that, as it had non-charitable objects which were not to be accomplished only in the course of and in pursuit of the main charitable objects, the appeal must necessarily fail. Counsel for the college, on the other hand, contended that the main objects of the college were clearly charitable and that, if or in so far as it had other objects, such other objects were purely ancillary to the main objects. He relied on the two last recitals in the charter of 1800 and the last recitals in the charter of 1822 and the charter of 1843 respectively as declaring the objects of the college in terms which he argued were clearly charitable. He also referred to the paragraphs in Lord Webb-Johnson's affidavit which deal with the current activities of the college. I doubt whether this latter evidence is admissible. We are concerned, not with what the college is in fact doing now, but with what it is authorised to do, and I do not think we are entitled to construe its charters of 1800, 1822 and 1843 by evidence of its actions in 1948. In support of his argument, counsel referred us to two decisions in relation to the Institution of Civil Engineers. In the first (*Inland Revenue Comrs. v. Forrest* (8)) the question was as to the right of the institution to exemption from duty under the Customs and Inland Revenue Act, 1885, s. 11. The House held that the institution was entitled to exemption as being formed, not for the professional ends of individuals, but for the promotion of science within s. 11. In the second (*Institution of Civil Engineers v. Inland Revenue Comrs.* (2)) the question was whether the institution was established for charitable purposes only within the Income Tax Act, 1918, s. 37 (1) (b). The Court of Appeal decided in favour of the institution. The charter of the institution contained a recital similar to the last recitals in the charter of 1800 of the college to the effect that it was in the national interest to establish an institution for

"the general advancement of mechanical science and more particularly for promoting the acquisition of the species of knowledge which constitutes

the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man."

The charter of the institution differed from the charter of 1800 of the college in that it expressly declared that the institution was incorporated for the purpose specified in the recital. This seems to me a material difference as it clearly defines the main purpose of the institution. I cannot, therefore, agree with counsel that the decision of the Court of Appeal as to the status of the college in 1899 was, or that any decision we might give in favour of the respondents in the present case would necessarily be, inconsistent with the decisions of the House of Lords and the Court of Appeal on the status of the Institution of Civil Engineers. I do, however, find assistance from certain passages in the judgments of the Court of Appeal. Thus, LORD HANWORTH, M.R., says ([1932] 1 K.B. 161):

"As ROWLATT, J., has said, there may be a charitable institution for the relief of sickness, and incidental advantages can be gained by a subscriber to the funds, without the institution losing its character; but if there is an object, e.g., the promotion of the profession in addition to the promotion of science that is collateral and not merely incidental, the result is that the institution cannot be described as established for charitable purposes only. I confess that I have a difficulty in attaching the same weight as was given to it by the commissioners and the learned judge to the fact that members of the institution can attach letters as suffixes to their names. The requirement of the institution whereby its members have to possess an adequate qualification does not appear to me to connote an advantage, amounting to a collateral purpose in the sense above. That its members should bring a certain knowledge and capacity for learning to the institution seems only to confirm its purpose of the general advancement of mechanical science and knowledge."

Then, again, he refers (*ibid.*, 166) to an observation of LORD MACNAGHTEN when he points out that where a society is incorporated and its purpose defined by charter or statute, it is not right to confuse the purpose of the society with the objects of individuals in joining it.

With these principles in mind I return to the charters and bye-laws of the college and would refer first to the last two recitals in the charter of 1800 which read as follows:

"And whereas, it is of great consequence to the commonweal of this kingdom, that the art and science of surgery should be duly promoted: And whereas, it appears to us, that the establishment of a college of surgeons will be expedient for the due promotion and encouragement of the study and practice of the said art and science."

Had these been the only recitals and had the charter gone on to provide, as did the charter of the Institution of Civil Engineers, that the college was incorporated for the purposes specified in the recitals, I should, I think, have agreed with your Lordships that the only main object of the college was charitable and that any professional object which might be deduced from the reference to the practice of the art of surgery was merely ancillary to the main object. This view would have been reinforced by the concluding recitals in the charters of 1822 and 1843. Unfortunately, the words of incorporation do not contain any direct reference to the material recitals and these are preceded by an historical account of the predecessors in title of the college all of which appear to have been in the nature of trade guilds under the jurisdiction of the corporation of London and conferring on their members franchises as freemen of the city of London. None of these predecessors could, I think, have claimed that their non-charitable activities were merely ancillary to a main object which was charitable. The last of such predecessors is, however, stated in the recitals to have been dissolved, and, although under the operative part of the charter its privileges and properties

are confirmed to the college, it is expressly provided that the corporation of London is to have no jurisdiction over the college nor are the members of the college to be freemen of the city of London.

It is, therefore, argued that the college is not in any sense a trade guild. On the other hand, it is to be observed that the master, governors and court of assistants are given power to make bye-laws for the regulation, government and advantage of the college and that the master, governors and assistants are obliged to take an oath to maintain the honour and the welfare of the college. The master, governors and court of assistants are further empowered to transact or ordain all such other matters and things as the master, governors and court of assistants of the late dissolved company or corporation might theretofore lawfully do, transact or ordain. Counsel for the college argued that this last power was purely administrative and was confined to doing such things as were requisite for the achievement of the charitable objects referred to in the last two recitals in the charter. In considering the validity of this argument it is, I think, permissible to look at the bye-laws which in fact the college adopted. They are set out in the calendar. Bye-law 15 reads as follows:

"The council will, at all times, protect and defend every fellow, fellow in dental surgery, member, and licentiate in dental surgery of the college in the exercise and enjoyment of the rights and privileges acquired by him as a diplomate of the college."

Bye-law 16 gives power to remove from fellowship or membership a fellow or member who is adjudged guilty of professional misconduct or is convicted of a criminal offence or has his name removed from the medical register of the General Medical Council under s. 29 of the Medical Act, 1858. Section 16, at any rate, cannot have existed in its present form at the time of the charter of 1800 or, indeed, at any date before the passing of the Medical Act, 1858, but it was not suggested that some disciplinary powers were not at all times contained in the bye-laws or that some provision had not always been made enabling the council to defend its fellows and members. Counsel for the college sought to explain these provisions on the grounds indicated in para. 22 and para. 23 of Lord Webb-Johnson's affidavit, where he says:

"22. Apart from examinations the college seeks and has sought in the interests of the public to do all it can to secure that surgical practitioners shall not only be technically competent but also shall hold to high standards of professional honour. As a corollary the college feels and has felt itself bound to take and retain powers to defend and protect in their professional capacity its fellows, members and licentiates, but this not in their interest but in the interest of the public so that surgeons feeling that they enjoy the support of the college may fearlessly and without anxiety render their best professional services to their patients. 23. As for disciplinary measures the council preserve their powers under the charters and bye-laws, but in practice the discipline of registered medical practitioners is now for the most part maintained by the General Medical Council established by the Medical Act, 1858."

In the light of this evidence, I am unable to reach a conclusion that the disciplinary and "defence" activities of the college are purely ancillary to its plainly charitable objects as set out in the recitals and illustrated in its report of 1948. It was the descendant of a body which plainly could not be regarded as a purely charitable corporation. If it had not had disciplinary powers over its members, there was, until the Medical Act, 1858, so far as the evidence goes, no other body which could exercise those powers over its members. Having regard to no. 15 of the bye-laws and to para. 22 of Lord Webb-Johnson's affidavit, it is difficult to accept the view that the power to defend and protect in their professional capacity its fellows, members and licentiates was taken in 1800

solely in the interests of the public and without any intention to promote the interests of the college. On the whole, therefore, though with some reluctance, having regard to the excellent work in research and education that the college is now doing, I have come to the conclusion that the college cannot properly be held to have established that its objects in so far as they are non-charitable are merely ancillary to a main charitable object. I would, therefore, dismiss the appeal.

Appeal allowed.

Solicitors: *Wilde, Sapte & Co.* (for the Royal College of Surgeons); *Withers & Co.* (for the executors and trustees of the will); *Peake & Co.* (for the Council of the Middlesex Hospital Medical School).

[Reported by J. D. PENNINGTON, ESQ., *Barrister-at-Law.*]

A. SMITH & SON (BOGNOR REGIS), LTD. v. WALKER.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), March 24, 25, 1952.]

Building Control—Licence—Licensed and unlicensed work carried out—Allocation of payments to licensed work—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended by S.R. & O., 1945, No. 502), reg. 56A (2).

By an agreement dated Apr. 20, 1948, the plaintiffs, a firm of building contractors, agreed to carry out certain demolition and building works on the defendant's house. Before a building licence, as required by reg. 56A (2) of the Defence (General) Regulations, 1939, had been obtained the plaintiffs pulled down a wall of the house and re-built it, and on Apr. 23, and June 11, 1948, the defendant paid to the plaintiffs two sums of £500. On June 11 and 30, 1948, the plaintiffs obtained licences in respect of work on the rest of the house authorising an expenditure of £3,200. The cost of the unlicensed work amounted to some £1,700. In a claim by the plaintiffs for the balance of the payments in respect of the work carried out,

HELD: the payments by the defendant should be allocated in respect of the sums which the plaintiffs could lawfully claim, and, therefore, should be allocated to the licensed work.

FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 56A (2), see BUTTERWORTHS COMMERCIAL CONTROLS, Vol. 1, p. 104.

Cases referred to:

(1) *Dennis & Co., Ltd. v. Munn*, [1949] 1 All E.R. 616; [1949] 2 K.B. 327; [1949] L.J.R. 857; 2nd Digest Supp.

(2) *Howell v. Falmouth Boat Construction, Ltd.*, [1951] 2 All E.R. 278; [1951] A.C. 837.

APPEAL by the defendant from an order of MORRIS, J., dated May 4, 1951.

The plaintiffs were building contractors and registered builders. The defendant was the owner of premises at 3, Mill Lane, Arundel, Sussex. The plaintiffs claimed from the defendant £2,358 12s. 6d., and £233 5s. 1d., balances alleged to be due for work done and materials supplied under an agreement dated Apr. 20, 1948, in respect of building operations at the defendant's premises, and damages for fraud. The plaintiffs alleged that they had been induced to enter into the agreement for the work carried out by a representation by the defendant that a building licence had been obtained in respect of the work, except for the demolition and re-building of a wall of the premises which, the plaintiffs claimed, was an emergency operation not requiring a licence. On Apr. 22, 1948, the plaintiffs started to carry out the demolition and re-building of the wall which finally cost £1,733 5s. 1d. On Apr. 23, and June 11, 1948, the defendant paid to the plaintiffs £500 which sums were acknowledged respectively as being "for demolition of faulty structure" and "on account of work carried out". On June 11 and 30, 1948, licences authorising operations on the premises, but not

including the work on the wall, at a cost not exceeding £3,200 were obtained by the plaintiffs. On Aug. 9, 1948, the defendant paid a further sum of £500. The plaintiffs claimed that the £1,500 paid by the defendant should be allocated towards the cost of the work carried out on the wall, leaving a balance of £233 5s. 1d. They further claimed that the cost of work up to £3,200 covered by the licences was recoverable from the defendant, giving credit only for payments of £500 and £341 made by the defendant in November, 1948. MORRIS, J., held that the defendant was not guilty of fraud, that the works carried out before June 11 were not emergency operations and required a licence, and that the first two payments made by the defendant were in respect of the unlicensed work and could not be allocated to the licensed work, and, taking into consideration the further payments made by the defendant after June 11, he gave judgment for £1,858 12s. 6d.

The defendant appeared in person.

G. R. F. Morris for the plaintiffs.

SOMERVELL, L.J.: This is an appeal from a decision of MORRIS, J., under which he ordered that judgment should be entered for the plaintiffs for £1,858 12s. 6d. alleged to be due under a building contract. The original contract, which was later replaced by another contract on a different basis, was contained in a document dated Apr. 20, 1948, addressed by the plaintiffs to the defendant as follows:

"We agree to carry out the demolition and building works of No. 3 Mill Lane, Arundel, Sussex, according to the plan handed to us, and passed by the Borough of Arundel Council 12/2/48, with the exception that the west elevation wall shall be demolished and re-built in 11 inch cavity brick-work for the sum of £2,500. Any alterations or deviation during the progress of the work shall be mutually agreed by estimate before any alterations or deviations are commenced. We undertake to commence the work tomorrow, Wednesday, Apr. 21 as arranged. We also agree to expedite in every possible way the completion of the contract. Methods of payments required:—£500 immediate payment. Further payments at intervals of twenty-eight days to be agreed mutually. We will set a target of completion in ten weeks, and shall do our utmost to beat this."

The work cost more than was estimated originally and there was a substituted contract on a cost-plus percentage basis.

The feature of the matter with which we are chiefly concerned is this. The work required a building licence, and one of the issues before the learned judge was an allegation of fraud by the plaintiffs against the defendant in that he had orally represented to them that he had lawfully obtained a licence for the demolition and building works other than the demolition and re-building of the west elevation wall and that such licence had been issued authorising the operations to be carried out at a cost not exceeding £2,500. That allegation of fraud failed before the learned judge. The position was that the defendant had taken steps towards obtaining a licence, and, as the plans had been passed by the Arundel council, it may well have been assumed that a licence would be forthcoming in respect of the work other than the demolition of the west elevation wall. When the plaintiffs started work, as they did on Apr. 21, they had no licence for the demolition of the west elevation wall, and there never was a licence for the demolition of that wall. It was sought to be said before the learned judge that this was emergency work, and that, having regard to the provisions of the Defence (General) Regulations, 1939, reg. 56A (6), proviso (b), it did not require a licence. The learned judge found against that contention, and, I should have thought, rightly. The appeal has proceeded on the basis that this was work which required to be licensed.

The main point on this appeal is illustrated by the following example. If one takes a case where there is a lump sum contract for work for, say, £4,000, and

payments are made under provisions such as the present from time to time, but not of the full amount—say, £2,500—and when the contractor sues for the balance it turns out that £1,000 worth of the work ought to have been, but was not, licensed, on principles which have been laid down by this court in *Dennis & Co., Ltd. v. Munn* (1) and by the House of Lords in *Howell v. Falmouth Boat Construction, Ltd.* (2), the contractor cannot recover more than £3,000. I think that in those circumstances the defendant would be entitled to say that the £2,500 which he had paid by instalments under general words such as those in this contract should be allocated as against the £3,000 which he was legally bound to pay. The plaintiffs here seek to say that the first payment of £500 and a subsequent payments of the same amount should be allocated to the work which has turned out to be illegal. If one isolates the work on the western elevation wall, assuming that there had been a separate contract for it and that there had been no payment, the plaintiffs could not recover in respect of that work. On the other hand, if payments had been made in respect of unlicensed work, it seems to me that the payer could not recover them back. If these first payments are to be treated as appropriated or allocated to the illegal work, they could not be recovered back and would not be available to be credited against the legal, licensed work. That is the view which the learned judge has taken and the question is whether he was right. I took a simpler case than the present one under which I think the contention put forward by the defendant, that the payments made must be allocated against the legal work, would have succeeded. The question is whether there are matters here which differentiate this case from that case? Having listened to counsel for the plaintiffs, I think this is a question of law on the documents and on the admitted facts. The admitted facts are that the first work done was the unlicensed work and at the time when these payments were made, that was the only work which had been done. Is that enough?

The learned judge based his judgment largely, if not wholly, on the wording of the receipts, given by the plaintiffs for the first two payments. He said:

“ Certain payments were made to the plaintiffs. Page 3 of the correspondence shows that £500 was received from the defendant, and it is described as ‘ for demolition of faulty structure at 3 Mill Lane, Arundel ’. The letter on p. 5 of the correspondence records that a further £500 was acknowledged on June 15: ‘ We thank you for your cheque value £500 on account of work carried out at the above ’. The defendant’s pleading, in para. 18, is that those two cheques were dated respectively Apr. 23 and June 11. The letter I have just read speaks of ‘ work carried out ’. Before June 11 there was no licence in existence, and the works that had been carried out before the licence was in existence were works that were unlawful, having regard to reg. 56A (2); but payment was in fact made by the defendant of those two amounts. The next payment that was made was [on Aug. 9] . . . The defendant, by para. 19 of the defence, has pleaded as follows: ‘ Further, if (which is denied) the plaintiffs carried out work upon the said site exceeding in cost £3,200, the same was illegal, not being licensed pursuant to reg. 56A of the Defence (General) Regulations, 1939 ’. Even if the defendant had not taken that point before the matter came into court, the court would have to take the point. The position, therefore, is that any works that are unlawful under reg. 56A (2), could not be made the subject of a claim. What the defendant says is: ‘ There were only, in total, licences for £3,200. I have paid four sums of £500 and I am entitled to credits as well ’. The defendant is, therefore, seeking to say that the payment that he made by cheque on Apr. 23 is a payment that he can allocate in respect of the work that was licensed, the £3,200. It was put by [counsel for the defendant] that the first £500 was merely a payment as contemplated by the contract . . . but that was a payment for the work done, and the plaintiffs, in

- A para. 10 of the statement of claim, have said that the payments were 'expressly appropriated by the plaintiffs to and in respect of and on account of the work specified in para. 8, being the emergency operations carried out at the request of the defendant and pursuant to the direction and/or authority of the said Simmonds acting for and on behalf of the Arundel Town Council'. Those latter words were struck out in the amended statement of claim. I have held that the plaintiffs are wrong in saying that those were emergency operations, but one must nevertheless see what were the facts, and it seems to me that the first payment, made by cheque on Apr. 23 and acknowledged on Apr. 30, was a cheque as recorded on p. 3, [in] payment 'for demolition of faulty structure', and no licence was in existence at that time; no licence was ever in existence to demolish the rear wall. That payment was then made for the work done, but it does not seem to me that the defendant can say that he seeks, in spite of the facts, to take that payment away from that date and relate it to the later period. The same applies, in my judgment, to . . . the cheque for £500 paid on June 11 and acknowledged on June 15, the plaintiffs saying: 'We thank you for your cheque value £500 on account of work carried out at the above'."
- B
- C I feel a difficulty about that decision. It seems to me that as a matter of law the nature of these payments must be sought in the contract under which they were made. The fact that words are put in the receipt which might indicate an intention to appropriate does not seem to me to be enough to deprive the payment of the character it had derived from the contract unless, of course—and this is not suggested—there had been some verbal or written agreement between the parties to that effect. The mere fact that the defendant did not object to the words on the receipt does not seem to me to be enough. All he was interested in was getting a receipt. It is to be noted that the receipts were sent some time after the payments, and, at any rate so far as the first payment is concerned, that was made practically before work was started. With regard to periodical payments which are made under contracts of this kind, in the absence of express
- D provision in the contract, there is nothing to restrict their use to the work actually in operation. They can be used for the purchase of materials required for future operations. Therefore, I do not think that the wording of the receipt is sufficient to enable the plaintiffs to say that these payments should not be treated as payments generally on account of the contract, nor do I think that it is sufficient to enable them to say that the work being done at that time was not only un-
- E licensed work, but work for which a licence was never obtained. We are only concerned here to apply the law, but I think that the plaintiffs (who after all were builders and should be familiar to some extent with the licensing provisions) had only themselves to blame if they took the view that all this work could be done without a licence as emergency work. I think the defendant is right in saying that these payments must be treated as payments under the contract as a whole and must be allocated to his credit in respect of such a sum
- F as the plaintiffs can lawfully claim from him. To that extent, in my view, the appeal should be allowed.
- G

H DENNING, L.J.: Builders, when they undertake building work, ought to see the licence before they start the work. It is no good their relying on the word of the owner that he has got a licence, because, if it should turn out that he has got none, the work will be illegal and they will be unable to recover payment for it: *Dennis & Co., Ltd. v. Munn* (1). They can charge him with fraud, but that is a very serious charge to make and very likely to fail. The builder usually makes himself responsible for getting the licence and does not, in fact, rely on the owner.

In the present case the builders pulled down a wall and re-built it without a licence. They then got licences for altering the rest of the house at a cost not to exceed £3,200. They now want to get payment not only of the £3,200 for the

licensed work, but also of some £1,700 for the cost of the unlicensed work. They sought to say that it was emergency work which did not need a licence. They failed on that point. They next sought to say that the owner assured them he had got a licence for it and that he had been guilty of fraud. They failed on that point also. Defeated on those two points, they then said that in the early days of the contract, while only the unlicensed work was being done, the defendant had paid them two sums of £500 and they claimed to appropriate these sums to the unlicensed work. They succeeded before the judge on that point. This means that they have got payment, not only of the £3,200 for the licensed work, but also of £1,000 for the unlicensed work. The important question in this case is: How far can a builder appropriate payments to unlicensed work?

Take, first, a case where all the work done was unlicensed, and part payments have been made. In such a case the builder cannot successfully claim the balance due to him and the owner cannot recover any payments that he has made. Both were parties to an illegal transaction and the law will not give its help to either of them. Take, now, a case where one part of the work is unlicensed and the other part is licensed. In such a case I think it plain that any payments made by the owner generally on account of the work must be allocated to the lawful part of it. It is not permissible for the builder to appropriate them to the unlawful part, but, if the owner himself specifically appropriates a particular payment to the unlawful part, then it remains where it is. He cannot turn round afterwards and appropriate it to the lawful part. Just as the builder cannot recover the balance due to him for the unlawful part, so also the owner cannot recover back any payments he has made specifically on account of it. He cannot do it directly by action, nor can he do it indirectly by altering his appropriation from the unlawful to the lawful part.

In these circumstances the sole question in the case is: Were these two sums of £500 paid generally on account or were they paid specifically in respect of the unlawful work? On the facts found by the judge, I think they were made generally on account. They were not appropriated by the owner to any particular work. At the time the builder sought to appropriate them to the unlawful part. That he cannot be allowed to do. It is true that the owner made no objection, but that does not matter. The builder knows, or ought to know, the position about the licences better than the owner, and he cannot be allowed to circumvent it by appropriating the payments to the unlawful parts, no matter at what stage he does it. Nothing less than a specific appropriation by the owner will suffice. I agree with my Lord, therefore, that this appeal should be allowed to that extent.

ROMER, L.J.: I also agree.

Appeal allowed.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Chamberlain, Martin & Spurgeon*, Bognor Regis (for the plaintiffs).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

WATTS v. ENFIELD ROLLING MILLS (ALUMINIUM), LTD.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), February 27, 1952.]

Factory—Protection of eyes—Obligation to provide goggles—"Cutting off of bolts from boilers or other plant"—"Plant"—Protection of Eyes Regulations, 1938 (S.R. & O., 1938, No. 654), schedule.

A *Factory—Statutory duty—Breach—Onus of proof—Injury to workman.*

A workman, who was employed as an aircraft stripper in a factory, was engaged with other workmen in dismantling an aircraft engine by breaking off its bolts. While this work was being done, bolts sometimes flew up from the engine against the wall or to the roof. The workman was injured, and, as a result, lost an eye, but it was not certain how the accident happened. In an action against his employers alleging, inter alia, a breach by them of their statutory duty under the Factories Act, 1937, s. 49, and the Protection of Eyes Regulations, 1938, in that they had failed to supply him with goggles while he was "cutting out or cutting off bolts from plant", the workman claimed that his injury must have been caused by a flying bolt and he contended that the court should draw the inference that it was so caused. The employers called evidence to show that the injury might have been caused by the workman hitting his eye against a rod which was in a vertical position near to him at the time of the accident. The trial judge declined to draw the inference that the injury was due to a flying bolt. On an appeal by the workman,

D HELD: (i) "plant" in the phrase "cutting out or cutting off... of... bolts from boilers or other plant" in the schedule to the regulations was not restricted to the plant of the occupier of the premises where the cutting off of the bolts was being done, but meant any object of a general kind which was riveted or bolted and from which bolts could be cut out or cut off, and, therefore, the aircraft engine which was being dismantled was "plant" within the meaning of the schedule.

E (ii) in a claim for damages for breach of a statutory duty under the Factories Act, 1937, the onus was on the workman to show, first, that the injury was caused by the danger against which the legislature intended to guard him (in this case, the flying bolt), and, after that was proved, the onus was then on him to show that there was a breach of the statutory duty which was intended to guard against that danger; only after both these matters had been proved or admitted was the onus on the employers to show that their breach of statutory duty was not the cause of the workman's injury; and, therefore, as the workman had failed to satisfy the judge that the cause of his injury was the flying bolt, he had not proved the first requisite, and his claim failed.

G FOR THE FACTORIES ACT, 1937, s. 49, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1039.

Cases referred to:

- (1) *Yarmouth v. France*, (1887), 19 Q.B.D. 647; 57 L.J.Q.B. 7; 34 Digest 225, 1884.
- (2) *Vyner v. Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] K.B. 50; 115 L.J.K.B. 119; 173 L.T. 330; 110 J.P. 76; 2nd Digest Supp.
- H (3) *Mist v. Toleman & Sons*, [1946] 1 All E.R. 139; 110 J.P. 149; 38 B.W.C.C. 150; 2nd Digest Supp.
- (4) *Lee v. Nursery Furnishings, Ltd.*, [1945] 1 All E.R. 387; 172 L.T. 285; 2nd Digest Supp.
- (5) *Stimson v. Standard Telephones & Cables, Ltd.*, [1939] 4 All E.R. 225; 161 L.T. 387; *sub nom. Stimpson v. Standard Telephones & Cables, Ltd.*, [1940] 1 K.B. 342; 109 L.J.K.B. 315; 32 B.W.C.C. 253; 2nd Digest Supp.

- (6) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (7) *Smithwick v. National Coal Board*, [1950] 2 K.B. 335; 2nd Digest Supp.

APPEAL by the plaintiff from an order of ORMEROD, J., dated Nov. 16, 1951, dismissing an action for damages for personal injuries.

The plaintiff, an aircraft stripper employed by the defendants, lost an eye as a result of an accident while he was engaged in dismantling an aircraft engine. **A** He claimed that the injury must have been caused by a flying bolt, and that, on the evidence, the court should draw the inference that the injury was so caused, and he contended that the defendants were liable to him in damages (a) in that they had failed to provide him with goggles in breach of their statutory duty under the Factories Act, 1937, s. 49, and the Protection of Eyes Regulations, 1938, and (b) for breach of their common law duty. **B** ORMEROD, J., held that the aircraft engine was not "plant" within the meaning of the schedule to the regulations of 1938, and he was not satisfied, on the evidence, that a flying bolt was the cause of the injury.

Beney, Q.C., and *Pickles* for the plaintiff.

Berryman, Q.C., and *Stanley-Price* for the defendants. **C**

SOMERVELL, L.J.: This is an appeal by the plaintiff from a decision of ORMEROD, J., in a claim for damages for personal injuries which resulted, unhappily, in the plaintiff losing his left eye. The plaintiff was employed by the defendants as an aircraft stripper. With others, he was engaged in breaking up or dismantling an engine, the object being to get the aluminium which was in it. In some cases, particularly if the engine has been under cover and comes straight from where it has been used, the dismantling is done by unscrewing the bolts with spanners. On the other hand, a number of these engines have been in the open air, or not used for some time, and the bolts are rusted up. In those circumstances the nuts or bolts are broken off by means of a hammer and a cold chisel, and, when they are broken off, from time to time they fly from the engine up against the wall and sometimes up to the roof. The accident happened in this way. While the plaintiff was engaged on this work, part of an engine, the supercharger, had come down to his rig (a sort of iron framework on which the engine rested) and had been placed on the floor. He was quite near it and was stooping down to pick up his hammer and chisel, which were on the floor. According to what he himself remembered (and there is no doubt about the main facts of the accident), as he stooped down or, according to other witnesses, just as he was about to rise, he cried out, having felt a blow on his eye. When his fellow workmen came up, his eye was on the side of his cheek. He was taken to hospital and lost the eye. **D** **E** **F**

The plaintiff claimed that the accident was due (i) to a breach by the defendants of the Factories Act, 1937, s. 49, and the Protection of Eyes Regulations, 1938, made under s. 49 of the Act, and (ii) to a breach by the defendants of their common law duty. His case was that the injury was caused by a bolt which had been chiselled off by one of the men working in the factory. He contended that a flying bolt must have been the cause of the injury, and that the court should draw the inference that it was. The defendants, on the other hand, called evidence, which was accepted by the judge, that, at the time when the accident happened, a tube, which was part of a supercharger, was on the ground by the plaintiff. Normally, it would be lying horizontally and would not be a danger to anybody stooping down, but at the time of the accident, it was in a vertical position. The defendants suggested that the plaintiff, as he stooped, did not see the upright tube and inadvertently put his eye against it, and that was the cause of the accident. There was only one man chiselling bolts in the shop at the time of the accident. He was working with his back to the plaintiff and at a distance of some thirty to forty-five feet from him. If the plaintiff **G** **H**

had been hit by a bolt, it would have been a bolt from the machine on which this man was working. The bolt would have hit the wall in front of him and then come back, possibly going up to the ceiling, as sometimes happened, and ricocheted back and hit the plaintiff's eye. The learned judge came to the conclusion that he was "far from being satisfied" that the accident was caused by such a flying bolt. He said:

- A "Before I can find that the plaintiff's unfortunate accident was the result of being struck by a piece of flying metal, I must be satisfied on the evidence that I should draw that inference, and, for the reasons which I have given, I can only say that on this evidence I am very far from being satisfied that that is the case."
- B He did not find affirmatively, nor was it necessary, I think, for him to do so, that the accident was due to the plaintiff's eye coming in contact with the tube. In regard to the plaintiff's claim under the Factories Act, 1937, s. 49, and the Protection of Eyes Regulations, 1938, the learned judge decided that this work was not within the regulations. Section 49 of the Act of 1937, under which the regulations were made, provides:
- C "In the case of any such process as may be specified by regulations of the Secretary of State, being a process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall, in accordance with any directions given by the regulations, be provided to protect the eyes of the persons employed in the process."
- D The plaintiff's case was that goggles were not provided and that, if they had been, the injury from the flying bolt would not have occurred. The processes in the case of which s. 49 is to apply are specified in the schedule to the regulations of 1938, and the relevant words of the schedule are:
- E "Cutting out or cutting off . . . of cold rivets or bolts from boilers or other plant or from ships."
- The learned judge held that these engines were not within those words, and his decision must involve that they were not covered by the words "other plant". The word "plant", I think, is one of those words the meaning of which, in its ordinary significance, is very wide. It may be cut down by its context. In certain contexts in the Factories Acts I think it means plant used by the occupier of the factory for the purposes of the processes he carries on there. In *Yarmouth v. France* (1) it was held that a horse used by a wharfinger was "plant" within the meaning of the Employers' Liability Act, 1880, s. 1 (1). I think that in this context "plant" means any object of a general kind which is riveted or bolted and from which, therefore, cold rivets or bolts may be cut out or cut off. I cannot accept the suggestion that "plant", within the meaning of the regulation, is restricted to the plant of the occupier of the premises where the cutting off of the bolts or rivets is being done, and, therefore, would not cover objects such as engines brought in to be dismantled. In these matters one must, I think, apply ordinary principles to the meaning of words, and the purpose which s. 49 of the Act of 1937 and the regulations of 1938 are intended to cover is the process of removing bolts and is not concerned with the past or present history of the object
- H from which the bolts are being cut out or cut off. I, therefore, would have come to the conclusion that these engines were "plant" within the schedule to the regulations of 1938.
- On that view counsel for the plaintiff submitted that the learned judge had misdirected himself because he had regarded the onus as remaining on the plaintiff to satisfy him that the accident was caused by a flying bolt, and he contended that, having regard to what was said in this court in *Vyner v. Waldenberg Bros., Ltd.* (2), that was wrong. In *Vyner v. Waldenberg Bros., Ltd.* (2) the plaintiff's left hand

was injured when he was working at a circular saw. It was common ground that the injury had been caused by the circular saw. A breach of the Factories Act with regard to circular saws was alleged and proved, but it was suggested that the injury was not caused by the employers' breach. It was in connection with those facts that SCOTT, L.J., delivering the judgment of the court, said ([1945] 2 All E.R. 549):

"If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach, the onus of proof shifts on to the employer to show that the breach was not the cause. We think that that principle lies at the very basis of statutory rules of absolute duty."

Those words (and I would emphasise the word "could" in the first sentence of the passage which I have quoted) might well be regarded as bringing this case within *Vyner v. Waldenberg Bros., Ltd.* (2), but MACKINNON, L.J., who was a party to that decision, referred to it in *Mist v. Toleman & Sons* (3), in which it was suggested that tuberculosis had developed in the plaintiff as a result of a breach of the Factories Act, 1937, s. 47 (1). After referring to what was said in the judgment of the court in *Vyner's* case (2), MACKINNON, L.J., went on to say ([1946] 1 All E.R. 142):

"Tuberculosis, however, is not the very thing that s. 47 (1) is designed to guard against or to prevent. The object of s. 47 (1) is to provide against every possible uncomfortable, offensive or injurious effect due to the presence of dust. Tuberculosis is not the very class of injury which, and which alone, is contemplated as the danger to be guarded against by this section for the removal of dust. The dust is a factor which may cause coughing, which coughing may be one of the many things which may activate a quiescent tuberculosis. But I think it is quite wrong to transfer the words of SCOTT, L.J., in *Vyner v. Waldenberg Bros., Ltd.* (2), and similarly the words of GODDARD, L.J., in *Lee v. Nursery Furnishings, Ltd.* (4), directed as they were to that particular rule about fencing a circular saw, so as to lay down a general proposition as regards any section in the Factories Act, with the result that, where any breach of the Factories Act is proved and that breach may be one of the causes which brought about the subsequent injury to the workman, the onus is then cast upon the employer to show that it did not do so. In my opinion, therefore, the onus of disproving the possibility that this presence of dust may have been a cause contributing to or activating the tubercular condition of the plaintiff was not cast upon the defendants, but remained with the plaintiff . . ."

I think that that application, or restriction, of what was said in *Vyner v. Waldenberg Bros., Ltd.* (2) is in accordance with what was said in the earlier decision of this court in *Stimson v. Standard Telephones & Cables, Ltd.* (5), where SIR WILFRID GREENE, M.R., basing himself on a passage from the opinion of LORD MACMILLAN ([1939] 3 All E.R. 732) in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (6), adopted an example which had been put by MACKINNON, L.J., in the course of the argument in *Stimson's* case (5). SIR WILFRID GREENE, M.R., said ([1939] 4 All E.R. 229):

"... it would not be sufficient to show that a workman was found in the neighbourhood of a dangerous machine unconscious, with a wound upon him which might have been caused by the dangerous part of the machine, or might have been caused in some other way by the use of, for instance, a hand tool which the workman had to use. If that were all that appeared, then, it would not be shown—although the breach of statutory duty would be established owing to the failure to fence the machine—that that accident was causally associated with the breach of the statutory duty, because the facts would be equally consistent with its having been due to some other cause."

Taking that example, one can, I think, illustrate from it the limitation of the general words used in *Vyner v. Waldenberg Bros., Ltd.* (2). If the workman, instead of being simply

“ . . . found in the neighbourhood of a dangerous machine unconscious, with a wound upon him which might have been caused by the dangerous part of the machine . . . ”

A had been found in circumstances in which the occupiers accepted that the wound was caused by the dangerous part of the machine, then the principle as stated in *Vyner v. Waldenberg Bros., Ltd.* (2) would have been applicable. In the present case I think that, whether one treats the failure to supply goggles as a breach of s. 49 of the Act of 1937 and the regulations of 1938, or as a breach of the duty at common law, the onus remains on the plaintiff to satisfy the learned judge that the cause of his injury was a flying bolt. [His LORDSHIP reviewed the evidence and continued:] It was for the learned judge to weigh the evidence, and as, in my opinion, he did not misdirect himself, I do not think this court can interfere with his decision.

C DENNING, L.J.: I agree with all that SOMERVELL, L.J., has said about the meaning of the word “plant” in the schedule to the regulations of 1938. I only wish to add a word on the question of the burden of proof under the Factories Act, which has often given rise to difficulty. The first burden which is always on the plaintiff is this. He must show that his injury was caused by the relevant danger, i.e., by the danger against which Parliament intended to guard him, such as a circular saw, a flying fragment, a revolving belt, or such like. That appears from *Stimson's case* (5), *Mist v. Toleman & Sons* (3) and *Smithwick v. National Coal Board* (7). When that is proved or admitted, then the second thing which the plaintiff must show is that there was a breach of a statutory duty which was intended to guard against that very danger. When both those matters are proved, the proper inference is that the breach was the cause of the injury unless the occupier of the factory proves that it was not: see *Lee v. Nursery Furnishings, Ltd.* (4) and *Vyner v. Waldenberg Bros., Ltd.* (2).

E In the present case, the relevant danger was a flying fragment. At the outset, therefore, the plaintiff had to show that the injury to his eye was caused by a flying fragment. The defendants denied this. They said it was caused by a standing rod which was not a relevant danger, i.e., not a danger against which there was any statutory duty to guard the plaintiff. They suggested that he F put his head down and ran his eye into a standing rod. The decision on that point was a matter of inference from the evidence. The judge declined to draw the inference that the injury was due to a flying fragment. That means that the plaintiff did not prove the first requisite. He did not prove that his injury was caused by the relevant danger. He did not, therefore, get to the point where he could put the burden on the occupiers of the factory. In the circumstances, G it seems to me that there is no ground on which this court can interfere with the decision of the learned judge below. The appropriate remedy of the workman is not damages but industrial assurance. I agree that the appeal should be dismissed.

H ROMER, L.J.: I also agree. I only desire to intimate my express concurrence in the interpretation that SOMERVELL, L.J., has put on the word “plant” in the schedule to the Protection of Eyes Regulations, 1938.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co.*, agents for *James A. Lee & Priestley*, Bradford (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *A. V. Hammond & Co.*, Bradford (for the defendants).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

BROWN v. BROWN.*Followed.* FROST v. FROST, [1
2 All E.R. 1125.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.JJ.), March 21, 1952.]

Legal Aid—Costs—Taxation—No order made as to costs—Need of order for taxation—Legal Aid and Advice Act, 1949 (c. 51), sched. III, para. 4 (1)—Legal Aid (General) Regulations, 1950 (S.I., 1950, No. 1359), reg. 18 (3).

A wife, an assisted person under the Legal Aid and Advice Act, 1949, petitioned for a decree of divorce on the ground of her husband's desertion. She asked for the exercise of the court's discretion in her favour, and the commissioner exercised his discretion in her favour and granted her a decree. Being of the opinion that the wife had not been frank in her discretion statement, he made no order as to costs and refused to order taxation of the wife's costs as between solicitor and client in accordance with the Legal Aid and Advice Act, 1949, sched. III, para. 4 (1), thus depriving her solicitors of their right to be paid out of the legal aid fund.

HELD: the court had power to make an order for the taxation of an assisted person's costs, notwithstanding that no other order as to costs was made, and in the circumstances of the present case an order should be made.

Per BIRKETT, L.J.: the Legal Aid (General) Regulations, 1950, reg. 18 (3), imperatively directed that an order for taxation of an assisted person's costs should be made.

FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 6, see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 540.

Case referred to:

(1) *Lonnkvist v. Lonnkvist*, [1952] W.N. 88.

APPEAL by the wife (petitioner in a divorce suit) from a refusal of His Honour JUDGE BATT sitting as a divorce commissioner to order taxation of her costs as an assisted person.

I. S. Webster for the wife.

The husband did not appear.

SINGLETON, L.J.: This point is not free from difficulty, having regard to the wording of reg. 18 (3) of the Legal Aid (General) Regulations, 1950, made under the Legal Aid and Advice Act, 1949.

The petitioner, Gladys Brown, was an assisted person. The legal aid certificate is dated Aug. 2, 1951, and her petition for a decree dissolving her marriage on the ground of her husband's desertion was heard by His Honour JUDGE BATT sitting as commissioner at Manchester on Nov. 27, 1951. The wife asked for the exercise of the discretion of the court in her favour. The learned commissioner heard the evidence of the husband, and he came to the conclusion that the wife had been far from frank in her discretion statement. If he had thought right, he could have adjourned the hearing and reported the matter to the Law Society so that the appropriate committee of the Law Society could move to set aside the legal aid certificate which had been granted to the wife or he could have refused to grant her a decree of divorce. He did neither of those things. He heard the petition to its end, and he then exercised his discretion in the wife's favour and granted her a decree.

Thereafter a question arose as to costs. Counsel for the wife was about to raise the matter when the learned commissioner said:

"I do not propose to make an order for taxation here. This woman will have to meet this obligation with her solicitors. Obviously there has been suppression here. The only way to deal with this case, to see that in future solicitors are very careful in these matters, is to refuse to make an order for these costs to be taxed under the fund. I do not make the order. The

solicitors instructing you will have to refer to their own methods to get the costs out of this woman."

Then he said to the husband:

"I have granted a decree. You will not have to pay any costs", for which the husband expressed his thanks.

A Some little time later counsel applied to the learned commissioner again on the question of costs, asking that he should make an order, and he referred the commissioner to reg. 18 (3) of the Legal Aid (General) Regulations, 1950, which is in this form:

B "Any order for the payment of the costs of any proceedings to which an assisted person is a party shall include a direction that his costs are (in addition to any other direction as to taxation contained in the order) to be taxed as between solicitor and client in accordance with the provisions of sched. III to the Act."

C The learned commissioner pointed out to counsel that he had not made an order for the payment of costs and so no question under that regulation arose, and on one reading of the order that may be said to be right. The usual form of order was altered and the printed words which appear on the order "and condemn the respondent in costs incurred . . ." were struck out, so that on the face of the order there was no order for the payment of costs.

D The difficulty I felt at one time was whether in those circumstances it was open to this court to interfere with the order at all. Counsel for the wife, or for her solicitors, submits that when the commissioner said: "I do not propose to make an order for taxation here", and, later (to the husband): "You will not have to pay any costs", that was an order in regard to costs and is to be covered by the words "any order for the payment of the costs." I am a little doubtful whether that argument is sound, though I think there is something to be said for it.

E It must be remembered that the Legal Aid and Advice Act, 1949, was passed to secure that those who could not afford to pay the costs of litigation should have legal aid in cases which were regarded by the appropriate committee as proper cases for that aid. Section 6 (1) of the Act provides:

F "Panels of solicitors and barristers willing to act for persons receiving legal aid shall be prepared and maintained, and there may be separate panels for different purposes, for different courts and for different districts."

G If solicitors undertake a duty under that section so that they become members of a panel for the area concerned, I suppose that, prima facie, when they are asked by a client to undertake a case in that area, they are bound to do so. At least, the committee would expect them to show good reason if they declined. If they become members of a panel under s. 6 (1), the later parts of the section apply to them. Sub-section (5) is in these terms:

"Subject to this Part of this Act, a solicitor who has acted for a person receiving legal aid shall be paid for so acting out of the legal aid fund, and any fees paid to counsel for so acting shall also be paid out of that fund."

H So, solicitors accepting the retainer of an assisted person under that section do so on the terms that, under sub-s. (5), they are entitled to payment for their services. Section 6 (6) of the Act provides:

"The sums payable under the last foregoing sub-section to a solicitor or counsel shall not exceed those allowed under sched. III to this Act."

The legal aid fund, which is administered by the Law Society, is available in the ordinary course to meet disbursements for solicitors or counsel and others. Schedule III to the Act provides in para. 2 what the payment to solicitors and counsel shall be, and it is pointed out that, if the order of His Honour JUDGE

BATT stands, those who have accepted duties under the Act are deprived of the pay or remuneration—and even of repayment in respect of the disbursements which they have incurred—which they were entitled to receive under the Act, for the sums allowed to counsel and to solicitors are, under sched. III, dependent on taxation.

The learned counsel referred us also to reg. 12 of the Legal Aid (General) Regulations, 1950, which deals with the effect of the discharge and revocation of certificates. Regulation 12 (3) provides:

“Upon determination of a retainer under this regulation—(a) the costs of the proceedings to which the certificate related, incurred by or on behalf of the person to whom it was issued, shall, as soon as practicable thereafter, be taxed or, as the case may be, assessed in accordance with the provisions of the Act and these regulations; (b) the fund shall remain liable for the payment of any costs so taxed or assessed.”

Thus, if it had been decided that the certificate should be revoked, the solicitors and counsel would have been paid, as provided. Again, the whole scheme of the Act and of the regulations under the Act is that those who perform duties under the Act shall be paid according to the terms of the Act. Unless there is an order for taxation, no one will tax the costs. The generally accepted practice under the assisted persons legislation has been that the order for the taxation of the assisted person's costs as between solicitor and client follows as of course. In *Lonnkvist v. Lonnkvist* (1) it would seem that the view of LORD MERRIMAN, P., was that the order could be made in a case in which an order for costs otherwise would not be made. It appears to me that the court ought to have power to do that in order to carry out the terms of the Act. If the court had no such power, the Act would fail, and those who had accepted retainers on behalf of assisted persons might find themselves without the remuneration which they were entitled to have under the Act.

The learned commissioner obviously thought that in the present case the wife ought not to have had legal aid. He said the solicitors might have found out that she had not given them full information. That is not always easy to find out, and if in such circumstances solicitors do not discover the true position, I do not think they ought necessarily to be deprived of all remuneration. If the wife was a person who ought to suffer for her lack of candour, there were ways of securing that. The failure to make the order which was sought in this case was no punishment of her. It merely placed difficulties on her advisers. I have formed the view that we ought to make the order which the commissioner would not make. I think we have power to do that, and, accordingly, in my opinion, there should be an order for the taxation of the assisted person's costs as between solicitor and client.

BIRKETT, L.J.: I am of the same opinion. I think that, if we do not make this order, we defeat the whole purpose of the Act, and, therefore, I think that the order certainly ought to be made. Section 6 of the Act lays down the scheme for panels of solicitors and counsel and deals with their remuneration, which is to come out of the legal aid fund, the amount of the remuneration being decided by reference to sched. III. It will be observed that that remuneration is wholly dependent on the taxation of the costs, and, therefore, unless an order for taxation is made, the whole scheme is defeated. Therefore, under reg. 18 (3) it is provided:

“Any order for the payment of the costs of any proceedings to which an assisted person is a party shall include a direction that his costs are (in addition to any other direction as to taxation contained in the order) to be taxed as between solicitor and client in accordance with the provisions of sched. III to the Act.”

That means, I think, that when the court is making an order as to costs, even though it is refusing to allow costs to the successful party, whatever else is done and whatever other direction is given, there is an imperative direction in order that the scheme should be carried out. For these reasons I agree with the judgment of SINGLETON, L.J.

A HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Taylor & Buckley*, Oldham (for the wife).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

B

COLIN & SHIELDS v. W. WEDDEL & CO., LTD.

[QUEEN'S BENCH DIVISION (Sellers, J.), March 25, 26, April 1, 1952.]

C *Shipping*—"Ship's delivery order"—Request to ship to deliver goods to buyers—Order addressed by shipowner to dock master porter—Master porter not in possession of goods—Buyer's right to reject.

D A contract for the sale of goods and for their shipment to Liverpool provided that the buyers were to make payment for the goods against documents consisting of invoice, full set of bills of lading and/or ship's delivery order (to be countersigned by banker, shipowner, captain or mate if so required by the buyers), and policy or certificate of insurance. If a bill of lading was not supplied, the buyers were to be put in the same position as if they had been in possession of such documents. The goods were shipped to Manchester, and on Aug. 27, 1951, three days before their arrival there, the bill of lading was tendered to the buyers who rejected it on the ground that it was made out for delivery to Manchester. On Oct. 13 the goods were loaded on a dumb barge and carried to Liverpool where they were discharged on Oct. 17. On Oct. 15, while the goods were in transit, the sellers made a second tender of documents, not including a bill of lading, but including a document which they claimed to be a ship's delivery order, made out on the shipowner's notepaper and signed by the shipowners in the following form: "Oct. 11, 1951. Rio Grande Bill of Lading No. 7. To the master porter of the hide berth in the North Carriers Dock, Liverpool. Deliver to [the buyers] the following goods", followed by a description of the goods "ex ss. Devis". The buyers refused to accept the documents or make payment against them.

E HELD: (i) in the absence of a bill of lading for the carriage of the goods to Liverpool the sellers had failed to perform their obligation under the contract.

G (ii) assuming that the tender of a proper delivery order could overcome this omission, the document tendered to the buyers was not such an order, for, in view of the provision for countersigning, if so required, by "ship's delivery order" the contract contemplated a delivery order by the sellers to the ship requesting the ship to deliver to the buyers the goods shipped under the bill of lading, and it must be given and presented while the goods were in the ship's possession ;

H (iii) even if this were not the true construction of the contract, a ship's delivery order must be addressed to and accepted by someone who at the time was in physical possession of the goods and could attorn to the buyers;

(iv) as the document complied with neither of those requirements, it was not a ship's delivery order within the meaning of the contract and the buyers were entitled to refuse payment against it.

AS TO DELIVERY BY BILL OF LADING AND OTHER DOCUMENTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 142-145, paras. 178-182; and FOR CASES, see DIGEST, Vol. 39, pp. 575-581, Nos. 1801-1839.

Cases referred to:

- (1) *Johnson v. Taylor Brothers & Co., Ltd.*, [1920] A.C. 144; 89 L.J.K.B. 227; 122 L.T. 130; 39 Digest 660, 2515.
- (2) *Comptoir D'Achat et de Vente du Boerenbond Belge S/A v. Luis de Ridder, Limitada (The Julia)*, [1949] 1 All E.R. 269; [1949] A.C. 293; [1949] L.J.R. 513; 2nd Digest Supp.

SPECIAL CASE stated by arbitrators.

By a contract dated June 12, 1951, the sellers, W. Weddel & Co., Ltd., sold to the buyers, Colin & Shields, one thousand wetsalted Anglo Pelotas frigorifico ox-hides at 34s. per pound, cost and freight, for shipment from Rio Grande to Liverpool by steamer and/or steamers within three months. Payment was to be by cash on presentation of shipping documents in London on or before arrival of the steamer at buyers' option, the documents to be invoice, bills of lading and/or ship's delivery order (the latter to be countersigned by banker, ship broker, captain, or mate, if so required), and policy or certificate of insurance. On July 31 the sellers made a declaration of shipment per ss. Devis for Liverpool. On Aug. 24 the sellers informed the buyers that the bill of lading had been wrongly made out by the shipping company, Lamport & Holt Line, Ltd., for delivery to Manchester. Later they informed the buyers that they had arranged with the shippers to add a clause to the bill of lading: "In transit to Liverpool". On Aug. 27 they tendered to the buyers documents which included the bill of lading. The buyers rejected the documents on the ground that the bill of lading was not made out for delivery to Liverpool, and they claimed arbitration. In their award the arbitrators held that the documents were not such as were called for by the contract and that the buyers were entitled to reject them. On Aug. 31 the ship reached Manchester via the Ship Canal, and on Sept. 7 she finished discharging her cargo there (including the one thousand ox-hides) and she left for Glasgow. The ox-hides remained in Manchester until Oct. 13, when they were loaded on a dumb barge which brought them to Liverpool and discharged them there on Oct. 17. On Oct. 15 the sellers made a second tender, of four documents described as shipping company's release signed by the shipowners, insurance certificate, specification, and invoice. The buyers rejected the documents. On a reference to arbitration, the arbitrators held that the documents tendered were as called for by the contract and that the buyers were not entitled to reject them. The buyers appealed to the committee of appeal of the Hide and Skin Shippers' and Agents' Association Incorporated. They conceded that the sellers were entitled to make a second tender of documents within the time limited by the contract, but contended that the tender was out of time because the sellers had not acted with reasonable expedition after they had shipped the goods. They also contended inter alia that the shipping company's release was not such a document as was contemplated by the contract as a "ship's delivery order", that the substitution of a ship's delivery order for a bill of lading implied a good bill of lading, and that the tender of a delivery order under a Manchester bill of lading was not good tender. The sellers submitted that it was customary to carry goods destined for Liverpool by dumb barge via the Ship Canal from Manchester and that the shipping company's release was a ship's delivery order (which the buyers had not chosen to require to be countersigned as they were entitled to require under the contract) and that the tender of it was good. At the request of the buyers the board of appeal stated its award in the form of a Special Case for the opinion of the court. It found that the second tender of documents was in time, that it was customary to carry goods destined for Liverpool in the way stated by the sellers, and, subject to the opinion of the court, that the documents tendered were as called for by the contract and the buyers

were not entitled to reject them. The question for the determination of the court was whether the buyers were in breach of the contract in refusing to make payment against the documents tendered by the sellers on Oct. 15, 1951.

Mocatta, Q.C., and *H. A. P. Fisher* for the buyers.

Scott Cairns, Q.C., and *Nicklin* for the sellers.

Cur. adv. vult.

- A** Apr. 1. **SELLERS, J.**, read a judgment in which he stated the facts, held that he was bound by the finding of fact in the award that the second tender of documents was in time, and continued: By cl. 3 of the contract the documents against which payment is to be made are to consist, of invoice, full set of bills of lading and/or ship's delivery order (the latter to be countersigned by banker, shipowner, captain or mate, if so required) and policy or certificate of insurance.
- B** Should bill of lading not be supplied, buyers to be put in the same position as if they had been in possession of such documents. No bill of lading was tendered, but in its place a document on the shipowner's notepaper in these terms:

"Oct. 11, 1951. Rio Grande Bill of Lading No. 7. To the master porter of the hide berth in the North Carriers Dock, Liverpool. Deliver to Messrs. Colin & Shields the following goods: Light blue tag 1000 (One thousand) wetsalted ox-hides ex ss. Devis. (Signed) Lamport & Holt Line Ltd."

- C** The buyers contended that that document addressed to the master porter, who was not at that date in possession of the goods, was not such a document as was contemplated by the contract as a ship's delivery order. It was submitted that the contractual goods were never shipped to the contractual destination—
- D** Liverpool, that at the original arbitration the documents were held to be rightly rejected by the buyers because the bill of lading was for Manchester and not for Liverpool, and that that defect could not be cured by the issue of a delivery order. For there to be a valid delivery order, it was argued, there must be a valid bill of lading in existence even though it was not tendered to the buyers, and the contract envisaged that a bill of lading would be in existence. For instance,
- E** by cl. 2 the bill of lading was to be proof of date of shipment in the absence of conclusive evidence to the contrary, and see that part of cl. 3 which provided that, if the bill of lading was not supplied, the buyers were to be put in the same position as if they had been in possession of it. On behalf of the sellers it was asserted that no bill of lading was necessary at all, that in any case the buyers were not entitled to it if a delivery order was substituted, that at the time the delivery order was made out and tendered it could make no difference that the goods were not then under the physical control of the person to whom the order was addressed, that it was sufficient if it were made out by the shipowners and addressed to someone who either had or would have the goods, and that it was, therefore, a proper document to tender under the contract.

- F** Although the sellers struggled to overcome the initial blunder of the goods being shipped and carried under a bill of lading for Manchester, I am of opinion that they have failed to do so. In LORD ATKINSON'S summary in *Johnson v. Taylor Brothers & Co., Ltd.* (1) the vendor is bound, he says ([1920] A.C. 156):

"... to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract."

- G** The contract in the present case permitted transshipment, and provided, by cl. 3
- H** (b) of the International Hide Booklet, that, if transshipment meant the drawing up of fresh bills of lading, payment should be made against presentation of the fresh documents which had been drawn up. No bill of lading, original or fresh, ever existed for the carriage of the goods to Liverpool, and, in my opinion, the sellers failed fundamentally to perform their contractual obligation by never having such a document. The delivery order tendered to the buyers did not overcome the omission. The contract provided that the documents should consist of bills of lading and/or ship's delivery order. A ship's delivery order

must mean either a delivery order by the ship or to the ship. As provision is made for it to be countersigned, if required by the buyers, not only by a banker and the shipbroker, but also by the captain or mate, the contract would appear to contemplate a delivery order by the sellers to the ship requesting the ship to deliver to the buyers the goods shipped under the bill of lading. Such an order would entitle the buyers to receive the goods from the ship in the same way as would a bill of lading, and it would have to be given and presented while the goods were in the ship's possession. A

The Julia (2) was a case concerning a contract very different from this, with terms that are not to be found here and with a course of business controlling the performance, but I think it gives support for the view that a ship's delivery order means an order on the ship. But, whether that is so or not, or whether or not, on the true construction of this contract, a delivery order on the ship is required (if there is to be a substitute for a bill of lading), the delivery order must, at least, be to someone who holds the goods and who could attorn to the buyers. LORD NORMAND in *The Julia* (2) said ([1949] 1 All E.R. 282): B

"But I think that if the words 'delivery order' had had to be construed without the aid of the previous course of dealing, it would have been held to mean a document addressed to and accepted by one in physical possession of the goods. The sellers would then have been bound to tender a document which was, in fact, the legal equivalent of the goods." C

On Oct. 15, when the documents were tendered, the goods were in transit from Manchester to Liverpool. The master porter, to whom the delivery order was addressed, was not in possession of the goods, and, if they had never arrived and been received by him, the delivery order, so far as I can see, would have been worthless. It gave no rights to the buyers against the shipowner under the bill of lading or otherwise. Rio Grande Bill of Lading No. 7 is referred to, but that bill of lading did not provide for carriage to Liverpool. There was no attempt at a physical delivery of the goods and the delivery order was in no sense a symbolic delivery, or a legal equivalent, of the goods. In my opinion, it was not a document which complied with the requirements of the contract. D E

The sellers sought to rectify the position by having the goods, which had lain at Manchester for about six weeks, sent by dumb barge to Liverpool, and the award finds that it is customary to carry goods destined for Liverpool by dumb barge via the Ship Canal from Manchester. That statement is extremely vague. It could refer merely to local trade between Manchester and Liverpool. If it is intended to relate to goods arriving by ocean steamer, it fails to state the circumstances to which the custom would apply. Goods on a Manchester bill of lading are destined *prima facie* for Manchester, and I do not think the super-added words: "In transit to Liverpool", have any legal effect. The circumstances in which, by custom, goods might be sent on to Liverpool by dumb barge do not appear, and, in particular, no reference is made to the customary period of time in which the forwarding takes place or whether the goods are transferred direct from steamer to dumb barge or whether they are placed first on the quay. However, the statement as it stands seems to me to be an irrelevant finding. I cannot relate it to the contract, and nowhere does the award find expressly that the goods in question were handled and forwarded in accordance with the custom. If the bill of lading had been made out for delivery at Liverpool by a steamer bound for Manchester where alone she intended to discharge, it might well have been in accordance with custom for goods to be sent to Liverpool by dumb barge at the ship's expense. The practice would avoid the steamer herself calling at Liverpool (with the attendant expense and inconvenience), either on her way to Manchester or on her return, to unload a small parcel. Such a parcel might not be readily accessible and other cargo might have to be moved to give access to it, or the parcel might have to be moved and re-loaded unless transhipped to give access to Manchester cargo. If the goods had been so sent F G H

on under a bill of lading for Liverpool, a good delivery might well have been made with either a bill of lading or a ship's delivery order. This would be subject to reasonable despatch, with which I have already dealt, and to another argument raised by the buyers' counsel.

A It was contended that a custom to forward goods by dumb barge to Liverpool, even if proved, could not apply to this contract because it would be inconsistent with the express term that the goods were to be carried by steamer or steamers with liberty to tranship, and that "steamer" was "to include any full-powered primarily engine driven vessel", and it was said that this was a transhipment. B The transfer of the goods from the ss. Devis at Manchester to the quay and then to the dumb barge must, I think, be regarded as a transhipment. Liverpool and Manchester are two separate ports, and the transfer cannot, perhaps, be regarded merely as a form of discharge even if it were immediately over side into the barge. C But Manchester, by its geographical position and its relation to Liverpool, at their respective ends of the Ship Canal, is hardly in the same position as a port of transhipment from which further ocean carriage is necessary. I prefer to reserve a final opinion on this point until it arises vitally for consideration. D I regard the submission as highly technical. It seems to me to have no business reason behind it and would probably never have been taken if major objections had not existed and spurred the inquiring and ingenious minds of counsel. I find nothing wrong with the invoice or the certificate of insurance which, in passing, I might add included craft risks to Liverpool and so would have covered the goods in the dumb barge from Oct. 15, 1951, the date of the certificate. In my judgment, for the reasons given, the buyers were justified in refusing to take up and pay for the documents tendered by the sellers on Oct. 15, 1951, and the sellers and not the buyers were in breach of the contract between them.

Question of law answered in favour of buyers.

Solicitors: *Coward, Chance & Co.* (for the buyers); *Wilfred Ellis*, agent for *Weightman, Pedder & Co.*, Liverpool (for the sellers).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

MATALON v. MATALON.

[COURT OF APPEAL (Singleton, Birkett and Hodson, L.JJ.), April 1, 1952.]

F *Divorce — Judicial separation — Jurisdiction — Residence — Respondent husband temporarily in England for business and for proceedings to obtain custody of child—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 32.*

G A wife petitioned for judicial separation on the ground of her husband's cruelty. Her husband was domiciled, and usually resided, in Jamaica, but at the time of the petition he had come to England temporarily for business purposes and also to pursue an application in the English courts for the custody of the child of the marriage. He had arrived in England on Aug. 20, 1950, and the petition was presented on Oct. 31, 1950, while he was still in England. He had no house in England, but moved from place to place, living in hotels and boarding-houses.

H HELD: on these facts the extent and quality of the husband's residence in England was sufficient to give the court jurisdiction to entertain the petition for judicial separation.

Armstrong v. Armstrong ([1898] P. 178), applied.

AS TO JURISDICTION OF COURT IN MATRIMONIAL CAUSES, see HALSBURY, *Hailsham Edn.*, Vol. 10, p. 691, para. 1027; and FOR CASES, see DIGEST, Vol. 11, pp. 421-428, Nos. 873-926.

Cases referred to:

(1) *Collett v. Collett*, (1843), 3 Curt. 726; 163 E.R. 881; 27 Digest 392, 3866.

- (2) *Ex p. Breull, Re Bowie*, (1880), 16 Ch.D. 484; 50 L.J.Ch. 384; 43 L.T. 580; 4 Digest 38, 322.
- (3) *Armytage v. Armytage*, [1898] P. 178; 67 L.J.P. 90; 78 L.T. 689; 27 Digest 264, 2321.
- (4) *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest 422, 885.
- (5) *Firebrace v. Firebrace*, (1878), 4 P.D. 63; 47 L.J.P. 41; 39 L.T. 94; 27 Digest 392, 3868.
- (6) *Newton v. Newton*, (1885), 11 P.D. 11; 55 L.J.P. 13; 27 Digest 549, 6005.
- (7) *Thornton v. Thornton*, (1886), 11 P.D. 176; 55 L.J.P. 40; 54 L.T. 774; 11 Digest 478, 1321.
- (8) *Niboyet v. Niboyet*, (1878), 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 11 Digest 423, 894.
- (9) *Re Adoption Application No. 52/1951*, [1951] 2 All E.R. 931; [1952] Ch. 16; 115 J.P. 625.

APPEAL by the husband from an order of Mr. Commissioner RHODES, made on Nov. 30, 1951, on an issue, holding that the extent and quality of the husband's residence in England was sufficient to give the court jurisdiction to entertain a suit by the wife for judicial separation.

Leonard Lewis for the husband.

Nahum for the wife.

SINGLETON, L.J.: I will ask HODSON, L.J., to give the first judgment.

HODSON, L.J.: This is an appeal from a decision of Mr. Commissioner RHODES sitting at Manchester on Nov. 30, 1951, determining an issue between the parties which was raised in this way. On Oct. 31, 1950, the wife presented a petition for judicial separation from the husband on the ground of cruelty in which she alleged that neither she nor her husband was domiciled in England, but that she and also her husband were resident in England. By his answer the husband denied the cruelty. Subsequently, he amended his answer by stating that he was not, at the time of the commencement of the proceedings or at any other time, resident in England, and contended that, therefore, the court had no jurisdiction to entertain the suit. On that state of the pleadings, before the merits of the case were investigated, an issue was directed to be tried to determine whether the husband at the commencement of the proceedings or at any other time was not resident in England and whether in the premises the court had no jurisdiction to entertain the wife's petition. No question arises for determination as to onus of proof. The order was made by consent, and there was no discussion as to who should be plaintiff and who should be defendant. It was also agreed that the evidence should be by affidavit.

The evidence shows that the parties were married in April, 1946, the husband being then resident in and domiciled in Jamaica, where he was born. Up to that time the wife was resident and domiciled in England, where the marriage took place. They settled in Jamaica after the marriage, and a child, Sandra, was born on Dec. 16, 1947. Some time in 1948 the wife visited England. She returned to Jamaica in 1949, and in July, 1949, she left her husband in Jamaica and came to England. On Aug. 20, 1950, the husband came to England. He was in the cotton and textile business, and he had business connections in Manchester and London. He came partly on business, he being the representative or manager of a textile firm in Jamaica, and partly to get the custody of his child. Having arrived in England, the husband took out a summons under the Guardianship of Infants Act, 1925, for the custody of the child. That summons has never been heard, proceedings under it being stayed having regard to the fact that on Oct. 31 the wife petitioned the court for judicial separation on the ground of cruelty. That petition was served on the husband in England. I need

not read in detail any of the evidence, but I think that it is necessary to read one paragraph from the wife's affidavit. In para. 7 she says:

"The [husband] remained in England from Aug. 20, 1950, until Dec. 20, 1950. After his return to England . . . I was again put in fear by his attitude and by his threats and that was why I consulted a solicitor. When I told him I had consulted a solicitor and told him the name of my solicitor he threatened physical violence against my said solicitor."

The husband, therefore, was in England between the dates I have mentioned. It is true he had no house in England, and, according to his evidence, he lived in hotels and boarding-houses, moving from one place to another in London and in Manchester in connection, not only with the business which he had with his customers and firms in England, but also in connection with his application for the custody of the child. The point which he has taken below and before us is that the quality of the residence which he had during this period was insufficient to give the court jurisdiction. Section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, which governs the position provides:

"The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained."

That, it is conceded, throws the court back to the practice and jurisdiction of the ecclesiastical courts, and counsel for the husband has contended that the length, character, and quality of the residence here is insufficient because it would have been regarded as insufficient by the ecclesiastical courts, and, therefore, this court ought not to entertain the petition. He pointed out that one looks on a question of jurisdiction to the statute of Henry VIII, called the Statute of Citations (23 Hen. 8, c. 9), which was passed in affirmance of the common law, and he referred us to a decision of Dr. LUSHINGTON in *Collett v. Collett* (1). That case, undoubtedly, goes a long way to support his argument that the ecclesiastical courts, in considering the jurisdiction of dioceses, not the jurisdiction of the realm, did look to see that there was at any rate an element of permanence in the residence before asserting jurisdiction. Dr. LUSHINGTON, referring to the Statute of Citations, said (3 Curt. 729):

"That statute is the document by which this court must be governed in these proceedings; it was passed for the purpose of preventing abuses which took place, by reason of the process to appear in the Arches and other ecclesiastical courts being served on a party far from and out of the dioceses, where the party cited dwelt, not where the party might happen to be at the period of issuing the citation, but out of the diocese wherein he dwelt. No doubt the word dwell means a permanent dwelling: in no other part of the statute are there any words to give a different meaning to the words I have cited, and in the enactment the words are, 'That no manner of person shall be cited, or called to appear out of the diocese, wherein he shall be inhabiting at the time of the awarding or going forth of the citation.' Undoubtedly the word inhabit is here used in precisely the same sense as the word dwell in the prior part of the statute. The term inhabit is one to which many meanings have been attached by the law, and is one which can only be construed by reference to the circumstances of each individual case."

So, here one has to construe, not the word "residence", but the words "dwell" and "inhabit" which have been translated into "residence" in later cases, as is shown by the form of the pleading in those cases. In that connection

I would refer to *Ex p. Breull Re Bowie* (2), a bankruptcy case where JAMES, L.J., said (16 Ch.D. 486):

"There are cases in which it has been judicially decided, and I think rightly, that the words 'residence' and 'business' have no actual definite technical meaning, but that you must construe them in every case in accordance with the object and intent of the Act in which they occur."

In the present case the wife is complaining of cruelty and is maintaining on oath that, during the period of her husband's sojourn in this country, she is fearful of him by reason of threats which have been made. It so happens that a very similar set of facts was considered in *Armytage v. Armytage* (3). The relevant statutory provision then in force was the Matrimonial Causes Act, 1857, s. 22, which corresponds in effect to s. 32 of the Supreme Court of Judicature (Consolidation) Act, 1925. That case has always been considered to be an authoritative decision on the matters there decided. Counsel for the husband has faced the difficulties presented by that case by saying that what it really decided was not what is sufficient residence to give jurisdiction, but whether residence in a case of this kind gave jurisdiction at all. I think that is perfectly true so far as the decision itself is concerned. Nevertheless, the facts in that case were more nearly parallel to the facts in the present matter than one usually expects to find. The case was one in which cruelty was alleged and GORELL BARNES, J., stated the facts as follows ([1898] P. 184):

"At the end of June, 1897, the respondent came to, and has since resided in, England, but I understand he has not taken up a permanent residence here, and has only come to and is remaining in England for the purpose of enforcing, and so long as may be necessary to determine, such rights as he may have against the petitioner with regard to the children."

So far as the facts are there set out, that case was weaker than the present one, because here the husband had the initial incentive in coming to this country on business. It is to be noted that the point was never taken by the experienced counsel who appeared for the husband in *Armytage v. Armytage* (3) that the quality of the residence was insufficient to found jurisdiction. Nevertheless, the matter was very fully discussed by GORELL BARNES, J., and he put the question in this way (*ibid.*, 186):

"The petitioner maintains that the test of domicile is not applicable as in a suit for dissolution of marriage, and that the ecclesiastical courts would have given her relief where she and her husband are both residing in England in the circumstances proved, whereas the respondent maintains that no relief would have been given because the parties are not domiciled in England, and no act of cruelty has been proved within the jurisdiction."

Counsel for the husband points out that residence in the jurisdiction was postulated, but in discussing the matter GORELL BARNES, J., cited a long passage from the speech of LORD WATSON in the well-known case before the Privy Council of *Le Mesurier v. Le Mesurier* (4) where he said ([1895] A.C. 527):

"If, for instance, a husband deserts his wife, although their residence be of a temporary character . . . and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists, and the general practice, is to the effect that the courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicile of the parties'."

I will go now to the following passage in the judgment of GORELL BARNES, J. ([1898] P. 192):

"I conclude from the writers to whom I have referred that most of them are disposed to consider that the courts of the country in which the parties

are living, though not domiciled, ought to have the right in a matrimonial suit to afford protection to an injured party from the cruelty of the other party. LORD HANNEN may possibly have had such a case in his mind when, in giving judgment in *Firebrace v. Firebrace* (5), he said (4 P.D. 67), 'The domicile of the wife is that of the husband, and her remedy for matrimonial wrongs must be usually sought in the place of that domicile'; but added 'It is not, however, inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country in which she is resident, though not domiciled.' That was a suit for restitution of conjugal rights where the respondent, the husband, who was domiciled in Australia, had left England before the institution of the suit, and it was held that the court had not jurisdiction over him after he left this country, and that the suit could not be maintained. Had he remained in England it would seem from the cases of *Newton v. Newton* (6) and *Thornton v. Thornton* (7) that the suit could have been maintained."

I will also read a passage to which counsel for the husband referred, where, after dealing with some of the old learning of the ecclesiastical courts, the learned judge in reference to the general principles and practice of the courts said (*ibid.*, 193):

"These are stated in general terms so far as concerns the matter under consideration by JAMES, L.J., in his judgment above referred to [*Niboyet v. Niboyet* (8) (4 P.D. 3)], where the jurisdiction of the court christian is considered, and it is pointed out that the church and its jurisdiction had nothing to do with the original nationality or acquired domicile of the parties, that residence as distinct from casual presence on a visit or in itinere was an important element, but that residence had no connection with or little analogy to the question of a person's domicile."

The learned judge was, therefore, alive to the necessity for something more than a casual presence or a visit when towards the end of the judgment he said this (*ibid.*, 196):

"... no valid reason can be urged against the courts of a country, in which a husband and wife are actually living, pronouncing a decree which will protect the one against the other so long as they remain within the jurisdiction."

Then GORELL BARNES, J., refers to the facts of the particular case, and says in reference to the husband (*ibid.*, 197):

"He has come here and subjected himself to the jurisdiction of the courts of this country. Could anything be more unreasonable than for this court to hold that it has no power to suspend the wife's obligation to live with her husband while in this country, and leave her to proceed in the courts in Australia to protect herself against her husband in England? It may, I think, be safely laid down that the ecclesiastical courts would formerly, and this court will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such intervention. I therefore hold that this court has jurisdiction to entertain this suit, and I pronounce a decree of judicial separation in favour of the petitioner..."

In my judgment, the learned commissioner was right in taking the view that, although the point was not directly decided in *Armytage v. Armytage* (3), yet, in his careful judgment, GORELL BARNES, J., laid down sufficient guidance for him to ascertain the extent and the quality of the residence which was necessary to found jurisdiction in this case. Following that guidance, he thought, and I think rightly thought, that the facts warranted an assumption of jurisdiction, and, therefore, I think he rightly decided the issue in favour of the wife.

There is only one other case to which I think reference should be made, and I do this out of deference to the argument of counsel for the husband. He referred us to a recent decision of HARMAN, J., in *Re Adoption Application No. 52/1951* (9), an application made by a woman regarding the adoption of a child under the Adoption Act, 1950. The question to be determined arose on the construction, first of all, of s. 2 (5) of the Act which provides:

"An adoption order shall not be made in England unless the applicant and the infant reside in England . . ."

I need say no more than I have already impliedly said by my citation from the passage in JAMES, L.J.'s, judgment in *Re Bowie* (2). These questions of construction have to be decided against the background of the subject-matter. Although HARMAN, J., in that case held that a woman who had remained in England, while her husband had gone back to Nigeria where he and she were resident, for the purpose of making an application for the adoption of the child did not qualify within the meaning of the Act because the word "resident" there denoted some degree of permanence, that case gives very little assistance. It is not necessary for this court to express any opinion whether, on the construction of the word "resident" in that Act, that decision was right. I am not for one moment to be taken as throwing any doubt on the correctness of that decision. In my judgment, this appeal fails.

BIRKETT, L.J.: I agree.

SINGLETON, L.J.: I agree.

Appeal dismissed.

Solicitors: *Fletcher, Napper & Co.* (for the husband); *Birkbeck, Julius, Edwards & Coburn*, agents for *A. L. Hamwee & Co.*, Manchester (for the wife).
[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Re WYATT (deceased).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), March 26, April 2, 1952.]

Will — Revocation — By oral evidence — Standard of proof required.

In 1935 the deceased made a will, and in 1937 she executed a codicil thereto by which she appointed the plaintiff bank to be executors of her will. In October, 1937, she instructed a solicitor to prepare another will which was duly executed and deposited with the plaintiff bank. On May 4, 1939, the deceased withdrew this later will from the bank and it was never seen again, nor was there any information available concerning its contents except that it was the solicitor's usual practice to include a revocation clause in any draft will and to submit each draft will to the proposed testator or testatrix for perusal and approval. On a motion by the plaintiff bank for an order that the first will and codicil be admitted to probate,

HELD: where it is sought to prove the revocation of an earlier will by oral evidence only, such evidence must be "stringent and conclusive"; there was no such evidence in this case; and, therefore, probate of the first will and codicil would be granted.

Cutto v. Gilbert (1854) (9 Moo. P.C.C. 131), applied.

AS TO REVOCATION OF WILL BY LATER WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 78-83, paras. 110-116; and FOR CASES, see DIGEST, Vol. 44, pp. 320-348, Nos. 1532-1781.

Cases referred to:

(1) *Brown v. Brown*, (1858), 8 E. & B. 876; 27 L.J.Q.B. 173; 30 L.T.O.S. 273; 120 E.R. 327; 23 Digest 108, 1018.

- (2) *Wood v. Wood*, (1867), L.R. 1 P. & D. 309; 36 L.J.P. & M. 34; 15 L.T. 593; 31 J.P. 567; 44 Digest 343, 1726.
- (3) *Cutto v. Gilbert*, (1854), 9 Moo. P.C.C. 131; 24 L.T.O.S. 193; 14 E.R. 247; 44 Digest 331, 1614.
- (4) *Hitchins v. Basset*, (1694), 2 Salk. 592; 91 E.R. 495; 44 Digest 343, 1729.
- (5) *Goodright d. Rolfe v. Harwood*, (1775), 7 Bro. Parl. Cas. 489; 3 E.R. 318; 44 Digest 343, 1723.
- A (6) *Hellier v. Hellier*, (1884), 9 P.D. 237; 53 L.J.P. 105; 49 J.P. 8; 44 Digest 342, 1721.
- (7) *In the Estate of Hampshire*, [1951] W.N. 174.

MOTION for an order that a will dated Jan. 2, 1935, and codicil thereto dated Apr. 12, 1937, be admitted to probate.

- B J. A. Gibson for the plaintiff bank.
Victor Russell for the Treasury Solicitor.

Cur. adv. vult.

Apr. 2. COLLINGWOOD, J., read the following judgment. This is a motion for an order that a will, dated Jan. 2, 1935, and the codicil thereto, dated Apr. 12, 1937, be admitted to probate on the application of the National Provincial Bank as executors thereof.

- C On Dec. 25, 1950, the deceased, Charlotte Frances Wyatt, died a widow, leaving, so far as can be ascertained, no person entitled to her estate as next of kin, and, accordingly, notice of motion was served on the Treasury Solicitor. On Jan. 2, 1935, she executed a will by which she appointed Lloyds Bank, Ltd., to be executor and trustee and left all her real and personal estate in trust
- D for her husband for life and on his death on trust as to two-thirds of the capital and income for the Poor People's Dispensary for Sick Animals and as to one-third for the National Canine League. On Apr. 12, 1937, she executed a codicil to this will, substituting the plaintiff bank, the National Provincial Bank, Ltd., as executors. This will and codicil were deposited by her for safe keeping at the Wallington branch of the plaintiff bank, where she had for some years
- E been a customer. There they remained until after her death, when they were transferred to the trustee department of the bank. In October, 1937, she instructed a solicitor to prepare another will. The solicitor has no recollection of what was said to him by the deceased on this, the only, occasion on which he visited her beyond that she expressed a wish to make provision for the benefit of institutions providing homes for animals. He has no recollection of receiving
- F any written instructions from her and all papers in his firm's offices were completely destroyed by burning as the result of enemy bombing in May, 1941. No one connected with the firm has any recollection of any matter concerning the preparation or contents of the will. It is clear, however, that a will was, in fact, executed, and on Nov. 4, 1937, the solicitor sent a completed copy of it
- G to the trustee department of the National Provincial Bank, asking whether they were prepared to accept the appointment as executor and trustee, and on Nov. 5 the bank replied accepting the appointment and returning the copy. From the records of the bank it appears that this will was deposited with the Wallington branch on the day of the execution (Nov. 1, 1937), and was withdrawn by the deceased on Dec. 30, 1937. It was returned to the bank on May 23, 1938, and was finally withdrawn by the deceased on May 4, 1939, after which the bank
- H have no further trace of it. It was not found among the deceased's effects, and no information has been forthcoming with regard to it despite advertisements inserted in local and other newspapers. In these circumstances the presumption arises that the will was destroyed by the testatrix with the intention of revoking it, and, in the absence of any evidence to repel it, that presumption prevails.

The question then arises: Did the will of November, 1937, revoke the previous will of 1935? The mere fact of making a subsequent testamentary paper does not effect a total revocation of a prior one unless the later document expressly

or impliedly revokes the former one. On the other hand, the execution of a second will which *expressly revokes*—or is entirely inconsistent with a former one—revokes the first even though the second will is not forthcoming at the death of the testator, and its contents are proved by oral evidence: *Brown v. Brown* (1); *Wood v. Wood* (2). But in such a case the authorities show that there must be clear proof of the provisions of the missing will. In *Cutto v. Gilbert* (3) DR. LUSHINGTON, after agreeing with the proposition that the onus probandi lay on the party seeking to prove the revocation, said (9 Moo. P.C.C. 140):

“The fact first to be proved, is the execution of some subsequent testamentary paper; and we here think it right to observe, that we are of opinion, that where the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will not appearing, and where there is no draft or instructions in writing, when such fact is to be proved by oral evidence only, such evidence ought to be most clear and satisfactory; for we concur in the opinion which has been expressed by very learned persons, that to revoke an existing will by parol evidence alone that another will has been executed, is, though the law may admit of it, a course of proceeding not unattended with danger, and, consequently, that such oral evidence ought to be stringent and conclusive.”

Thus, in *Hitchins v. Basset* (4), where it was proved that a subsequent will had been executed, but no evidence was available as to its contents, the earlier will was held not to be revoked. And the same result was reached where the subsequent will was found to have contained a different disposition from the earlier, but in what particulars it differed was unknown: *Goodright d. Rolfe v. Harwood* (5).

In *Cutto v. Gilbert* (3) DR. LUSHINGTON further states (*ibid.*, 147):

“There is not one authority which lays down the proposition that the execution of a subsequent will destroyed animo revocandi by the testator, the contents of which are not known, revokes a prior will. On the contrary, in all the cases where revocation has been held to be effected, there has been proof of a difference of disposition. These considerations alone would induce us to doubt the correctness of the judgment in the court below, in the case now under consideration; but the very foundation of that judgment appears to us to be unsound; that judgment is mainly based upon the evidence that the latter paper contained the words, ‘This is my last will and testament’. We are of opinion, that these words do not import that the paper contained a different disposition of the property, nor that the mere fact of so calling it could possibly render it a revocatory instrument.”

In *Hellier v. Hellier* (6) a testator made a will in 1864, appointing his wife sole executrix, and in 1877 he executed another document. There was no evidence of the contents of the second document, but after its execution the testator said: “I have made a will altering my affairs . . .”, and at the foot of the earlier will was a memorandum: “This will is now useless, a new will having been made in October, 1877, upon my wife telling me she was sorry she had ever seen me”. It was held that, in the absence of proof of an alteration of executrix or a revocatory clause, or a disposition wholly inconsistent with the first will, that will was not revoked, and was entitled to probate.

In his affidavit of Feb. 12, 1952, the solicitor states that it was his practice to include a revocation clause in any draft will prepared by him on the instructions of a client, and he went on to describe the various stages of preparation which were customary, including the sending of the draft for perusal and approval, and the making of any amendments or deletions necessitated thereby, and final engrossment. He had, however, no recollection of any of these matters in relation to the will in question. From this I was invited on behalf of the Treasury Solicitor to draw the conclusion that the lost will contained a revocation

clause. I was referred to the report of *In the Estate of Hampshire* (7). The report is a short one, but I think it is clear from the judgment that the learned judge had evidence before him which he felt (to quote his own word) "compelled" him to find that the missing will contained both a revocation clause and an effective disposition of the whole estate of the testator.

In this case, on the evidence before me, I think that so to find involves the assumption that the solicitor's usual procedure was in fact followed in the present instance, and the further assumption that the testatrix accepted the draft as correctly expressing her intentions in the matter. In my opinion, I ought not to make these assumptions in respect of a will the contents of which are wholly unknown. To do so would, I think, be to substitute surmise for the "stringent and conclusive" oral evidence required by *DR. LUSHINGTON in Cutto v. Gilbert* (3), and thereby, to use his words, to pursue "a course of proceeding not unattended with danger."

Grant of probate of will dated Jan. 2, 1935, and codicil thereto dated Apr. 12, 1937.

Solicitors: *Chas. J. Odhams & Sons* (for the plaintiff bank); *Treasury Solicitor*.
[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

ALLIANCE BUILDING SOCIETY v. SHAVE AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), April 1, 1952.]

Mortgage—Possession of mortgaged property—Mortgagor not in occupation—Order for possession against occupier although mortgagor not joined in proceedings—R.S.C., Ord. 55, r. 5A, r. 8A.

In 1948 the borrowers charged by way of legal mortgage a dwelling-house to secure repayment to the mortgagee of £765, with interest, by equal monthly instalments. The charge provided inter alia that the statutory power of sale should be exercisable free from the restrictions imposed by the Law of Property Act, 1925, s. 103. The instalments fell into arrear, and the mortgagee desired to take possession of the dwelling-house which was in the occupation of one, B., the borrowers having vacated the premises. The mortgagee claimed to be entitled to an order for possession notwithstanding that only B. was joined as a defendant to the summons.

HELD: notwithstanding the form of order prescribed in R.S.C., Ord. 55, r. 8A, an order for possession could be made against B. without any such order being made against the borrowers, and as the borrowers could not be prejudiced by the making of such an order in their absence, it was proper to make the order in this case.

Alliance Building Society v. Varma ([1949] 2 All E.R. 261), applied.

Martins Bank, Ltd. v. Kavanagh ([1948] 2 All E.R. 448), distinguished.

AS TO RELIEF CLAIMABLE BY ORIGINATING SUMMONS, see HALSBURY, Hailsham Edn., Vol. 26, p. 106, para. 209; and FOR CASES, see DIGEST, 2nd Supp.

Cases referred to:

- (1) *Martins Bank, Ltd. v. Kavanagh*, [1948] 2 All E.R. 448; 2nd Digest Supp.
- (2) *Temperance Permanent Benefit Building Society v. Nevitt*, [1940] 3 All E.R. 237; 163 L.T. 234; 2nd Digest Supp.
- (3) *Alliance Building Society v. Varma*, [1949] 2 All E.R. 261; [1949] Ch. 724; [1949] L.J.R. 1452; 2nd Digest Supp.

PROCEDURE SUMMONS.

By an originating summons under R.S.C., Ord. 55, r. 5A, the Alliance Building Society, as mortgagee, sought an order that the defendants and each of them should deliver up possession of land and premises known as No. 48, Castle Road, Winton, Bournemouth, and comprised in a legal charge, dated Oct. 22, 1948, and made between the first two defendants, Francis Harry Shave and Ivor

Frederick Charles Shave (thereinafter together called "the borrowers"), of the one part, and the plaintiff, of the other part. By the said legal charge the borrowers charged the said land and premises by way of legal mortgage with the payment to the plaintiff of £765, with interest, by monthly instalments. The legal charge contained an attornment clause in the usual form and a joint and several covenant by the borrowers to pay to the plaintiff £765, with interest, by monthly instalments during the term of twenty-five years, the first payment to be made on Nov. 9, 1948. It was further provided that, if there were default by the borrowers for two months in making any of the payments covenanted to be made, then the whole principal money thereby secured and the interest thereon should become immediately due and payable and the statutory power of sale and of appointing a receiver might be exercised immediately. The borrowers having made default in the payments under the legal charge, the tenancy (under the attornment clause) expired or was determined by notice to quit which expired on Nov. 22, 1951. At the date of the notice the payments were in arrear for upwards of two months. The third defendant, Bartlett, was in occupation of the premises at the date of the present hearing, the borrowers having vacated the property (according to the plaintiff's evidence) since these proceedings were commenced. The first and the third defendants were served with the summons, but none of the defendants entered an appearance. The summons was argued on the footing that the order ought to be granted even though neither of the borrowers had been joined. The third defendant, according to a statement made after judgment by counsel for the plaintiff, was, so far as the plaintiff was aware, in occupation as licensee of the borrowers, but there was no evidence on the matter.

Denys B. Buckley for the plaintiff.

The defendants were not represented.

WYNN-PARRY, J.: This is a summons by the plaintiff as mortgagee asking for an order for possession of the mortgaged premises. The defendants are three in number. The first two are the mortgagors, and the third is the person who alone is in possession of the mortgaged premises. The summons comes before me because it has only been found possible to serve the first defendant and the last defendant. The second defendant, a co-mortgagor with the first defendant, has not been found. The case has been argued before me on the basis that an order for possession ought to be made even although neither of the first two defendants, the mortgagors, had been joined.

I confess at once that, had the matter been free from authority, I should have found little difficulty in acceding to the application, but it becomes necessary to consider one or two cases. The chief authority which appears to stand in the way of the plaintiff is *Martins Bank, Ltd. v. Kavanagh* (1). In that case in 1944 the defendant charged a farm by way of legal mortgage with the payment of certain moneys to the plaintiff bank. In 1947 she was adjudicated bankrupt, but she remained in occupation of the farm. The plaintiff bank issued an originating summons claiming possession of the farm and before the master elected not to add as a defendant the trustee in bankruptcy, in whom, of course, the equity of redemption was vested. The matter came before ROXBURGH, J., who delivered a reserved judgment. He dealt with two points which had been raised before him. The first was a question of procedure, on which he held that the application was properly made by originating summons under R.S.C., Ord. 55, r. 5A. The second was whether or not, on the basis that the application was properly made by summons, the trustee in bankruptcy should have been joined, and ROXBURGH, J., held that he should have been joined. On that point, after he had referred on the first point to *Temperance Permanent Benefit Building Society v. Nevitt* (2), he said ([1948] 2 All E.R. 449):

"The Court of Appeal, in the case to which I have already referred, held

that there the mortgagor was a necessary party. The form of order prescribed by Ord. 55, r. 8A, contemplates that the mortgagor will be a party, but, furthermore, the application involves a step in the enforcement of the security which may prejudice the person entitled to the equity of redemption. I am satisfied, therefore, that he ought to be a defendant under the existing practice of the Chancery Division."

A It will be observed that ROXBURGH, J., rests his decision on two distinct grounds, the first being that the form of order prescribed by Ord. 55, r. 8A, contemplates that the mortgagor will be a party.

B Since that case was decided, *Alliance Building Society v. Varma* (3) has come before the Court of Appeal. In that case by a conveyance in September, 1945, a mortgagor acquired property which, by a mortgage of the same date, he charged to the plaintiff society with the payment of a secured sum by instalments. Before the date of the conveyance by which he acquired the property, the mortgagor had been permitted by the vendors to enter into possession of the property, and he agreed with the second defendant in the case that she should go into possession as tenant at will. In 1948 the instalments had fallen into arrears, and the plaintiff society took out an originating summons under Ord. 55, r. 5A, against the second defendant claiming possession. The Court of Appeal held that Ord. 55, r. 5A, gave the court power to make an order for delivery up of possession to the plaintiff against the second defendant, as being a person in possession of the property, even though she was neither the mortgagor nor a person claiming to derive title under him. It is true that the mortgagor was made a party, but, in the course of his judgment, SIR RAYMOND EVERSHED, D M.R., said ([1949] 2 All E.R. 263):

" . . . there only remains the question of the form of the order. The second defendant is in occupation of the mansion house and the right order to make will be an order that she deliver up to the plaintiffs within the proper time possession of the premises described in the schedule to the summons or such part thereof as she now occupies. As the mortgagor is not in occupation of anything, no order is required against him, and, therefore, it appears to be proper not to make any other order on the summons save to give to the plaintiffs the right to add their costs of the summons and of the appeal to this court to their security."

E The effect of that judgment is that, notwithstanding the form of order prescribed by Ord. 55, r. 8A, which will be found in the ANNUAL PRACTICE, 1949, vol. 2, at p. 2759, an order for possession can be made against a stranger in title and no order need be made against the mortgagor. I, therefore, feel constrained to conclude that the first ground on which ROXBURGH, J., based his judgment in *Martins Bank, Ltd. v. Kavanagh* (1) no longer binds me.

G There remains the second ground, viz., that the application involves a step in the enforcement of the security which may prejudice the person entitled to the equity of redemption. No doubt, if in a case it can be shown that such an application may prejudice the person entitled to the equity of redemption, the court will insist on that person being before it. In *Martins Bank, Ltd. v. Kavanagh* (1) there must have been some circumstance which, to the mind of ROXBURGH, J., pointed to the likelihood of such prejudice arising. I do not, on consideration, read the judgment of ROXBURGH, J., as preventing me in the case before me from inquiring whether or not any such prejudice can arise. In the present case, by the terms of the legal mortgage, it is expressly provided that the statutory power of sale shall be exercisable free from the restrictions imposed by the Law of Property Act, 1925, s. 103. I have carefully considered whether in any respect, in the circumstances of the present case, it could be postulated that to make an order against this stranger to the title, in the absence of the mortgagors, could possibly prejudice them. In my judgment, it is impossible to

discover any such circumstance, and, therefore, I feel free to treat this case as distinguishable from *Martins Bank, Ltd. v. Kavanagh* (1). For these reasons, I propose to accede to the application and I shall make the order for possession.

Order accordingly.

Solicitors: *Boxall & Boxall*, agents for *Cardens*, Brighton (for the plaintiff).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re BATLEY (deceased). PUBLIC TRUSTEE AND ANOTHER *v.*
HERT AND OTHERS. *Varied.* C.A. [1952] 2 All E.R.

[CHANCERY DIVISION (Vaisey, J.), March 26, April 4, 1952.]

Income Tax—Annuity—Annuity free of income tax—Reliefs and allowances—Liability to account to trustees—Annuitant's husband assessed in respect of his and annuitant's joint incomes—Husband, and not annuitant, entitled to claim for relief.

By his will, dated Jan. 27, 1937, and made shortly after his divorce from the annuitant, his first wife, and on the day of his marriage to his second wife, the testator bequeathed "free of duty to my former wife . . . an annuity of £416 for her life . . . such annuity to be considered as a continuance of the alimony which I am paying her during my lifetime . . . thus continuing after my death the payments of alimony which I am making to her during my lifetime. But if at any time during the lifetime of my second wife . . . such annuity of £416 should exceed the amount of one-third of the total income of my estate after payment of income tax then and in such case the amount to be paid . . . by way of such annuity shall be such one-third of the total income of my estate after payment of income tax . . ." After the annuitant had re-married in 1939 her second husband was assessed to income tax in respect of their joint incomes and he was entitled to claim income tax reliefs in respect of their personal allowances as husband and wife. In consequence, the annuitant was not liable to pay income tax on her annuity and was not entitled to claim any appropriate relief. During his life the testator paid the alimony without deduction of income tax, no claim for any rebate of tax under the Income Tax Acts was made by the annuitant or her husband, and the testator never asked them to make a claim. On May 4, 1947, the testator died. On a summons taken out by the trustees of his will after his death it was held that the annuity was payable free of income tax, but without prejudice to the question whether the annuitant was liable to account for income tax relief in accordance with the rule in *Re Pettit* ([1922] 2 Ch. 765). On a summons by the trustees of the will to determine this question,

HELD: the annuitant was a trustee of her statutory right to recover the income tax overpaid in respect of her annuity and was bound, at the request of the trustees of the will, to exercise that right, and, if necessary for that purpose, to apply to be assessed separately from her husband, under the Income Tax Act, 1918, All Schedules Rules, r. 17 (1), and any relief or allowances by way of repayment of income tax recovered or recoverable by the annuitant and her husband, or by either of them, in respect of and so far as was attributable to the annuity, belonged to the trustees of the testator's will, in accordance with the rule in *Re Pettit* (supra).

Re Kingcome ([1936] 1 All E.R. 173), applied.

AS TO TAX-FREE ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 214-216, paras. 386-388; and FOR CASES, see DIGEST, Vol. 39, pp. 166-168, Nos. 572-593.

Cases referred to:

- (1) *Re Batley*, [1951] Ch. 558.
- (2) *Re Pettit*, [1922] 2 Ch. 765; 91 L.J.Ch. 732; 127 L.T. 491; 39 Digest 167, 587.
- (3) *Re Maclellan*, [1939] 3 All E.R. 81; [1939] Ch. 750; 108 L.J.Ch. 364; 160 L.T. 612; Digest Supp.
- (4) *Re Eves*, [1939] Ch. 969; 108 L.J.Ch. 374; 161 L.T. 270; Digest Supp.
- (5) *Re Tatham*, [1945] 1 All E.R. 29; [1945] Ch. 34; 114 L.J.Ch. 9; 172 L.T. 14; 2nd Digest Supp.
- (6) *Re Williams*, [1945] 2 All E.R. 102; [1945] Ch. 320; 115 L.J.Ch. 101; 173 L.T. 132; 2nd Digest Supp.
- (7) *Re Arno*, [1947] 1 All E.R. 64; [1947] Ch. 198; [1947] L.J.R. 435; 176 L.T. 152; 2nd Digest Supp.
- (8) *Re Lyons*, [1952] 1 All E.R. 34; [1952] Ch. 129.
- (9) *Re Jones*, [1933] Ch. 842; 102 L.J.Ch. 303; 149 L.T. 417; Digest Supp.
- (10) *Re Kingcome*, [1936] 1 All E.R. 173; [1936] Ch. 566; 105 L.J.Ch. 209; 154 L.T. 462; Digest Supp.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Charles Gurson Batley, deceased, and in the events which had happened, any relief or allowances by way of repayment of income tax recovered or recoverable by the first and second defendants, Dorothy Hert and John Albert Hert, the testator's first wife and her present husband, or either of them, in respect of and so far as was attributable to an annuity bequeathed to the first defendant by the testator's will free of income tax belonged to the plaintiffs as trustees of the will in accordance with the rule in *Re Pettit* (2) ([1922] 2 Ch. 765). The second defendant was assessed to tax in respect of his and the first defendant's joint incomes, and the first defendant contended inter alia that the reliefs or allowances in respect of the annuity were not repayable to the testator's estate, as the second defendant, being the accountable party, could not be compelled to account to the trustees of the will.

McMullen for the plaintiffs, the trustees.

J. F. Bowyer for the first and second defendants, the testator's first wife (the annuitant) and her husband.

Fletcher-Cooke for the third defendant (the testator's second wife) and the fourth and fifth defendants, the remaindermen (infant children of the testator's second marriage).

Cur. adv. vult.

April 4. VAISEY, J., read the following judgment. This originating summons is supplemental to an earlier summons between the same parties, with the exception that to the present summons there is an added defendant, John Albert Hert, who is the husband of Dorothy Hert, the first defendant to both summonses. The previous case is reported [*sub nom. Re Batley* (1)] and I will summarise the headnote to the report. The testator by his will, which was made on Jan. 27, 1937, shortly after his divorce from his first wife (the said Dorothy Hert), and on the same day as his marriage to his second wife (the defendant, Grace Lucy Smith), bequeathed

" . . . free of duty to my former wife . . . an annuity of £416 for her life . . . such annuity to be considered as a continuance of the alimony which I am paying her during my lifetime and to be paid to her at the rate of £32 every four weeks thus continuing after my death the payments of alimony which I am making to her during my lifetime."

The will further provided that if at any time during the lifetime of his second wife

" . . . such annuity of £416 should exceed the amount of one-third of the total income of my estate after payment of income tax then and in

such case the amount to be paid . . . by way of such annuity shall be such one-third of the total income of my estate after payment of income tax . . . ”

The testator's marriage to his first wife had been dissolved by decree absolute on Dec. 21, 1936, and on that day an order was made by consent that the testator should as from that day pay or cause to be paid to her during their joint lives and until further order maintenance at the rate of £7 (not £8) free of tax per week, the said sum to be paid monthly. He had no issue by his first wife. By his second wife he had two children, who are the infant defendants to both summonses. The first wife married the defendant, John Albert Hert, on June 27, 1939. The testator during his life paid to the first wife £8 (not £7) free of tax per week by equal monthly instalments, namely, £416 per annum tax free. He died on May 4, 1947, and his will, with a codicil immaterial for the present purpose, was proved by the Public Trustee and Arthur Bolden (plaintiffs in both the summonses) on Aug. 22, 1947. His second wife was married to one Charles Frederick Smith on Sept. 3, 1949.

The first summons came before me on Nov. 22, 1950, when I held (among other things) that the annuity was subject to and not free of income tax. From that part of my order the first wife appealed, and on Mar. 8, 1951, the Court of Appeal varied my decision and held and declared that the annuity was payable free of income tax, but such declaration was expressed to be without prejudice to the question whether or not the first wife was liable to account for income tax relief in accordance with the rule in *Re Pettit* (2). That question is, accordingly, now raised by the present summons, which asks whether on the true construction of the testator's will and in the events which have happened the first wife is entitled to retain for her own benefit any relief or allowances by way of repayment of income tax to which she is entitled or whether she must account for the same or any part thereof to the plaintiffs in accordance with the rule in *Re Pettit* (2).

The first wife has deposed that her husband, John Albert Hert, is assessed to income tax in respect of their joint incomes, that he alone is entitled to claim income tax reliefs in respect of their personal allowances as husband and wife, and that she herself does not, and is not entitled to, make any claim for such relief. John Albert Hert was joined as a defendant to the present summons on Jan. 23, 1952, and a further paragraph was added to the summons during the hearing before me raising the further question of this defendant's liability to account, which seemed to me to arise by implication from the question of the first wife's liability reserved by the order of the Court of Appeal [in *Re Batley* (1)]. It was objected on behalf of the first wife that her husband was not a proper party to the present summons and that the further question ought not to be raised in this proceeding, but I overruled the objection and will deal with both questions.

The first point that occurs to me is that, by a parity of reasoning to that on which the decision of the Court of Appeal in the former proceeding was based, the answers to the questions may depend on the practice adopted by the testator with respect to the weekly sums paid by him in his lifetime, and that, if he was content to allow his former wife and her present husband to retain the benefit of any allowances, making no claim in that respect for himself, it should be assumed that the annuity given “in continuation of” those sums should carry and include the same privilege. The testator was a solicitor, and is hardly likely to have acted or refrained from acting in the matter per incuriam. There is no evidence on the point, but I understand that no claim for any rebate was, in fact, made either by the first wife or her husband in the testator's lifetime, and that the testator never asked them or either of them to make such a claim. I have come to the conclusion, however, that I ought not to decide the matter on that short and simple ground, and must disregard the action or inaction of the testator as irrelevant.

Re Pettit (2) laid down a principle which is, on the face of it, quite simple, and it is somewhat surprising to find how many difficulties have arisen in the application of it. The headnote to the report is:

"Testator gives an annuity free of income tax, and the annuitant, under the provisions of the Income Tax Acts, obtains relief by way of repayment of income tax in excess of the amount properly payable by him:—Held, that the residuary estate of the testator is entitled to such proportion of the sum so repaid as the annuity bears to the total income of the annuitant."

In his judgment, ROMER, J., said ([1922] 2 Ch. 770):

"... if ... the annuitant is repaid the excess by the Special Commissioners, I cannot understand on what ground it can be suggested that such excess should be retained by the annuitant who has not paid it, and not be handed back to the residuary legatees who have."

That, of course, is the gist of the matter. The principle has been applied in a large number of reported cases, such as *Re Maclellan* (3), which was a case of an annuity payable under a deed, *Re Eves* (4), *Re Tatham* (5), *Re Williams* (6), *Re Arno* (7) and *Re Lyons* (8).

The present case is, in my judgment, covered by these authorities (*Re Jones* (9) having, I think, no application to it), and I doubt whether this could have been questioned if the first wife were discoverd and liable to be directly assessed to tax. The only difficulty, to my mind, arises from the circumstance that it is the husband of the first wife, and not she herself, who is liable to pay the income tax on her income and entitled to claim any appropriate reliefs. It is remarkable that this aspect of the matter has never, so far as I know, been judicially considered hitherto. The contentions put forward on behalf of the first wife are that the appropriate statutory relief is not repayable to the testator's estate (i) on the construction of the will (applying *Re Jones* (9))—this contention I have rejected—and (ii) on the ground that her husband, being the accountable party, cannot be compelled to account to the trustees of the will. The position of a husband in regard to the tax on his wife's income is tolerably well settled: see KONSTAM'S LAW OF INCOME TAX, 11th ed., paras. 298-300. I am inclined to the view that the husband in the present case, if he obtained the appropriate relief in respect of the annuity, would hold it impressed with a trust in favour of the testator's estate, and, if necessary, I should be prepared to decide that he is, in the circumstances, under an obligation to claim the relief for the benefit pro tanto of the estate. But I prefer to base my judgment on the authority of *Re Kingcome* (10) (considered and approved in *Re Lyons* (8)), by holding that the first wife is a trustee of her statutory right to recover the overpaid tax and is bound, at the request of the trustees of the will, to exercise that right, and, if necessary, to apply to be, for that purpose, under the Income Tax Act, 1918, All Schedules Rules, r. 17 (1), assessed separately from her husband. I adopt from the judgment of BENNETT, J. ([1936] Ch. 569) in *Re Kingcome* (10) the statement that

"... the court ought to do everything it can to enable the income tax that has been overpaid to be recovered."

Of course, a separate assessment may not have to be made in actual fact if the first wife or her husband are willing to pay over and account for the amount which she could and would have obtained if such an assessment had been made.

I think that I should deal with the questions raised in para. 1 and para. 2 of the re-amended summons in a somewhat different form from that which is suggested, and so I will declare that, on the true construction of the testator's will and in the events which have happened, any relief or allowances by way of repayment of income tax recovered or recoverable by the defendants, Dorothy Hert and John Albert Hert, or either of them in respect of and so far as is attributable to the annuity bequeathed to the said Dorothy Hert by the testator's

will free of income tax belong to the plaintiffs as trustees of such will, in accordance with the rule in *Re Pettit* (2). There will be liberty to apply, and, unless other arrangements are made to give effect to the foregoing declaration, I should order the wife to apply and the husband to support her application to be separately assessed. No representation order on this occasion is necessary.

Order accordingly.

Solicitors: *Maxwell, Batley & Co.* (for the plaintiffs); *Chalton Hubbard & Co.*, agents for *Marsh & Ferriman*, Worthing (for the first and second defendants); *Collyer-Bristow & Co.*, agents for *Birkett, Ridley & Bartley*, Ipswich (for the remaining defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

R. v. OWEN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Ormerod and Parker, J.J.), April 1, 7, 1952.]

Criminal Law—Evidence—Witness called after summing-up at request of jury after retirement.

The appellant was convicted on an indictment charging him with carnal knowledge of a girl under sixteen. It was alleged that the offences were committed in the X-ray room of a public clinic on three afternoons, and a police witness was cross-examined to show that the clinic was a much frequented place. After the summing-up the jury, who had been enclosed for some time, sent a message to the judge saying they wanted evidence whether the clinic was empty or occupied at the material times. A doctor who had given evidence was then re-called and he stated that generally speaking no doctors or patients would be at the clinic at the material times. The jury retired again and shortly afterwards returned a verdict of Guilty. On appeal,

HELD: whether evidence should be admitted after the defence had been closed to rebut matters raised for the first time by the defence was a matter for the discretion of the judge, who should apply his discretion with caution, but after the whole case had been concluded and it only remained for the jury to deliver their verdict it was not right to allow further evidence to clear up some matter which was troubling the jury.

R. v. Frost (1840) (9 C. & P. 129), discussed.

R. v. Browne (1943) (29 Cr. App. Rep. 106), applied.

AS TO THE RECALLING OF WITNESSES BY THE JUDGE, see HALSBURY, Hailsham Edn., Vol. 9, p. 170, para. 246; and FOR CASES, see DIGEST, Vol. 14, pp. 289-292, Nos. 3045-3066.

Cases referred to:

- (1) *R. v. Frost*, (1840), 9 C. & P. 129; 173 E.R. 771; 14 Digest 290, 3056.
- (2) *R. v. Crippen*, [1911] 1 K.B. 149; 80 L.J.K.B. 290; 103 L.T. 704; 75 J.P. 141; 14 Digest 291, 3064.
- (3) *R. v. Harris*, [1927] 2 K.B. 587; 96 L.J.K.B. 1069; 137 L.T. 535; 91 J.P. 152; Digest Supp.
- (4) *R. v. Sullivan*, [1923] 1 K.B. 47; 91 L.J.K.B. 927; 126 L.T. 643; 86 J.P. 167; 14 Digest 291, 3065.
- (5) *R. v. Liddle*, (1928), 21 Cr. App. Rep. 3; Digest Supp.
- (6) *R. v. Browne*, (1943), 29 Cr. App. Rep. 106, 126; 2nd Digest Supp.

APPEAL against conviction.

The appellant was convicted before OLIVER, J., at Chester Assizes on an indictment containing three counts charging him with having had carnal knowledge of a girl under sixteen. The ground of the appeal was that evidence

had wrongly been allowed to be given in consequence of a question by the jury after they had retired to consider their verdict.

J. J. Roberts for the appellant.

E. B. B. Richards for the Crown.

Cur. adv. vult.

A April 7. **LORD GODDARD, C.J.**, read the following judgment of the court. The appellant was charged at Chester Assizes before **OLIVER, J.**, with having had carnal knowledge of a girl under the age of sixteen. He was convicted and sentenced to nine months' imprisonment. **OLIVER, J.**, granted a certificate to enable him to appeal, the point of law that arises being whether the judge was right in allowing a witness to be re-called, after the summing-up and after the jury were enclosed, to deal with a question which the jury put to the judge.

B The appellant, a man of some seventy years of age, was a caretaker or porter at a clinic at Blaenau-Festiniog, and it was alleged that on three occasions he took the girl, whose age was fourteen, to the clinic and in a room there, which seems to have been the X-ray room, committed the offences charged. These visits to the clinic all took place at about 3.30 or 4 p.m., when the girl was coming home from school. The police inspector who gave evidence was cross-examined

C by counsel for the defendant, and, among other questions, these were put to him:

"Q.—So this clinic would be visible to twenty or thirty houses placed on Wynnes Road? A.—Yes. Q.—It is a public place, in other words? A.—Yes. Q.—Indeed, a much frequented place? A.—Undoubtedly. Q.—Doctors go there to attend to their patients, and there are often ten to forty patients awaiting examination at the same time? A.—I cannot say the numbers. **OLIVER, J.**: Do you know what the clinic hours were? A.—No. Q.—Do you know that doctors do their work in the clinic, and it is a common sight to see people waiting about for their turn to go into the clinic? A.—Yes."

E On re-examination he was asked:

"Q.—Do you know whether or not the public go into this dark room? A.—Not to my knowledge."

When the case for the prosecution was closed the appellant gave a complete denial of the charge and the judge summed up. After the jury had retired for some time, they sent a message to the judge saying that they wanted evidence

F whether the clinic would be empty or occupied at the material times. **OLIVER, J.**, was of opinion that the question was, as he described it, of vital relevance and could have been proved by the prosecution as part of their case, and, as he has stated in his certificate,

G "being of opinion that the interests of justice demanded the evidence, and that the defendant would not be unjustly prejudiced if I allowed the evidence, I did so."

The doctor who had previously given evidence as to the girl's physical condition, was re-called, and the effect of his evidence was that at the times when the offences were alleged to have been committed no one, neither doctors nor patients, would be at the clinic unless exceptionally. That evidence having been

H given, the jury, after a very short retirement, returned a verdict of Guilty.

The question how far evidence may be called by the prosecution after the case has been closed has been discussed in many cases, but in only one in such circumstances as these. It is clear that in his discretion a judge may allow evidence to be called in rebuttal of some case set up for the first time by the defence. The case usually cited as authority on this point is *R. v. Frost* (1), where **TINDAL, C.J.**, said (9 C. & P. 159):

"There can be no doubt about the general rule, that where the Crown

begins a case (as it is with an ordinary plaintiff), they bring forward their evidence, and cannot afterwards support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises *ex improviso*, which the Crown could not foresee, supposing it to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply."

This, it will be observed, deals only with the right of the Crown to call evidence in rebuttal and does not deal with the question whether evidence can be given after the summing-up. We may also observe that the rule laid down by TINDAL, C.J., is probably in wider language than would be used at the present day. Indeed, in *R. v. Crippen* (2), the court said in terms that they did not propose to adopt the language of that learned judge and that it was a question for the judge at the trial to determine in his discretion whether the evidence, not having been tendered in-chief, ought to be given as rebutting evidence.

In *R. v. Harris* (3) the court seems to have re-considered with approval the words we have just cited from *R. v. Frost* (1), but that was a case in which the recorder himself called a witness towards the end of the case and examined him himself. In *R. v. Sullivan* (4) rebutting evidence was called after the speech of counsel for the defence and before the summing-up, apparently to rebut a suggestion in counsel's speech that a particular person had committed the offence with which the prisoner was charged. It was held that the judge had a discretionary power to act as he did and that this court would not interfere unless they were of opinion that an injustice had been caused, whereas in *R. v. Liddle* (5), the deputy chairman of quarter sessions adjourned a case for three days to enable evidence to be called to rebut the defence of alibi and it was held that the conviction must be quashed as this was an irregularity, the court considering that the nature of the defence was one of so common a kind that it must always be anticipated and it was not proper to take the course there adopted merely for the purpose of rebutting the defence of alibi.

None of these cases—and there are more to the like effect—is really in point in determining the question which falls for decision in this case, and the only case of which we are aware in which the point has actually arisen is *R. v. Browne* (6). In that case, after the summing-up and the enclosure of the jury, the jury asked the chairman to allow some evidence to be given with regard to the prisoner's state of mind, and, after some pressure, the chairman allowed the prison doctor to be called and he gave evidence on this matter. It is true that in that case there were other grounds for quashing the conviction, but the court, consisting of LORD CALDECOTE, C.J., ASQUITH, J., and CASSELS, J., were of opinion that this was an irregularity and was a reason for quashing the conviction. In the judgment of the court it is stated (29 Cr. App. Rep. 112):

"A jury is sworn to give a verdict according to the evidence. It is not sworn to give a verdict according to any suggestions or propositions which may have been followed up in the course of the trial."

We do not desire in any way to limit the discretion of a judge to admit evidence for the prosecution after the case for the defence has been closed where it becomes necessary to rebut matters which have been raised for the first time by the defence. It is much more likely that this may be necessary nowadays since prisoners are entitled to give evidence on their own behalf whereas in the days of TINDAL, C.J., such evidence could not be given. As we have said, this court in *R. v. Crippen* (2) declined to adopt the rule that TINDAL, C.J., laid down in all its strictness. It must be a matter for the discretion of the judge, which should be applied with caution, but it appears to us that it is quite another thing to say that, after the whole case is concluded and it remains only for the jury to return their verdict, it is right to allow further evidence to be given to clear up some matter which is troubling the jury. In the present case the evidence which

was admitted was not evidence by way of rebuttal of any matter set up by the appellant. If it contradicted any evidence, it was that of the police inspector who was a witness for the prosecution.

A It is by no means uncommon for a jury to put a question to the judge after he has concluded his summing-up, whether before or after they have retired, and the usual practice is for the judge to tell the jury, if it is the fact, that no evidence on the point has been given and they must take it, therefore, that there is no evidence on it, though, if they ask a question on which evidence has been given, it is right for the judge to remind the jury of the evidence. We think this is the only safe practice, and it ought to be followed. The theory of our law is that he who affirms must prove, and, therefore, it is for the prosecutor to prove his case, and, if there is some matter which the prosecution might have proved, B but have not, after the summing-up it is too late to allow further evidence to be given. That is so whether it might have been given by one of the witnesses already called or whether it would necessitate, as in *R. v. Browne* (6), the calling of a fresh witness. If this were allowed, it is difficult to see what limitation could be put on it. A witness might be called who would then be open to cross-examination and the defence might then apply to call further evidence in answer.

C In the present case it is true that the question asked by the jury was most pertinent, and it is not an unfair assumption to make that their verdict depended on the answer which the doctor gave. If he had said that other people were likely to be at the clinic at the time, it is a reasonable assumption that the jury would have returned a verdict of Not Guilty. As his evidence was that generally there were no people about at the time, it is easy to see that the jury thought this was a vital point, and almost immediately after the evidence had been D given they returned a verdict of Guilty. We think they ought to have been told that the prosecution had laid before them such evidence as they had thought fit and the evidence could not now be re-opened. It is only fair to OLIVER, J., to say that he himself felt considerable doubt whether it was right to recall the witness. Being on circuit he did not have the advantage of seeing the reports. Had he been able to refer to *R. v. Browne* (6), he probably would not have E admitted the evidence. In any case, we think it right to lay down that, once the summing-up is concluded, no further evidence ought to be given. The jury can be instructed in reply to any question they may put on any matter on which evidence has been given, but no further evidence should be allowed.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Hatchett Jones & Co.*, agents for *H. E. Jones, Blaenau-Festiniog* (for the Crown).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

HARRIS v. DIRECTOR OF PUBLIC PROSECUTIONS.

[HOUSE OF LORDS (Viscount Simon, Lord Porter, Lord Oaksey, Lord Morton of Henryton and Lord Tucker), March 10, 11, 12, 13, April 9, 1952.]

Criminal Law—Evidence—Criminal acts other than those charged—Proof of intention—Rebuttal of possible defence—Discretion of judge to exclude.

The prosecution may adduce all proper evidence tending to prove the charge against the accused, including evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal, and evidence of similar acts, e.g., to show intention or to rebut a possible defence of accident may properly be admitted, but, though such evidence is strictly admissible, the judge has a discretion to exclude it if it merely tends to deepen suspicion against the accused and its prejudicial effect is out of proportion to its probative value.

Dicta of LORD HERSHELL, L.C., in *Makin v. A.-G. for New South Wales* ([1894] A.C. 65), and LORD DU PARCQ in *Noor Mohamed v. R.* ([1949] 1 All E.R. 370), applied.

Observations of LORD SUMNER in *Thompson v. R.* ([1918] A.C. 232) and of LORD GODDARD, C.J., in *R. v. Sims* ([1946] 1 All E.R. 701), explained.

AS TO JOINDER OF SEVERAL OFFENCES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 137, 138, paras. 179, 180; and FOR CASES, see DIGEST, Vol. 14, pp. 226-231, Nos. 2111-2174, and Digest Supps.

Cases referred to:

- (1) *Makin v. A.-G. for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 69 L.T. 778; 58 J.P. 148; 14 Digest 371, 3924.
- (2) *R. v. Ball*, [1911] A.C. 47; 75 J.P. 180; *sub nom. Public Prosecutions (Director) v. Ball (No. 2)*, 80 L.J.K.B. 691; 103 L.T. 738; 14 Digest 375, 3959.
- (3) *Perkins v. Jeffery*, [1915] 2 K.B. 702; 84 L.J.K.B. 1554; 113 L.T. 456; 79 J.P. 425; 14 Digest 373, 3941.
- (4) *Noor Mohamed v. R.*, [1949] 1 All E.R. 365; [1949] A.C. 182; 2nd Digest Supp.
- (5) *Thompson v. R.*, [1918] A.C. 221; 87 L.J.K.B. 478; 118 L.T. 418; 82 J.P. 145; 14 Digest 360, 3810.
- (6) *R. v. Mortimer*, (1936), 25 Cr. App. Rep. 150; Digest Supp.
- (7) *R. v. Christie*, [1914] A.C. 545; *sub nom. Public Prosecutions (Director) v. Christie*, 83 L.J.K.B. 1097; 111 L.T. 220; 78 J.P. 321; 14 Digest 360, 3811.
- (8) *R. v. Sims*, [1946] 1 All E.R. 697; [1946] K.B. 531; [1947] L.J.R. 160; 175 L.T. 72; 2nd Digest Supp.
- (9) *R. v. Smith*, (1915), 84 L.J.K.B. 2153; 114 L.T. 239; 80 J.P. 31; 14 Digest 302, 3185.
- (10) *R. v. Armstrong*, [1922] 2 K.B. 555; 91 L.J.K.B. 904; 127 L.T. 221; 86 J.P. 209; 14 Digest 378, 3988.
- (11) *R. v. Bywaters*, (1922), 17 Cr. App. Rep. 66; 14 Digest 226, 2101.
- (12) *R. v. Bond*, [1906] 2 K.B. 389; 75 L.J.K.B. 693; 95 L.T. 296; 70 J.P. 424; 14 Digest 371, 3921.
- (13) *Maxwell v. Public Prosecutions (Director)*, [1935] A.C. 309; 103 L.J.K.B. 501; 151 L.T. 477; 98 J.P. 387; Digest Supp.
- (14) *R. v. Hall*, [1952] 1 All E.R. 66; 116 J.P. 43.
- (15) *R. v. Bailey*, [1924] 2 K.B. 300; 93 L.J.K.B. 989; 132 L.T. 349; 88 J.P. 72; Digest Supp.
- (16) *Stirland v. Public Prosecutions (Director)*, [1944] 2 All E.R. 13; [1944] A.C. 315; 113 L.J.K.B. 394; 171 L.T. 78; 109 J.P. 1; 2nd Digest Supp.

APPEAL against a decision of the Court of Criminal Appeal (LORD GODDARD, C.J., BYRNE and PARKER, JJ.), dated Jan. 29, 1952, dismissing an appeal against conviction by the appellant.

The appellant was charged before PEARSON, J., at Leeds Assizes on an indictment containing eight counts with office-breaking and larceny between May and July, 1951. He was acquitted by the jury on the first seven counts and convicted on the eighth. Before the appellant pleaded an application was made by counsel for the defence for a separate trial on the eighth count and that that count should be tried first, counsel submitting that the depositions disclosed no case in respect of the first seven counts and that it would be prejudicial to the appellant to open those counts against him when there was only one count on which there was evidence which could be left to the jury. The learned judge refused the application on the grounds that the charges could all be properly included in one indictment, and that, in his opinion, the appellant would not be embarrassed or prejudiced by the trial of all eight counts together.

Burton, Q.C., and R. Lyons for the appellant.

The Attorney-General (Sir Lionel Heald, Q.C.), Hylton-Foster, Q.C., and Snowden for the Crown.

The House took time for consideration.

April 9. The following opinions were read.

VISCOUNT SIMON: My Lords, this is an appeal from a decision of the Court of Criminal Appeal which comes before the House in consequence of a certificate given by the Attorney-General that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought.

The appellant was a member of the city of Bradford police force. He was tried at the Leeds autumn assizes last November before PEARSON, J. on an indictment containing eight counts charging him with office-breaking and larceny on a series of dates in May, June, and July, 1951, by breaking into and entering the premises of a company of fruit and vegetable merchants situated in an enclosed and extensive Bradford market and stealing therefrom various sums of money. In every case the money stolen was only a part of the amount that the thief, whoever he was, might have taken. In every case the same means of access was used, and in every case the theft occurred in a period during part of which the appellant was on duty in uniform in the course of patrolling the market, and, apparently, at an hour when most of the gates to the market were closed to the general public. But, on the first seven of these occasions, there was no further evidence to associate the appellant specifically with the thefts. On the eighth occasion, however, which was between 6 and 7 o'clock on Sunday morning, July 22, the appellant, who was on solitary duty in the market as before, was found to be just outside the premises by two detective officers who had rushed to the spot on hearing, in the quarters where they were secretly waiting, the ringing of a bell actuated, without the knowledge of the appellant, by the thief's weight when he stepped on the floor of the shop. On this occasion, marked money which had been placed in the till had been abstracted, but it was not found on the appellant when he was arrested. It had been concealed in a coal-bin, not far away from where he was when first seen. The two detectives were well known to the appellant and might have been expected to be at once recognised by him, but when they entered the market, one by climbing over a gate and the other by opening it with some difficulty, though they were in the appellant's view at no great distance, he contended that he had not recognised them at first as members of the police force and so had not moved to join them. He said he thought they were market-men entering the area for some innocent purpose. By the time the two detectives had reached the premises he had disappeared from view and a little later came running up to join them. The time

which elapsed between their first sight of him and his return was just sufficient to enable him to have reached the coal-bin and come back.

Before the appellant was arraigned and in the absence of the jury, his counsel asked for the severance of the indictment and urged that the charge contained in the eighth count should be tried first and separately. The learned judge applied s. 5 (3) of the Indictments Act, 1915, and ruled that there was no good reason for ordering a separate trial on the eighth count and that the case fell within r. 3 of sched. I to the Act, since the charges formed part of a series of offences of the same or a similar character. In so deciding, the learned judge was rightly exercising his discretion and no valid objection could be taken to his ruling. It was urged that the first seven counts, if taken alone, would be unsupported by any relevant evidence. But to this the answer was suggested that, if a jury took the view that the resemblance between the different thefts was so close that they must be regarded as the work of a single thief, the evidence of what happened on July 22 might be considered as identifying the criminal on all the counts. The jury, however, returned, as it was entitled to do, a verdict of Not Guilty on the first seven counts, but found the appellant Guilty on the eighth count. He appealed to the Court of Criminal Appeal against this conviction on various grounds, to one of which reference must be made hereafter. His appeal was dismissed, but, as already stated, he obtained the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that a further appeal should be brought. The Criminal Appeal Act, 1907, s. 1 (6), while conferring this power on the Attorney-General, does not require that his certificate should indicate what is the point of law which he considers should in the public interest be thus brought for final decision before this House. In the present instance, moreover, the House was without the assistance usually derived from previous written formulation of the arguments and reasons put forward on either side. On the hearing of the appeal, however, counsel for the appellant made it clear that his main contention was that evidence as to the thefts that had occurred on the first seven occasions, when the appellant was not shown to be near the shop at the time when they occurred, could not be advanced by the prosecution or considered by the jury as part of the material to prove the charge on the eighth occasion. The Attorney-General presented the problem arising on the appeal more widely and in effect invited the House to deal with a series of authorities beginning with *Makin v. A.-G. for New South Wales* (1), in which limits as to the admissibility of evidence of "similar facts" had been suggested or laid down, and to decide whether the principle enunciated in *Makin's* case (1) should now be treated as modified or its application regarded as extended.

In my opinion, the principle laid down by LORD HERSCHELL, L.C., in *Makin's* case (1) remains the proper principle to apply, and I see no reason for modifying it. *Makin's* case (1) was a decision of the Judicial Committee of the Privy Council, but it was unanimously approved by the House of Lords in *R. v. Ball* (2) ([1911] A.C. 71) and has been constantly relied on ever since. It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates. Such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried. It is the application that may sometimes be difficult, and the particular case now before the House illustrates that difficulty. The principle as laid down by LORD HERSCHELL, L.C. ([1894] A.C. 65), is as follows:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission

of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

- A When LORD HERSCHELL speaks of evidence of other occasions in which the accused was concerned as being admissible to "rebut" a defence which would otherwise be open to the accused, he is not using the vocabulary of civil pleadings and requiring a specific line of defence to be set up before evidence is tendered which would overthrow it. If it were so, instances would arise where magistrates might be urged not to commit for trial, or it might be ruled at the trial, at the end of the prosecution's case, that enough had not been established
- B to displace the presumption of innocence, when all the time evidence properly available to support the prosecution was being withheld. AVORY, J., in giving the judgment of the Divisional Court in *Perkins v. Jeffery* (3), said ([1915] 2 K.B. 707):

- C "... in criminal cases, and especially in those where the justices have summary jurisdiction, the admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution, and frequently without any indication of the particular defence that is going to be set up."

- D LORD DU PARCQ pointed out ([1949] 1 All E.R. 370) in *Noor Mohamed v. R.* (4), in commenting on what LORD SUMNER had said in *Thompson v. R.* (5) ([1918] A.C. 232):

- E "An accused person need set up no defence other than a general denial of the crime alleged. The plea of Not Guilty may be equivalent to saying: 'Let the prosecution prove its case, if it can', and, having said so much, the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be 'crediting the accused with a fancy defence' if they sought to adduce such evidence."

- F LORD HERSCHELL's statement in *Makin's case* (1) that evidence of "similar facts" may sometimes be admissible as bearing on the question whether "the acts alleged to constitute the crime charged in the indictment were designed or accidental" deserves close analysis. Sometimes the purpose properly served by such evidence is to help to show that what happened was not an accident. If it was, the accused had nothing to do with it. Sometimes the purpose is to
- G help to show what was the intention with which the accused did the act which he is proved to have done. In a proper case, and subject to the safeguards which LORD HERSCHELL indicates, either purpose is legitimate. SCRUTTON, J., points out the distinction very clearly in *Ball's case* (2) ([1911] A.C. 52). Sometimes the two purposes are served by the same evidence. The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which
- H tends to prove the charge. I do not understand LORD HERSCHELL's words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal. Where, for instance, mens rea is an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he

intended to do what he did on the occasion charged and was thus acting criminally. *R. v. Mortimer* (6) is a good example of this. What LORD SUMNER meant in *Thompson v. R.* (5) when he denied ([1918] A.C. 232) the right of the prosecution to "credit the accused with fancy defences" was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause.

There is a second proposition which ought to be added under this head. It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for. LORD DU PARCQ referred to it in *Noor Mohamed's case* (4) immediately after the passage above quoted, when he said ([1949] 1 All E.R. 370):

" . . . in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge."

This second proposition flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of "similar facts" affecting the accused, though admissible, should not be pressed because its probable effect "would be out of proportion to its true evidential value": per LORD MOULTON in *R. v. Christie* (7) ([1914] A.C. 559). Such an intimation rests entirely within the discretion of the judge. It is, of course, clear that evidence of "similar facts" cannot in any case be admissible to support an accusation against the accused unless they are connected in some relevant way with the accused and with his participation in the crime: see LORD SUMNER in *Thompson v. R.* (5) ([1918] A.C. 234). It is the fact that he was involved in the other occurrences which may negative the inference of accident or establish his mens rea by showing "system", or, again, the other occurrences may sometimes assist to prove his identity, as, for instance, in *Perkins v. Jeffery* (3). But evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt. This is the ground, as it seems to me, on which the Judicial Committee of the Privy Council allowed the appeal in *Noor Mohamed's case* (5) ([1949] 1 All E.R. 370). The Board there took the view that the evidence as to the previous death of the accused's wife was not relevant to prove the charge against him of murdering another woman, and, if it was not relevant, it was at the same time highly prejudicial. It is to be noted that the Judicial Committee did not question the decision in *R. v. Sims* (8).

It remains to examine certain reported cases dealing with the admissibility of evidence of "similar facts" decided since *Makin's case* (1), to which the Attorney-General referred us. Rightly understood, these cases do not seem to me to involve any enlargement of the area within which evidence of "similar facts" might be admitted. In *R. v. Smith* (9) the accused was charged with murdering a woman immediately after going through a form of marriage with her by drowning her in a bath in the lodging where they were staying. Evidence was held to be rightly admitted of very similar circumstances which connected the accused with the deaths at a later date of two other women who were drowned in their baths after the accused had gone through a form of marriage with each

of them in turn. In all three cases it was shown that the accused benefited by the death. In all three cases the prisoner urged the woman to take a bath and was on the premises when she prepared to do so. The ground on which the evidence of the two later occurrences was admissible was that the occurrences were so alike and the part taken by the accused in arranging what the woman would do was so similar in each case as to get rid of any suggestion of accident. The decision in *Smith's* case (9), therefore, involved no extension of the principle laid down in *Makin's* case (1). The challenged evidence was admissible both to show that what happened in the case of the first woman was not an accident and also to show what was the intention with which the accused did what he did. In *R. v. Armstrong* (10) the accused was indicted for the murder of his wife by administering arsenic to her. The wife was shown to have died from arsenical poisoning, but the defence urged that it was not shown that the husband had administered the poison to her, but that she had committed suicide. The accused had purchased a quantity of arsenic and made it up into a number of small packets, each containing what would constitute a fatal dose, but offered the explanation that he had purchased the poison merely to use it as a weed-killer in his garden. The prosecution called evidence to show that, eight months after the death of his wife, he secretly administered arsenic to another person. The Court of Criminal Appeal held that this evidence was admissible because it went to disprove the suggestion that he had purchased and kept arsenic for an innocent purpose. The decision in *Armstrong's* case (10) appears to me to involve no enlargement of the principle in *Makin's* case (1). LORD HEWART, C.J., rightly observed ([1922] 2 K.B. 566):

D "The fact that he was subsequently found not merely in possession of but actually using for a similar deadly purpose the very kind of poison that caused the death of his wife was evidence from which the jury might infer that that poison was not in his possession at the earlier date for an innocent purpose . . . "

E I do not find anything in the report of *R. v. Bywaters* (11) which could be read as extending the principle of *Makin's* case (1).

In *R. v. Sims* (8) there is a passage in the judgment of LORD GODDARD, C.J., which appears to have raised doubts in some quarters whether the principle in *Makin's* case (1) was being extended. The Lord Chief Justice observed ([1946] 1 All E.R. 701) that one method of approaching the relevant problem is to start with the general proposition that all evidence that is "logically probative" is admissible unless excluded by established rules, and that it would follow that evidence for the prosecution "is admissible irrespective of the issues raised by the defence". It is the words "logically probative" which have raised doubts in some minds. Such a phrase may seem to invite philosophic discussion which would be ill suited to the practical business of applying the criminal law with justice to all concerned. But I do not understand the Lord Chief Justice by the use of such a phrase to be enlarging the ambit of the principle in *Makin's* case (1) at all or to be disregarding the restrictions which LORD HERSCHELL indicated. In one sense, evidence of previous bad conduct, or hearsay evidence, might be regarded as having, logically, a probative value, but, of course, the judgment in *Sims' case* (8) is not opening the door to that. I understand the passage quoted to mean no more than what I have already formulated, viz., that the prosecution may advance proper evidence to prove its case without waiting to ascertain what is the line adopted by the defence. LORD DU PARCQ, in *Noor Mohamed's case* (4) ([1949] 1 All E.R. 371, 372), points out the possibility of misunderstanding the Lord Chief Justice's words and proceeds to put his own construction on them. In substance, I agree with his interpretation. There is, however, this to be added. The proper working of the criminal law in this connection depends on the due observance of both the propositions which I have endeavoured to expound in this judgment. While the prosecution may adduce all proper evidence which

tends to prove the charge, it must do so with due regard to the warnings contained in the judgments of KENNEDY, J., in *R. v. Bond* (12) ([1906] 2 K.B. 398) and VISCOUNT SANKEY, L.C., in *Maxwell v. Public Prosecutions (Director)* (13) ([1935] A.C. 320). A criminal trial in this country is conducted for the purpose of deciding whether the prosecution has proved that the accused is guilty of the particular crime charged, and evidence of "similar facts" should be excluded unless such evidence has a really material bearing on the issues to be decided. This, in my opinion, is the way in which LORD SUMNER's observations in *Thompson's case* (5) ([1918] A.C. 232) should be regarded. It should be noted that in that case LORD PARKER OF WADDINGTON (*ibid.*, 231) was careful to insist that it would be wrong to treat the decision as "laying down any principle capable of general application". With this explanation, I see no reason to differ from the conclusion in *Sims' case* (8). I have already expressed my view of the explanation of the decision in *Noor Mohamed's case* (4). It appears to me to turn on the court's view of the relevance of the earlier facts. So regarded, it is not an authority which ought to raise doubts as to the proper application of the principle in *Makin's case* (1), or as disturbing the two governing propositions which I have set out above.

Lastly, I must refer to *R. v. Hall* (14). The way in which the judgment of LORD GODDARD, C.J., in that case was framed was manifestly in deference to the passage in *Noor Mohamed's case* (4), which I have already discussed. On any view, the decision of the Court of Criminal Appeal was right, and I trust that the decision now being given by this House may serve to clear up some of the perplexities which *Hall's case* (14) showed to have arisen. It must always be remembered that every case is decided on its own facts, and expressions used, or even principles stated, when the court is considering particular facts, cannot always be applied as if they were absolute rules applicable in all circumstances.

Applying the above general propositions to the case before us, it appears to me that the only difficulty arises from the form of the summing-up. The learned judge, having decided that the eight counts should be tried together, did not warn the jury that the evidence called in support of the earlier counts did not in itself provide confirmation of the last charge. Yet, if the eighth count had been the only charge to be tried, it is difficult to see how the fact that there had been similar thefts of the same pattern before would confirm the allegation that the appellant was the thief on July 22. The eighth count raised two issues: (i) Was the money stolen on July 22? (ii) Is it proved that it was the appellant who stole it? Previous events could not confirm (i), which, indeed, was proved beyond dispute. As for (ii), the accused denied that he was the thief and the fact that someone perpetrated the earlier thefts when the appellant may have been somewhere in the market does not provide material confirmation of his identity as the thief on the last occasion. The case against him on July 22 depended on the facts of that date. Yet the jury may well have been swayed, however illogically, in reaching its verdict on the eighth count by the earlier evidence. It should have been warned of this danger, especially as *Sims' case* (8) shows that on an indictment containing several counts evidence may be given which supports only some of them: see the observations of LORD HEWART, C.J., in *R. v. Bailey* (15). One of the grounds stated in the appellant's notice of appeal to the Court of Criminal Appeal was that the learned judge failed to direct the jury that it was its duty to consider each count separately and not to be influenced in its decision on the eighth count by the evidence of the earlier thefts. The learned judge did, indeed, in his summing-up, go through each count separately, but he treated the evidence as cumulative and told the jury that the main question was whether it was satisfied that the appellant "stole the money" without pointing out that the relevant considerations might be somewhat different on the different counts. True it is that the jury by its verdict distinguished between them, but the fact remains that it was not directed to consider what

part of the evidence was properly of weight in deciding its verdict on the eighth count.

This leaves a final question to be determined, viz., whether the error can be regarded as immaterial in view of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, on the ground that no substantial miscarriage of justice has actually occurred. If it could be said that a reasonable jury after being properly directed would, on the evidence properly admissible, without doubt have convicted on the eighth count, the proviso should be applied. This is the test laid down by this House in *Stirland v. Public Prosecutions (Director)* (16). It is sufficient to say that, in the present instance, it would be going too far to make this assumption and the appeal must, therefore, be allowed. Section 44 (3) of the Criminal Justice Act, 1948, gives this House a discretion, when a criminal appeal is determined in favour of the accused, to direct payment out of local funds of costs to meet expenses incurred by him in the appeal to this House or in the prosecution of his appeal to the Court of Criminal Appeal. It is not the practice of the Court of Criminal Appeal to grant a successful appellant costs of an appeal to it save in exceptional circumstances, and, so far as that court is concerned, there is no special reason for disturbing that practice on the present occasion. But I think that the appellant should receive his taxed costs in respect of his appeal to this House. The section requires that this should be done by directing the proper payment out of local funds, but I understand that the Director of Public Prosecutions has already met, or agreed to meet, much of the appellant's expenses, and the effect of the House's order will, therefore, be to require local funds to bear only the balance, if any.

My Lords, my noble and learned friend, **LORD PORTER**, who is unable to be present today, authorises me to say that he agrees in all respects with this opinion.

LORD OAKSEY: My Lords, I agree with the principles stated by the noble viscount on the Woolsack as to the admissibility of evidence, but I find myself unable to agree with your Lordships' application of those principles to the facts of the case. I agree with your Lordships that the discretion of **PEARSON, J.**, to try the eight counts together ought not to be disturbed. As I understand it, your Lordships are of opinion that the evidence on counts 1 to 7 was relevant on the eighth count, but so slightly relevant that it should have been excluded by the judge. I agree with the principle that the judge at the trial has a discretion to exclude evidence which, though strictly speaking admissible, is only slightly relevant and, if it relates to former offences by the appellant, may have a prejudicial effect out of proportion to its relevance, but I do not agree that that principle is applicable to the facts of this case and I am of opinion that the summing-up of **PEARSON, J.**, and the judgment of the Court of Criminal Appeal were right.

There is, in my opinion, no question of general importance in this appeal. The only question is: Do the facts which were proved as to the thefts referred to in counts 1 to 7 tend so slightly to implicate the accused in the crime in July with which he was charged in the eighth count that they ought to have been excluded? The facts on the eight occasions were, undoubtedly, similar. The premises were the same. The method of entry to the premises was the same. The money taken was less than the money on the premises. The appellant might have broken into the premises while on duty as a police constable when money was stolen, and when he was on leave no thefts took place. The only difference in the July facts was that the appellant was proved then to be close by the premises directly after the alarm was given in circumstances of suspicion. It is, in my opinion, important to observe that there was no direct evidence that the appellant broke in and committed the theft in July. The evidence, of course, was much more cogent than the evidence of May and June, but it was not conclusive and was really only a much stronger case of opportunity. It is

true that the admission of the evidence of the facts of May and June involves the suggestion that the appellant committed crimes other than the particular crime on which ex hypothesi he was being tried, and, if the only relevance of the facts as to counts 1 to 7 was that he had committed crimes on those occasions, I should agree that evidence of such facts would be inadmissible. But that is not the only relevance of these facts. Their relevance consists and consists only, in my opinion, in the similarities which existed between the facts of May and June and the facts of July. It is one thing to prove that the appellant has committed a number of different crimes on different occasions; it may be a totally different thing to adduce evidence which tends to show that he has committed the same sort of offence in the same circumstances on several occasions. I do not understand your Lordships to hold that the evidence of what happened in July was inadmissible or should have been excluded on any of the counts 1 to 7, and, if that is so, it could, in my opinion, only be because of the same similarities in the evidence, from which it might be inferred that the accused stole the money on the first seven occasions although there was no direct evidence that he was, in fact, present when the money was stolen on any one of those occasions. The question may be tested in this way: Can it be said that no jury could reasonably find that one person committed all eight thefts? In my opinion, the same similarity must be equally relevant whether it is adduced on one count as on the others.

My Lords, I desire to add that I do not agree with the observations made by LORD DU PARCQ in stating the advice tendered to His Majesty in Council in *Noor Mohamed v. R.* (4) ([1949] 1 All E.R. 371), in which he criticised the judgment of the Court of Criminal Appeal in *R. v. Sims* (8). I do not agree with that criticism, which was not in any way necessary to the decision of the *Noor Mohamed* case (4). I see nothing wrong in approaching the question what evidence is admissible by considering, first, the general rule as to admissibility and, secondly, what are the exceptions to it. No one doubts that evidence of previous or subsequent bad or criminal conduct on the part of the accused is to be excluded unless it is relevant to some issue in the case, but it is for the prosecution to prove the guilt of the accused, and the prosecution must, in proving facts which are more consistent than not with the guilt of the accused, negative "a defence which would otherwise be open to the accused" to use the words of LORD HERSCHELL; L.C., in *Makin's* case (1) ([1894] A.C. 57). It is probably impossible to give an exhaustive definition of the kind of defences which may be open to a prisoner or of the kind of bad or criminal conduct which may be relevant to the question of his guilt on the particular charge on which he is being tried. The issue to which the evidence in question was, in my opinion, relevant was whether the appellant was near the premises in July for an innocent purpose or not. For these reasons I agree with the judgment of the Court of Criminal Appeal.

LORD MORTON OF HENRYTON: My Lords, I agree with the speech which has been delivered by my noble and learned friend on the Woolsack. I desire only to add that, in my view, evidence as to the thefts which occurred on the first seven occasions was not admissible for the purpose of the trial of the appellant on the eighth count, because the appellant was not proved to have been near the shop or even in the market, at the time when these thefts occurred. It is, however, quite clear that the learned judge invited the jury to take that evidence into account when considering the eighth count. In making these observations, I do not regard myself as differing in any way from the speech with which I have just expressed my agreement. I make them only for the purpose of explaining why I cannot accept the views which have just been expressed by my noble and learned friend, LORD OAKSEY.

LORD TUCKER: My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack I concur in the motion which he has

proposed. I agree with my noble and learned friend, LORD MORTON OF HENRY-TON, that the evidence with regard to the first seven occasions was irrelevant to the charge on the eighth count, but was left to the jury as relevant.

Appeal allowed.

Solicitors: *Sidney Torrance & Co.*, agents for *J. Levi*, Leeds (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

EAST INDIA TRADING CO., INC. v. CARMEL EXPORTERS AND IMPORTERS, LTD.

[QUEEN'S BENCH DIVISION (Sellers, J.), March 27, April 8, 1952.]

Money—Currency—Rate of exchange—Damages for breach of contract—Foreign judgment sued on in the United Kingdom—Rate at date of judgment.

On May 11, 1950, following a breach of contract by the defendants on June 13, 1949, the plaintiffs obtained final judgment against the defendants in the Supreme Court of the State of New York. On Sept. 20, 1949, between the date of the breach and that of the final judgment, the rate of exchange between the United States of America and the United Kingdom was altered from \$4.03 to \$2.80 to the pound sterling. In an action on the New York judgment,

HELD: since the plaintiffs had sued on the judgment and not on the breach of contract, they were entitled to judgment for the amount of the judgment debt converted into sterling at the rate of exchange at the date of the judgment (\$2.80 to the pound).

Scott v. Bevan (1831) (2 B. & Ad. 78) and *Madeleine Vionnet et Cie. v. Wills* ([1939] 4 All E.R. 136), applied.

AS TO DAMAGES IN FOREIGN CURRENCY, see HALSBURY, Hailsham Edn., Vol. 10, p. 150, para. 191; and FOR CASES, see DIGEST, Vol. 17, pp. 158-161, Nos. 596-614.

Cases referred to:

- (1) *Scott v. Bevan*, (1831), 2 B. & Ad. 78; 9 L.J.O.S.K.B. 152; 109 E.R. 1073; 35 Digest 174, 44.
- (2) *Di Ferdinando v. Simon, Smits & Co., Ltd.*, [1920] 3 K.B. 409; 89 L.J.K.B. 1039; 124 L.T. 117; 35 Digest 175, 52.
- (3) *Lebeaupin v. Crispin (R.) & Co.*, [1920] 2 K.B. 714; 89 L.J.K.B. 1024; 124 L.T. 124; 35 Digest 175, 51.
- (4) *Nouvion v. Freeman*, (1888), 37 Ch.D. 244; *affd.* H.L., (1889), 15 App. Cas. 1; 59 L.J.Ch. 337; 62 L.T. 189; 11 Digest 454, 1108.
- (5) *Williams v. Jones*, (1845), 13 M. & W. 628; 14 L.J.Ex. 145; 4 L.T.O.S. 318; 153 E.R. 262; 11 Digest 466, 1220.
- (6) *Madeleine Vionnet et Cie. v. Wills*, [1939] 4 All E.R. 136; [1940] 1 K.B. 72; 109 L.J.K.B. 22; 161 L.T. 311; 2nd Digest Supp.
- (7) *Cummings v. London Bullion Co., Ltd.*, [1952] 1 All E.R. 383.

ACTION on a judgment of the Supreme Court of the State of New York.

The plaintiffs claimed £11,703 3s. 5d., being the sterling equivalent of a sum for which they had obtained final judgment for a breach of contract in the Supreme Court of the State of New York on May 11, 1950, calculated at \$2.80 to the pound, being the rate of exchange at the date of the New York judgment. A master gave the plaintiffs leave to sign judgment for £8,131 4s. 9d., the sterling equivalent of the judgment debt at \$4.03 to the pound, being the rate of exchange at June 13, 1949, the date of the breach of contract, and gave the defendants leave to defend the action as to the balance of £3,571 18s. 8d., the issue being

whether \$4.03 or \$2.80 to the pound sterling was the correct rate of exchange at which the amount of the judgment debt should be converted into sterling.

Mocatta, Q.C., and P. H. R. Bristow for the plaintiffs.

S. Pascoe Hayward, Q.C., and I. H. Jacob for the defendants.

Cur. adv. vult.

April 8. **SELLERS, J.**, read the following judgment. The plaintiffs seek to enforce a judgment which they obtained on May 11, 1950, in the Supreme Court of the State of New York, United States of America, by claiming in this action the sterling equivalent of the amount in dollars of the judgment and costs at the rate of exchange prevailing at the date of the foreign judgment. The sole question for decision is whether the conversion of the amount in dollars of the foreign judgment and costs into pounds sterling, in which alone the English judgment can be given, is to be made at the rate of exchange ruling at the time of the foreign judgment or at some other time. On behalf of the defendants it is said that the question is open as it has not been the subject of a binding decision, and it is alleged that in the circumstances of this case and on principle the conversion should be made at the rate of exchange ruling, not at the date of the foreign judgment, but at the date when the defendants were in breach of their contract with the plaintiffs which gave rise to this liability.

By an award made on Aug. 2, 1949, in an arbitration between the parties in New York the defendants were held to have broken a contract dated Mar. 21, 1949, for the sale of some goods to the plaintiffs by failing to ship or deliver the goods, and the date of the breach was found to be June 13, 1949. There was an appeal, and the award was upheld on Dec. 7, 1949. In the interval, on Sept. 20, 1949, the rate of exchange which had previously at all material times been United States of America \$4.03 to the pound sterling became \$2.80 to the pound, and has remained so up to the present time. Judgment has already been entered for £8,131 4s. 9d. on the basis prevailing before the devaluation of sterling, and this is sufficient if the rate of exchange has to be calculated as on June 13, 1949, or at some date before Sept. 20, 1949. But a further sum of £3,571 18s. 8d. is due if the judgment is to be entered in this action at a rate of exchange which will give the plaintiffs the amount in dollars equivalent to the amount of the American judgment on May 11, 1950.

As far back as 1831 in *Scott v. Bevan* (1) a claim was made to enforce in this country a judgment obtained by the plaintiff in Jamaica. The headnote is as follows:

"In an action brought in England to recover the value of a given sum Jamaica currency, upon a judgment obtained in that island; the value is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment."

It appears that the only point taken, as learned counsel for the defendant indicated in that case, was whether the rate of exchange to be applied was the actual rate ruling between the two countries or the par rate of exchange, and, therefore, it is, perhaps, strictly accurate to say that it does not decide the point now in issue. But the original liability of the defendant was for damages for some breach of duty established in the Jamaica action, and the judgment quantified the amount due to the plaintiff. Neither LORD TENTERDEN, C.J., in his judgment nor the other judges nor any of the distinguished counsel seem to have questioned that the material date for calculating the conversion was the date of the Jamaican judgment. Neither has that date been criticised when the case has been referred to on occasions since, as one might have expected from the distinguished judges who have considered it if they had thought the decision wrong in this respect, although it is, I think, correct to say that the point has never called for express consideration. I am omitting a criticism of McCARDIE, J. (in *Lebeaupin v. Crispin (R.) & Co. (3)*), based on what would seem to be a misreading of the decision.

The plaintiffs here base their claim on the foreign judgment. That is the cause of action and it creates the debt, they allege, which is enforceable by action in this country. They rely on a statement of the law expressed in r. 86 in DICEY'S CONFLICT OF LAWS, 6th ed., p. 403, which is in these terms:

"Subject to the exceptions hereinafter mentioned, a valid foreign judgment in personam may be enforced by an action for the amount due under it if the judgment is (i) for a debt, or definite sum of money; and (ii) final and conclusive, but not otherwise."

None of the exceptions is relevant, but at p. 410 there is set out a sub-rule:

"A valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given."

It was alleged and relied on by the defendants, but not conceded by the plaintiffs, that, instead of suing on the foreign judgment, the plaintiffs could have proceeded in this country on the original cause of action, namely, the breach of contract. In that case the damages would be assessed at the date of the breach of contract if the action were successful: see *Di Ferdinando v. Simon, Smits & Co., Ltd.* (2). The defendants submitted that, that being so, the court should hold that the date of the breach of contract should in both cases be held to be the date when the rate of exchange had to be applied, otherwise it would vary according to which course the plaintiffs took, either to enforce the judgment obtained in New York, or to start a fresh action here. For myself, I see less objection to a plaintiff who has obtained judgment rather than a defendant who is in default being in a position to select the most advantageous course. A rigid rule may have the advantage of certainty, but I apprehend that in some circumstances it might prove advantageous to the party in default, and equally disadvantageous to the innocent party. Rates of exchange may in a given period vary, first in one direction and then in the opposite, and it may be that the fluctuations of the exchange market might give scope to either of the parties concerned to turn it to his advantage by expediting or delaying the steps he takes. MCCARDIE, J., envisaged this in *Lebeaupin v. R. Crispin & Co.* (3) ([1920] 2 K.B. 722). But I do not think the advantage would always be as one-sided as the learned judge there indicated. It is, however, not open to me to apply some sort of equitable rule which would seek to ensure the fairest award when the parties' dealings have been affected by variations in the rate of exchange. The American judgment was a judgment for a fixed sum, and was final and conclusive. In *Nouvion v. Freeman* (4) in the Court of Appeal, COTTON, L.J., stated the law in this way in his judgment (37 Ch.D. 250):

"What is required in England in order that a foreign judgment may be sued upon here as giving a good cause of action? A foreign judgment does not, in the view of an English court, merge the original cause of action, but if the party likes to proceed here on his original cause of action, he may do so, notwithstanding the foreign judgment. If he elects to proceed on the foreign judgment, then he must show that the matter has been adjudicated upon by a competent court, and that the adjudication is final and conclusive."

In the same case in the House of Lords LORD HERSCHELL put the matter in this way (15 App. Cas. 8):

"Now, my Lords, there can be no doubt that in the courts of this country effect will be given to a foreign judgment. It is unnecessary to inquire upon what principle the courts proceed in giving effect to such a judgment, and in treating it as sufficient to establish the debt. Reliance was placed upon a dictum by PARKE, B., and ALDERSON, B., in the case of *Williams v. Jones* (5) (13 M. & W. 633) where the law is thus stated: 'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an

action of debt to enforce the judgment may be maintained'. But it was conceded, and necessarily conceded, by the learned counsel for the appellant, that a judgment, to come within the terms of the law as properly laid down, must be a judgment which results from an adjudication of a court of competent jurisdiction, such judgment being final and conclusive."

It may be an open question for a higher court whether a debt expressed in foreign currency must, in litigation in this country, be converted into sterling with reference to the rate of exchange prevailing on the day when the debt was payable or with reference to the day of the judgment in the English court. That was not the contention on behalf of the defendants, for in the present case the result would be the same. In the case of the enforcement of a foreign judgment I would follow the most recent decision of *Madeleine Vionnet et Cie. v. Wills* (6), which decides that the correct date on which to convert a debt in foreign currency sued for in this country is the date on which the debt became due. This is in accord with *Scott v. Bevan* (1) which, after all these years, should be followed unless there are impelling reasons to the contrary. This decision also makes for uniformity between a foreign judgment which can be registered and one which has to be enforced by action. By the Foreign Judgments (Reciprocal Enforcement) Act, 1933, it is provided by s. 2 (3):

"Where the sum payable under a judgment which is to be registered is expressed in a currency other than the currency of the United Kingdom, the judgment shall be registered as if it were a judgment for such sum in the currency of the United Kingdom as, on the basis of the rate of exchange prevailing at the date of the judgment of the original court, is equivalent to the sum so payable."

The American judgment could not be registered under that Act, there being no reciprocal arrangement between the two countries, but the principle which I have applied here gives the same result as a registration under the Act would have given.

The Exchange Control Act, 1947, has no application to this case. No question arises here such as was the subject of decision in *Cummings v. London Bullion Co., Ltd.* (7) to which I was referred by learned counsel. In my judgment, authority and good reason are against the defendants' contention that the date of the breach of the contract should be taken as the material date. The American judgment is the immediate source from which the defendants' liability flows in the present action, and no earlier date can be called into consideration. I give judgment for the plaintiffs for £3,571 18s. 8d. together with interest from May 11, 1950, on this amount only at 4 per cent. which is the rate current in our courts, although I understand that a higher rate of interest rules in the American tribunal where the judgment was originally obtained.

Judgment for the plaintiffs.

Solicitors: *Richards, Butler & Co.* (for the plaintiffs); *Fink, Proudfoot & Waters* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re AN APPLICATION BY MARLY LABORATORY, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.),
March 26, 27, 1952.]

Chose in Action—Rights included in chose—Rights of party to apply for costs of action.

A *Costs—Party not represented by counsel—Company—Jurisdiction to award costs.*

Judgment—Order—Correction—Accidental slip or omission of any party to proceedings—Right to apply for correction—R.S.C., Ord. 28, r. 11.

B On an application by M.L., Ltd. for registration of a trade mark of which it was the proprietor, the proceedings on its behalf before the hearing officer acting on behalf of the Comptroller-General of Trade Marks were conducted by G., its managing director. The hearing officer having decided that the trade mark might be properly registered, the opponents gave notice of appeal. So as to have the right of audience on appeal, G. procured an assignment to himself of the trade mark and all choses in action relating to it, and he was added as a party to the proceedings. The appeal was dismissed by the judge, and the opponents were ordered to pay G.'s costs of the motion on appeal, but the order for costs contained no reference to the costs of M.L., Ltd. An application by G. to the judge for an order that the costs of M.L., Ltd. should be treated as his costs was refused, and the judge held that, although the failure to include in the order for costs any reference to M.L., Ltd. was a slip on the part of the court which could be corrected under R.S.C., Ord. 28, r. 11, he had no jurisdiction to amend the order by making provision for the costs of M.L., Ltd. unless M.L., Ltd. applied by counsel for the amendment.

C HELD: (i) a chose in action did not include the right of a party to an action to make an application to the judge for an order for costs, and, therefore, under the Law of Property Act, 1925, s. 136 (1), G. was not entitled by reason of the assignment to apply to the judge for an order that the costs of M.L., Ltd. should be treated as his costs.

E (ii) an order for costs could have been made in favour of M.L., Ltd., notwithstanding the fact that it was not represented by counsel at the hearing of the appeal.

F (iii) any party to the proceedings was entitled to apply under R.S.C., Ord. 28, r. 11, to have an accidental slip or omission put right, and, therefore, on an application to that effect by G., the order for costs could be amended by including therein a direction that the costs of M.L., Ltd. of the motion of appeal should be paid by the opponents.

FOR R.S.C., ORD. 28, r. 11, see THE ANNUAL PRACTICE, 1951, p. 465.

G APPEAL by the applicant, Friedrich Josef Gurtner, from an order of LLOYD-JACOB, J., dated Dec. 17, 1951, whereby he refused to vary an order for costs made by him on Jan. 24, 1951, in proceedings in respect of the registration of a trade mark.

H The applicant was the managing director of a company, Marly Laboratory, Ltd., which applied for registration of a trade mark of which it was the proprietor. The application was opposed by Morny, Ltd., but the hearing officer, Mr. W. M. Faulkner, acting for the Comptroller-General of Trade Marks, decided that the mark might be properly registered. The proceedings before the hearing officer were conducted by the applicant on behalf of Marly Laboratory, Ltd., and, after the opponents, Morny, Ltd., had given notice of appeal from the decision of the hearing officer, the applicant procured an assignment to himself by deed of all the interest which Marly Laboratory, Ltd. had in the trade mark and the business connected with it, including all choses in action relative to the subject-matter assigned, so as to have the right of audience before the High Court. On notice being given of the assignment, he was added

as a party to the proceedings. Marly Laboratory, Ltd. remained a party, but did not appear by counsel before the judge. LLOYD-JACOB, J., dismissed the appeal from the order of the hearing officer, and, by an order dated Jan. 24, 1951, directed that the applicant's costs of the motion should be paid by the opponents. The order contained no reference to the costs of Marly Laboratory, Ltd. On Apr. 9, 1951, an appeal by the opponents from the order of LLOYD-JACOB, J., dismissing the appeal from the decision of the hearing officer was dismissed by the Court of Appeal. On taxation of costs, the taxing master refused to allow costs incurred by Marly Laboratory, Ltd., on the ground that they were not part of the applicant's costs. The applicant then applied to the learned judge for an order varying the order of Jan. 24, 1951, by directing that the costs of Marly Laboratory, Ltd. should be treated as his costs, but his application was refused by LLOYD-JACOB, J. In his judgment the learned judge said that the failure to include any reference to the costs of Marly Laboratory, Ltd. in his order of Jan. 24, 1951, was an omission, a slip on the part of the court, which the court could correct under R.S.C., Ord. 28, r. 11, but that he could not make an amendment under r. 11 unless someone properly authorised on the company's behalf invited him to do so.

The applicant appeared in person.

Whitford for the opponents.

SIR RAYMOND EVERSLED, M.R., stated the facts, and continued: I do not take the view that, in the first instance, an order for costs could not have been made in favour of Marly Laboratory, Ltd. without the company being present by counsel to ask for them. In other words, on Jan. 24, 1951, though Marly Laboratory, Ltd. was not there, it would have been competent for the judge, and, obviously, in accordance with his intention, to order that the costs of the motion, properly incurred by Marly Laboratory, Ltd., should be paid by the opponents. It would be absurd to suggest that Marly Laboratory, Ltd. would necessarily have to appear by counsel merely to ask for costs.

Then the question is raised whether, the mistake (viz., the omission) having been made, anyone other than Marly Laboratory, Ltd. can apply under R.S.C., Ord. 28, r. 11, to have it put right. In my view, any party to the action is entitled to come to the court and draw the attention of the court to the fact (if it be the fact) that a slip has been made in the order, even though the putting right of the slip does not, in fact, benefit, and may even injure, the party making the application. I think that counsel for the opponents was disposed to agree that (to take the extreme case) it would have been open to the opponents to make the application on the ground that a mistake had been made of which they did not desire to take advantage. In this case the applicant made the application, but sought a different kind of order. He claimed that the proper costs incurred by Marly Laboratory, Ltd. ought now to be part of his costs, and he relied on the assignment to him of all the interest which that company had in the trade mark, and also on the Law of Property Act, 1925, s. 136 (1). As regards that, I think that the applicant's argument is erroneous and that it rests on the hypothesis (which is also erroneous) that a chose in action includes the right of a party to an action to make an application to the judge for an order for costs which the judge may or may not direct, and, therefore, I do not think that the applicant's application was correctly made. But I think that there is no objection to the applicant saying: "I am a party. I am in fact interested, and I say that there has been a slip which ought to be put right, in favour, not of me, but of another party, namely, Marly Laboratory, Ltd." I think that, in all the circumstances, the judge erred in thinking that he had no jurisdiction to do what he plainly would have liked to do and intended to do. The order which I think should be made is that the order of Jan. 24, 1951, should be treated as amended by including in it a direction for taxation of the party and party

costs of Marly Laboratory, Ltd. of the motion, with a direction that they be paid by the opponents or set off.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I also agree.

Appeal allowed.

Solicitors: *J. D. Langton & Passmore* (for the opponents).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

R. v. SUMMERS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Ormerod and Parker, JJ.), April 1, 1952.]

Criminal Law—Trial—Direction to jury—Use of expression “reasonable doubt.”

Per curiam: In summing up a criminal case to the jury it is advisable not to direct them that, if they have a “reasonable doubt” about the guilt of the prisoner, they should acquit him. It is difficult to define what is a “reasonable doubt”, and an explanation of the phrase tends to result in confusion rather than clarity. The jury should be directed that they should not convict unless they are satisfied by the evidence given by the prosecution that the offence has been committed, so that, when they give their verdict, they can be sure that it is a right one.

AS TO JUDGE'S SUMMING UP, see HALSBURY, Hailsham Edn., Vol. 9, p. 170, para. 247; and FOR CASES, see DIGEST, Vol. 14, pp. 296-303, Nos. 3124-3195.

APPEAL against conviction and sentence.

The appellant was convicted at Surrey Quarter Sessions of stealing copper from a mausoleum and was sentenced to five years' imprisonment. When arrested and questioned, he said: “How did you find out I was in that? There is no need to put me up for identification . . . I know I am bound to be picked out”. In summing up the chairman told the jury that, if they had a reasonable doubt as to the guilt of the appellant, they should acquit him. He then explained what he meant by “reasonable doubt”. The Court of Criminal Appeal in dismissing the appeal made certain observations on the use of the expression “reasonable doubt” with which this report is concerned.

Buckland for the appellant.

Sir John Cameron for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: There is no ground for interfering with the conviction so far as the evidence is concerned, but the learned single judge gave leave to appeal because of a passage in the summing up. The chairman of quarter sessions said:

“We have used the words ‘reasonable doubt’. Some people have difficulty in understanding that. I feel sure you will not have any difficulty in understanding it. If you come to the conclusion on the evidence when you are dealing with these conversations: ‘This might have happened, or it might not’, that is a reasonable doubt. I do not want you to bring yourself into that frame of mind if your real view is: ‘It is just barely possible.’ . . . Look at it from the point of view of ordinary people, as if you were considering something in your ordinary lives. Would you, as ordinary people, if this had been something you had been told about by friends of yours, be inclined to believe them or disbelieve them? That is the sort of thing which is meant by ‘reasonable doubt’. It is nothing to do with

lawyers' jargon; it is merely the sort of judgment which the ordinary man of the world brings to bear on his own affairs, and look at it from that point of view."

In the opinion of the court, no jury hearing that would think that the learned chairman was saying any more than: "If you have a doubt in this matter, remember the case is not proved and you must acquit".

I have never yet heard any court give a real definition of what is a "reasonable doubt", and it would be very much better if that expression was not used. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity. It is far better, instead of using the words "reasonable doubt" and then trying to say what is a reasonable doubt, to say to a jury: "You must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed". The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[Reported by J. D. PENNINGTON, Esq., *Barrister-at-Law.*]

Re GOVERNMENT OF INDIA AND MUBARAK ALI AHMED.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., and Parker, J.), April 4, 1952.]

Extradition—Fugitive offender—Fugitive from Republic of India—Operation of Fugitive Offenders Act, 1881 (c. 69), s. 5—Preservation of existing provisions of Imperial statutes—India (Consequential Provision) Act, 1949 (c. 92), s. 1 (1).

Extradition—Fugitive offender—Political offence—Fugitive Offenders Act, 1881 (c. 69), s. 10.

The applicant, a native of Pakistan, was being tried in India on charges of forgery and fraud when he broke his bail and fled to Pakistan whence he came to England where he was arrested on a provisional warrant issued by a metropolitan magistrate on the application of the government of India. After hearing legal submissions the magistrate made an order under the Fugitive Offenders Act, 1881, s. 5, for the applicant's detention in custody pending his return to India to answer the charges made against him. On an application by the applicant for a writ of habeas corpus,

HELD: the Fugitive Offenders Act, 1881, was in force as between India and Great Britain on Jan. 26, 1950, when India became a republic, and it was continued in force by virtue of s. 1 (1) of the India (Consequential Provision) Act, 1949, and, therefore, the magistrate had jurisdiction to make the order for the applicant's return.

Per LORD GODDARD, C.J.: If the offence with which a man is charged is really a political offence the court would apply the same rules under the Fugitive Offenders Act, 1881, as are laid down in s. 3 (1) of the Extradition Act, 1870, and would, no doubt, refuse to make an order returning him to the country seeking his return.

AS TO RETURN OF FUGITIVE OFFENDERS, see HALSBURY, Hailsham Edn., Vol. 14, p. 544, para. 1046, and pp. 549-551, paras. 1057-1060; and FOR CASES, see DIGEST, Vol. 24, pp. 889-891, Nos. 147-155.

Cases referred to:

- (1) *Amand v. Secretary of State for Home Affairs*, [1942] 2 All E.R. 381; sub nom. *Amand v. Home Secretary & Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147; sub nom. *R. v. Secretary of State for Home Affairs & Minister of Defence of the Royal Netherlands Government*. Ex p. *Amand*, 111 L.J.K.B. 657; 167 L.T. 177; 2nd Digest Supp.
- (2) *Re Castioni*, [1891] 1 Q.B. 149; 60 L.J.M.C. 22; 64 L.T. 344; 55 J.P. 328; 24 Digest 873, 36.

APPLICATION for a writ of habeas corpus and for the discharge of an order for the detention of the applicant pending his return to India to take his trial on charges of forgery and fraud, made on Mar. 21, 1952, by a metropolitan magistrate, sitting at Bow Street Magistrate's Court, under the Fugitive Offenders Act, 1881. In an affidavit the applicant set out the following grounds in support of his application: (i) that the Fugitive Offenders Act, 1881, was of no effect as between the republic of India and this country; (ii) that there was no substance in the charges made against him in that all the information was available to the complainants in 1946, that their differences were settled by his paying an agreed sum, and that no further action was taken until the eve of the invasion of Hyderabad by India when the present proceedings were commenced in order to prevent the applicant from taking any active part in the events of that time; (iii) that the proceedings were based on political considerations only, that since June, 1948, efforts had been made to keep him in custody on political grounds, and that his family had also been persecuted; (iv) that he was publicly branded as a political spy for Pakistan and that he would not be given a fair trial by any jury in the presidency of Bombay; (v) that, if returned to Bombay to stand trial, he would be unable to defend himself properly by reason of his inability to call the necessary witnesses who were in Pakistan and would not go to India; (vi) and that he had no funds in India for his defence, all his property there having been confiscated.

Sir Godfrey Russell Vick, Q.C., and *Aarvold* for the applicant.

LORD GODDARD, C.J.: This is a motion for a writ of habeas corpus to bring up and discharge the applicant, Mubarak Ali Ahmed, who is at present the subject of an order under the Fugitive Offenders Act, 1881, made by a metropolitan magistrate sitting at Bow Street Magistrate's Court, returning him to India there to take his trial on a charge of forgery. The application is made partly under s. 5 of the Fugitive Offenders Act, 1881, which gives a person who has been ordered by a magistrate to be returned the right to apply for a writ of habeas corpus, and partly under s. 10 of the Act which gives power to a superior court in this country to discharge an offender where, to use the words of the marginal note, the case is frivolous or the return would be unjust.

The applicant, who claims to be a native of Pakistan, was arrested in the republic of India and was there charged with the offence of forgery and fraud. He was committed for trial, and after the trial had proceeded for two or three days he defaulted on his bail and fled from India. He fled first to Pakistan. We are told—it is not for this court to go into the matter, because it only concerns Pakistan and India—that it is thought doubtful whether at the present time extradition proceedings lie between Pakistan and India. The applicant did not stay in Pakistan, where he might have been safe. He came to this country and was arrested here, and the only substantial question is whether or not the Fugitive Offenders Act, 1881, still applies as between this country and the republic of India.

By s. 12 of the Fugitive Offenders Act, 1881, that Act could be applied to any of Her Majesty's dominions by an Order in Council, and we were told that an Order in Council was made in 1904 (S.R. & O., 1904, No. 318), applying the Act to

India which was then a part of the sovereign's dominions. Until India became an independent republic on Jan. 26, 1950, there was no question that the Act was in force so that its provisions could be applied to a person who was alleged to be a fugitive offender from India and was arrested in this country. In 1947 Dominion status was conferred on India, and the constitution which had hitherto applied in India no longer applied after Jan. 26, 1950, when India set up its own constitution and became an independent republic, but remained a member of the Commonwealth. It may be—I speak with diffidence—that it is an unusual situation that a republic can be a member of the Commonwealth, but so it is. That is recognised by Her Majesty and this court takes notice of it, but we need not go into those points because, in anticipation of India becoming a republic, on Dec. 16, 1949, the Imperial Parliament passed the India (Consequential Provision) Act, 1949.

The first point made on behalf of the applicant is that the Fugitive Offenders Act, 1881, no longer applies as between this country and India, and, therefore, if a fugitive offender gets to this country from India he cannot be handed over. The answer to that seems to be that by the clear words of the India (Consequential Provision) Act, 1949, s. 1 (1), it is provided that all Acts, rules of law, and so forth, which were in existence at the time when India became a republic, are to remain in force. The words of s. 1 are:

“(1) On and after the date of India's becoming a republic, all existing law, that is to say, all law which, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, is in force on that date or has been passed or made before that date and comes into force thereafter, shall, until provision to the contrary is made by the authority having power to alter that law and subject to the provisions of sub-s. (3) of this section, have the same operation in relation to India, and to persons and things in any way belonging to or connected with India, as it would have had if India had not become a republic . . . (3) His Majesty may by Order in Council make provision for such modification of any existing law to which this Act extends as may appear to him to be necessary or expedient in view of India's becoming a republic while remaining a member of the Commonwealth, and sub-s. (1) of this section shall have effect in relation to any such law as modified by such an order save in so far as the contrary intention appears in the order. An Order in Council under this section—(a) may be made either before or after India becomes a republic, and may be revoked or varied by a subsequent Order in Council; and (b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.”

It seems to me clear that that Act, which was passed in direct contemplation of India becoming a republic within some five weeks of its passing, preserves in force all the laws of this country relating to India which were in force at the date of the republic coming into existence. That is the only possible construction which can be put on s. 1, and it seems to me extremely likely that the Fugitive Offenders Act, 1881, was one of the Acts which Parliament had in mind when preserving the operation of existing statutory provisions, but we need not consider that. All we have to do is to construe the provisions of the Act of 1949. It is clear that the Fugitive Offenders Act, 1881, was in force as between India and this country at the time when India became a republic, and it remained in force by the joint operation of the Act of 1881 and an Order in Council of 1904 which is still in force. In my opinion, therefore, the Fugitive Offenders Act, 1881, is in full force and effect between this country and India, the magistrate had jurisdiction to inquire into the matter, and there is no complaint to be made on that ground that an order was made.

Secondly, the application is to this court as a superior court under the Fugitive Offenders Act, 1881, s. 10. We have allowed fairly full argument on this matter

because, since the decision of *Amand v. Secretary of State for Home Affairs* (1), it is very doubtful whether any appeal can lie from this court, the proceeding coming within the definition of a criminal cause or matter. The application to this court is that the court refuse to order the fugitive to be given up and it is made under s. 10 which provides:

A "Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just."

B

Affidavits have been filed in which it is suggested that the applicant is being persecuted as a political offender. I am quite sure that in a proper case the court would apply the same rules with regard to applications under the Fugitive Offenders Act, 1881, as it does under s. 3 (1) of the Extradition Act, 1870. If it appeared that the offence with which the prisoner was charged was in effect a political offence, no doubt this court would refuse to return him. The sort of case that has arisen (e.g., *Re Castioni* (2)) is where a man has been charged with murder and it is shown that there was a revolution in the country where he was and that the alleged murder was committed in the course of the revolution and was regarded as a political matter. In such a case extradition has been refused. The present applicant was standing his trial on a charge of forgery. It may be that, rightly or wrongly—it is a matter into which this court cannot inquire—he was regarded by the Indian government as a troublesome political personage who could be dealt with under the Indian Public Security Act, but this court finds that the applicant was actually on trial in India when he fled. It would be astonishing if in those circumstances this court said they would not hand him back because it would be unjust or oppressive to do so. He was allowed bail during the course of the trial and broke his bail, and we are now asked to refuse to send him back to India because, it is said, he will not get a fair trial. I think it would be an impossible position for this court to take up to say that they would not return a person for trial to a country which is a member of the Commonwealth and where it is known that courts of justice have been presided over by Indian judges for very many years because we thought the court would not give him a fair trial. That would be an insult to the courts of India. It seems to me that under the words of s. 10 of the Act of 1881, wide as they may be, we cannot say that it would be unjust or oppressive to return this man to India to take his trial. For these reasons, the court refuses the application.

D

E

F

PARKER, J.: I agree.

Application refused.

Solicitors: *Philip Conway, Thomas & Co.* (for the applicant).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CORK v. KIRBY MACLEAN, LTD.

[QUEEN'S BENCH DIVISION (Donovan, J.), March 17, 18, April 11, 1951. ^{Reversed in part. C.A. [1952] 2 E.R. 402.}
Building—Safety regulations—Working platform—“Used for

—“Material”—Painter's bucket of distemper and brush—Failure to provide guard-rails or toe-boards—Workman's fall through epileptic fit—Building (Safety, Health and Welfare) Regulations, 1948 (S.I., 1948, No. 1145), reg. 22 (c), reg. 24 (1).

A
 A painter employed on distemping the roof inside a factory, was working on a platform twenty-seven inches wide and twenty-three feet above the floor and on it from time to time he placed his bucket of distemper and brush. No guard-rails or toe-boards were provided for the platform, contrary to reg. 24 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, and, as a result of an epileptic fit, the painter fell from the platform and was killed. He had not disclosed to his employers at the time of his engagement that he was subject to such fits and was forbidden to work at heights. B

C
 HELD: (i) the painter's bucket of distemper and brush were “material” and the platform was used for “the deposit of material” within the meaning of reg. 22 (c) of the regulations, and, therefore, the employers were in breach of the requirement of that regulation that the platform should be not less than thirty-four inches wide,

(ii) as the employers could not discharge the onus which was on them of showing that the painter would have fallen from the platform even if reg. 24 (1) had been complied with, they were liable for damages for the accident as arising from their breach of duty in not complying with it. D

Vyner v. Waldenberg Bros., Ltd. ([1945] 2 All E.R. 547), applied.

Cases referred to:

- (1) *Vyner v. Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] K.B. 50; 115 L.J.K.B. 119; 173 L.T. 330; 110 J.P. 76; 2nd Digest Supp.
 (2) *Wicks v. Dowell & Co., Ltd.*, [1905] 2 K.B. 225; *sub nom. Wilkes v. Dowell & Co.*, 74 L.J.K.B. 572; 92 L.T. 677; 34 Digest 266, 2665. E

ACTION for damages for negligence and breach of statutory duty.

F
 The plaintiff was the administratrix of the estate of her husband, the workman, Albert Cork, who, on Jan. 14, 1950, was employed by the defendants on distemping the roof inside a factory at Colchester belonging to Davey Paxman, Ltd., with whom the defendants had contracted to do the work. While working on a platform twenty-seven inches wide and twenty-three feet above the floor of the factory, to which there were no guard-rails or toe-boards, and on which he used to rest his bucket containing distemper and his brush, the workman fell to the floor and was killed. The plaintiff claimed damages for herself and her infant son under the Fatal Accidents Acts, 1846-1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, alleging failure by the defendants to provide and maintain a safe system of work and the breach by them of the Building (Safety, Health and Welfare) Regulations, 1948, reg. 22 (c) (requiring in the circumstances a minimum width of platform of thirty-four inches) and reg. 24 (1) (requiring the provision of guard-rails and toe-boards). The defendants contended that the platform was not a platform within the meaning of reg. 22 (c) because it was not used for the deposit of material, and that they were excused from providing toe-boards by the terms of reg. 24 (5) (a) because their provision was impracticable on account of the nature or special circumstances of the work. G
 They submitted that the accident was caused by the onset of an epileptic fit which made the workman lose consciousness and fall, and said that they were absolved from liability because he had concealed from them the fact that he was an epileptic and was forbidden to work at heights. H

F. H. Lawton for the plaintiff.

R. Bowen for the defendants.

Cur. adv. vult.

April 7. **DONOVAN, J.**, stated the facts and continued: The distemping work in question admittedly comes within the scope of the Building (Safety, Health and Welfare) Regulations, 1948, and the following of those regulations are in point here. By reg. 4:

A "It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply (i) to comply with such of the requirements of regs. 5-30 . . . as affect any workman employed by him."

By reg. 22:

B "Every working platform from which a person is liable to fall more than six feet six inches shall be—(a) closely boarded, planked, or plated; (b) at least twenty-five inches wide if the platform is used as a footing only and not for the deposit of any material; (c) at least thirty-four inches wide if the platform is used for the deposit of material."

By reg. 24 (1):

C ". . . every side of a working platform or working place, being a side thereof from which a person is liable to fall a distance of more than six feet six inches, shall be provided with a suitable guard-rail or guard-rails of adequate strength, to a height of at least three feet above the platform or place and above any raised standing place on the platform, and with toe-boards up to a sufficient height being in no case less than eight inches and so placed as to prevent so far as possible the fall of persons, materials and tools from such platform or place."

D The working platform used by the deceased workman to do his work was a platform from which he was liable to fall more than six feet six inches. In fact, he was liable to fall, and did fall, twenty-three feet. The platform was used for the deposit of material—to wit, his bucket containing the distemper he was using and his brush. It was not thirty-four inches wide, but only some twenty-seven inches. Prima facie, therefore, there was a breach by the defendants of reg. 22 (c). Counsel for the defendants contests this view on the ground that, if all that a painter does is to rest his bucket on the platform and lay down his brush there from time to time, the platform is not used "for the deposit of material" within the meaning of the regulation. Some evidence was given to the effect that the painter should carry an "S" hook with him and by means of it hook his bucket on something convenient nearby instead of leaving it on the platform. No such rule was enjoined on the workman. Mr. Everett, the district manager of the defendants, said the bucket *could* be placed on the platform, and I think the defendants must have contemplated that some of their painters would from time to time do this. It is further clear from the terms of proviso (iv) of reg. 22 (at least to me) that painters' buckets and brushes are "material" within the meaning of the word as used in reg. 22 (c). They are certainly "material" in the ordinary sense of that word in the English language, and I see no reason for giving a restricted meaning to the term in these regulations. I come to the conclusion, therefore, that the defendants were in breach of that regulation.

G [His LORDSHIP reviewed the evidence, held that it had not been impracticable to provide toe-boards, and that, therefore, the defendants were in breach of reg. 24 (1) in not providing them, and continued:] The question now arises whether the breaches of the statutory regulations above referred to, or either of them, caused the accident. The decision of the Court of Appeal in *Vyner v. Waldenberg Bros., Ltd.* (1) makes it clear that the defendants must show that they did not, for here there were breaches of safety regulations and the workman was injured in a way which could result from the breaches. Then, says the Court of Appeal, the onus of proof shifts on to the employer to show that the breach

was not the cause. The conclusion from the evidence relating to the epilepsy from which the workman suffered, which seems to me to be inevitable, is that the workman must suddenly have lost consciousness while he was on the platform, and, in consequence, he fell from it to the floor, and I think the reason why he thus lost consciousness must have been the onset of one of the epileptic fits to which he was unfortunately subject. Such a finding, say the defendants, will absolve them from responsibility, for the workman concealed from them that he was an epileptic who had been forbidden to work at heights, and, had he disclosed those facts, as he should, he would never have been put to work on the platform in question. He was shown what work he would have to do before he was engaged and he said he could do it. All this is true. In other words, a *causa sine qua non* of the accident was the workman's non-disclosure of his affliction. But what I have to determine is, I think, the *causa causans* of the injuries which the workman suffered, or, as it is described in the case cited to me by counsel for the plaintiff, *Wicks v. Dowell & Co., Ltd.* (2), the immediate, and not the remote, cause. The immediate cause was the workman's fall from the platform and the effect of what the Court of Appeal said in *Vyner v. Waldenberg Bros., Ltd.* (1) seems to me to be that I must treat the breach of the statutory regulations as occasioning that fall, unless the defendants establish the opposite.

Here, I think, I should be on my guard against a possible insidious effect which the word "epileptic" tends to produce on one's mind. In the last analysis the workman fell from the platform because he lost control over his body. He lost it through unconsciousness induced by epilepsy. The regulations are designed to prevent workmen falling from working platforms, and one obvious reason why a workman may so fall is that temporarily he loses control over his bodily movements. He may lose that control through carelessness, or illness, or unconsciousness. The fact that unconsciousness may be the cause in no way absolves the employer who is in breach of the regulations, still less because the unconsciousness itself is due to some particular malady. The fact that here the cause was epilepsy does not really differentiate the case from that where a man loses consciousness because of an ordinary faint. The defendants say, therefore, as I think they must, that, had the workman told them of his affliction, he would never have been on the platform at all. In my view, they must go further. They must establish that the workman would have fallen off the platform even had handrails and toe-boards been provided. But this is pure speculation. There is an obvious chance that toe-boards might have saved him. It is also possible that he had some sudden, if short, warning of the fit, sufficient to enable him to grip a handrail. On two previous occasions when working for other employers he was able, when having a "bad turn", as he called it, to hold on to the ladder, descend it, and sit or lie down till he was better. It is pure surmise to say that had the regulations been obeyed the workman would still have died.

One cannot help feeling some sympathy with the defendants for they knew nothing of the workman's complaint, but the consequences of disobedience to these statutory regulations cannot depend on whether or not the workman discloses all or some of his infirmities. Otherwise the courts would soon be engaged on compiling a list of legally notifiable disorders. The simpler task is for the employer to do his duty and to obey the regulations, thus protecting himself as well as his workmen. Here the defendants broke the regulations. They told me that they took a deliberate decision not to have handrails or toe-boards, and the reason was that they were commercially impracticable though not impracticable in fact. An accident happened of the kind the regulations were designed to prevent and they must pay for the consequences unless they show that it would have happened had the regulations been obeyed—which they cannot do. In the circumstances the plaintiff succeeds in her claim based on breach of statutory duty.

HIS LORDSHIP assessed the damages under the Fatal Accidents Acts, 1846-1908, at £1,500 (including £500 to go to the infant child) and under the Law Reform (Miscellaneous Provisions) Act, 1934, at £294 3s. 6d., and gave judgment for the plaintiff for those amounts.

Judgment for the plaintiff.

Solicitors: *Ellison & Co.* (for the plaintiff); *Kimber, Williams, Sweetland & Stinson* (for the defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re ASTOR'S SETTLEMENT TRUSTS. ASTOR v. SCHOLFIELD AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), March 21, 24, 25, April 2, 1952.]

Settlement—Application of income of trust funds to be applied during specified period for all or any of certain public, but non-charitable, purposes—Application in discretion of trustees, subject to directions of settlors—Person entitled to fund at end of specified period not at present ascertainable.

By a settlement, dated Feb. 27, 1945, the trustees were directed to pay or apply the income of the trust funds during a specified period "for or towards all or any of the objects or purposes mentioned" in a schedule to the settlement "in such amounts . . . and in such manner . . . as [the settlors] or the survivor of them during their or his lifetime shall from time to time in writing direct . . . or in default of and subject to any such direction then as the trustees in their own discretion shall from time to time decide and so . . . that [the settlors] or the survivor of them may at any time or times by deed release or suspend wholly or partially the foregoing power of direction." "The objects or purposes" mentioned in the schedule included: "1. The establishment maintenance and improvement of good understanding . . . between nations . . . and also between different sections of people in any nation or community. 2. The preservation of the independence and integrity of newspapers and the encouragement of the adoption and maintenance by newspapers of fearless educational and constructive policies. 3. The promotion of the freedom independence and integrity of the Press . . . 5. The protection of newspapers . . . from being absorbed or controlled by combines . . . 6. The restoration . . . protection and maintenance of the independence of . . . writers in newspapers . . . 7. The establishment . . . or support of any charitable public or benevolent schemes . . . for or in connection with (a) the improvement of newspapers or journalism or (b) the relief or benefit of persons . . . engaged in journalism . . ." After the end of the specified period (which did not offend the rule against perpetuities), the trust funds and income thereof were to be held in trust absolutely and beneficially "for the younger of the two persons who shall at such end be respectively the warden of All Souls College Oxford and the master of Trinity College Cambridge . . ." No directions had been given by the settlors in regard to the application of the income of the trust funds. It was agreed that the trusts of the settlement were not charitable.

HELD: (i) as the trusts of income during the specified period were for the benefit of non-charitable purposes and the beneficiary entitled to the trust funds at the end of the specified period was not at present ascertainable, there was no one who could initiate proceedings against the trustees, either directly or indirectly, in respect of the trusts of income during the specified period, and, therefore, the trusts were void as being unenforceable.

Dicta of LORD PARKER OF WADDINGTON in *Bowman v. Secular Society, Ltd.* ([1917] A.C. 437, 441), applied.

(ii) assuming that an enumeration of purposes which were non-charitable could take the place of an enumeration of beneficiaries, (a) the purposes to which the income of the trust funds was to be applied were not so defined that, if the trustees surrendered their discretion, the court could carry out the purposes declared and not merely a selection of them arrived at by eliminating those which were too uncertain, and (b) the settlement gave no guidance in regard to the manner in which the trusts were to be performed; and, therefore, the trusts of income were void for uncertainty, as they were of such a nature that the court could not control them.

Dictum of LORD ELDON, L.C., in *Morice v. Durham (Bishop)* (1805) (10 Ves. 539), applied.

AS TO DEFINITION OF OBJECTS TO BE BENEFITED, see HALSBURY, Hailsham Edn., Vol. 33, pp. 101, 102, paras. 166-170; and FOR CASES, see DIGEST, Vol. 43, pp. 592-595, Nos. 410-437.

Cases referred to:

- (1) *Bowman v. Secular Society, Ltd.*, [1917] A.C. 406; 86 L.J.Ch. 568; 117 L.T. 161; 8 Digest 265, 270.
- (2) *A.-G. v. Brown*, (1818), 1 Swan. 265 (36 E.R. 384); 1 Wils. Ch. 323 (37 E.R. 138); 8 Digest 257, 184.
- (3) *Pettingall v. Pettingall*, (1842), 11 L.J.Ch. 176; 8 Digest 264, 258.
- (4) *Mitford v. Reynolds*, (1848), 16 Sim. 105; 17 L.J.Ch. 238; 10 L.T.O.S. 499; 60 E.R. 812; 8 Digest 320, 1025.
- (5) *Re Dean*, (1889), 41 Ch.D. 552; 58 L.J.Ch. 693; 60 L.T. 813; 8 Digest 264, 259.
- (6) *Pirbright v. Salwey*, [1896] W.N. 86; 8 Digest 261, 230.
- (7) *Re Hooper*, [1932] 1 Ch. 38; 101 L.J.Ch. 61; 146 L.T. 208; Digest Supp.
- (8) *Re Thompson*, [1934] Ch. 342; 103 L.J.Ch. 162; 150 L.T. 451; Digest Supp.
- (9) *Re Price*, [1943] 2 All E.R. 505; [1943] Ch. 422; 112 L.J.Ch. 273; 169 L.T. 121; 2nd Digest Supp.
- (10) *Re Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 8 Digest 244, 28.
- (11) *Morice v. Durham (Bp.)*, (1805), 10 Ves. 522; 32 E.R. 947; *affg.* (1804) 9 Ves. 399; 32 E.R. 656; 8 Digest 293, 705.
- (12) *Re Wood*, [1949] 1 All E.R. 1100; [1949] Ch. 498; [1949] L.J.R. 1509; 2nd Digest Supp.
- (13) *Re Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 8 Digest 296, 731.

ADJOURNED SUMMONS to determine the validity of the trusts of income during a specified period declared by a settlement dated Feb. 27, 1945. The trusts of income were for certain public, but non-charitable, purposes, and the person absolutely and beneficially entitled to the trust funds at the end of the period (which did not offend the rule against perpetuities) was not at present ascertainable. By a settlement, dated Aug. 20, 1951, the settlors of the 1945 settlement assigned to trustees any beneficial interest which they might have, by way of resulting trust or otherwise, in the trust funds settled by the 1945 settlement. The trusts of the 1951 settlement were charitable and no question arose in regard to their validity.

E. I. Goulding for the plaintiff, one of the settlors.

Gray, Q.C., and *Wilfrid Hunt* for the first, second, third and fourth defendants, trustees of the 1945 settlement.

Raymond Jennings, Q.C., and *Winterbotham* for the fifth and sixth defendants, the trustees of the 1951 settlement.

Denys B. Buckley for the Attorney-General.

Cur. adv. vult.

April 2. **ROXBURGH, J.**, read the following judgment. By a settlement, dated Feb. 27, 1945, and made between Viscount Astor, of the first part, his second son, David Astor, of the second part, and Viscount Astor, Arthur Henry Mann, and Thomas Jones, as trustees, of the third part, certain trusts and purposes were declared of substantially all the issued shares of the Observer, Ltd., the proprietors of "The Observer" and other newspapers, which had been transferred to the trustees. The present trustees are Lord Astor and the first four defendants. Clause 5 of the settlement provided that, subject to the provisions of cl. 6 and cl. 8 (which related to accumulations and the remuneration of the trustees), the trustees should during "the specified period", that is,

" . . . the period from the date of the settlement until Jan. 1, 2040, or the earlier expiration of twenty years after the death of the survivor of the issue actually born before the date of the settlement of Lord Astor's late father the Right Honourable William Waldorf first Viscount Astor and his late Majesty King George V. respectively, pay or apply the income of the trust funds for or towards all or any of the objects or purposes mentioned in sched. III hereto at or for such times in such amounts or proportions and in such manner in all respects as Lord Astor and David Astor or the survivor of them during their or his lifetime shall from time to time in writing direct (in respect of the whole or any part or parts of the specified period) or in default of and subject to any such direction then as the trustees in their own discretion shall from time to time decide and so that any income may in accordance with such direction or decision as aforesaid be paid to any person or persons or corporate body for application under this clause without the trustees being bound to see to the actual application thereof and that Lord Astor and David Astor or the survivor of them may at any time or times by deed release or suspend wholly or partially the foregoing power of direction."

Schedule III was headed "Objects or purposes referred to in cl. 5 above (no priority between them is to be inferred from the numbers or order by or in which they are mentioned)" and it provided:

"1. The establishment maintenance and improvement of good understanding sympathy and co-operation between nations, especially the nations of the English speaking world and also between different sections of people in any nation or community. 2. The preservation of the independence and integrity of newspapers and the encouragement of the adoption and maintenance by newspapers of fearless educational and constructive policies. 3. The promotion of the freedom independence and integrity of the Press in all its activities and of the adoption and maintenance of the highest standards throughout the profession of journalism. 4. The control publication carrying on financing or management of any newspapers periodicals books pamphlets or publications or any businesses connected therewith or with the publication thereof. 5. The protection of newspapers (particularly country or provincial newspapers as distinct from those of the capital) from being absorbed or controlled by combines or being tied by finance or otherwise to special or limited views or interests inconsistent with the highest integrity or independence. 6. The restoration encouragement protection and maintenance of the independence of the editors of and writers in newspapers and periodicals and the securing (as far as possible) for the public of full means of ascertaining by whom any newspaper is actually owned or controlled. 7. The establishment assistance or support of any charitable public or benevolent schemes trusts funds associations or bodies for or in connection with the (a) improvement of newspapers or journalism or (b) the relief or benefit of persons (or the families or dependents of persons) actually or formerly engaged in journalism or

in the newspaper business or any branch thereof or (c) any of the objects or purposes mentioned in this schedule."

Clause 7 of the settlement provided:

"From and after the end of the specified period the trustees shall hold the trust funds and the income thereof in trust absolutely and beneficially for the younger of the two persons who shall at such end be respectively the warden of All Souls College Oxford and the master of Trinity College Cambridge or if the younger of them shall disclaim this benefit then for the other of them or if either office (of warden or master) shall be vacant at such end then for the person who shall hold the other office at such end."

It is common ground that none of these trusts or purposes offends the rule against perpetuities, that they are not charitable, that no directions have been given by the settlors pursuant to cl. 5, and that the beneficiary to take from and after the end of "the specified period" cannot now be ascertained. But some little time ago Lord Astor and his son were advised that it might be arguable that the trusts of income during "the specified period" were void for uncertainty and it was pointed out to them that the trust at the end of "the specified period" would fail if there was then neither a warden of All Souls College, Oxford, nor a master of Trinity College, Cambridge. Accordingly, on Aug. 20, 1951, Lord Astor and his son, David, assigned to the fifth and sixth defendants, as trustees, any beneficial interest which they might have in the trust funds settled by the 1945 settlement by way of resulting trust or otherwise. The trusts of the 1951 settlement are charitable, and the seventh defendant, the Attorney-General, is interested therein accordingly.

The question on which I am giving this reserved judgment is whether the non-charitable trusts of income during "the specified period" declared by cl. 5 and sched. III of the 1945 settlement are void. Counsel for the trustees of the 1951 settlement and for the Attorney-General have submitted that they are void on two grounds: (i) that they are not trusts for the benefit of individuals; (ii) that they are void for uncertainty. LORD PARKER OF WADDINGTON dealt with the first of these two questions in his speech in *Bowman v. Secular Society, Ltd.* (1), and I will cite two important passages. The first ([1917] A.C. 437) is:

"The question whether a trust be legal or illegal or be in accordance with or contrary to the policy of the law only arises when it has been determined that a trust has been created, and is then only part of the larger question whether the trust is enforceable. For, as will presently appear, trusts may be unenforceable and therefore void, not only because they are illegal or contrary to the policy of the law, but for other reasons."

The second (*ibid.*, 441) is:

"A trust to be valid must be for the benefit of individuals, which this is certainly not, or must be in that class of gifts for the benefit of the public which the courts in this country recognise as charitable in the legal as opposed to the popular sense of that term."

Commenting on those passages, counsel for the trustees of the 1945 settlement observed that *Bowman v. Secular Society, Ltd.* (1) arose out of a will and he asked me to hold that LORD PARKER intended them to be confined to cases arising under a will. But they were, I think, intended to be quite general in character. Further, counsel pointed out that LORD PARKER made no mention of the exceptions or apparent exceptions which, undoubtedly, exist, and from this he asked me to infer that no such general principle can be laid down. The question is whether those cases are to be regarded as exceptional and anomalous or whether they are destructive of the supposed principle. I must later analyse them. But I will first consider whether LORD PARKER's propositions can be attacked from a base of principle.

The typical case of a trust is one in which the legal owner of property is constrained by a court of equity so to deal with it as to give effect to the equitable rights of another. These equitable rights have been hammered out in the process of litigation in which a claimant on equitable grounds has successfully asserted rights against a legal owner or other person in control of property. Prima facie, therefore, a trustee would not be expected to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right, and the nature and extent of that obligation would be worked out in proceedings for enforcement. This is what I understand by LORD PARKER's first proposition. At an early stage, however, the courts were confronted with attempts to create trusts for charitable purposes which there was no equitable owner to enforce. In *A.-G. v. Brown* (2) LORD ELDON, L.C., explains (1 Swan, 290) how this difficulty was dealt with:

"It is the duty of a court of equity, a main part, originally almost the whole, of its jurisdiction, to administer trusts; to protect not the visible owner, who alone can proceed at law, but the individual equitably, though not legally, entitled. From this principle has arisen the practice of administering the trust of a public charity: persons possessed of funds appropriated to such purposes are within the general rule; but no one being entitled by an immediate and peculiar interest to prefer a complaint, who is to compel the performance of their obligations, and to enforce their responsibility? It is the duty of the King, as *parens patriae*, to protect property devoted to charitable uses; and that duty is executed by the officer who represents the Crown for all forensic purposes. On this foundation rests the right of the Attorney-General in such cases to obtain by information the interposition of a court of equity . . ."

But if the purposes are not charitable, great difficulties do arise both in theory and in practice. In theory, because, having regard to the historical origins of equity, it is difficult to visualise the growth of equitable obligations which nobody can enforce, and in practice, because it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of State can control, or, in the case of maladministration, reform. Therefore, LORD PARKER's second proposition would prima facie appear to be well founded. Moreover, it gains no little support from the practical considerations that no officer has ever been constituted to take, in the case of non-charitable purposes, the position held by the Attorney-General in connection with charitable purposes, and no case has been found in the reports in which the court has ever directly enforced a non-charitable purpose against a trustee. Indeed, where, as in the present case, the only beneficiaries are purposes and an at present unascertainable person, it is difficult to see who could initiate such proceedings. If the purposes are valid trusts, the settlors have retained no beneficial interest and could not initiate them. It was suggested that the trustees might proceed *ex parte* to enforce the trusts against themselves. I doubt that, but at any rate nobody could enforce the trusts against them. This point is, in my judgment, of importance, because, in most of the cases which are put forward to disprove LORD PARKER's propositions, the court had indirect means of enforcing the execution of the non-charitable purpose.

These cases I must now consider. First, there is a group relating to horses, dogs, graves and monuments, among which I was referred to *Pettingall v. Pettingall* (3), *Mitford v. Reynolds* (4), *Re Dean* (5), *Pirbright v. Salwey* (6) and *Re Hooper* (7). In *Pettingall v. Pettingall* (3) a testator made the following bequest by his will:

"Having a favourite black mare, I hereby bequeath, that at my death, £50 per annum be paid for her keep in some park in England or Wales; her shoes to be taken off, and she never to be ridden or put in harness; and that my executor consider himself in honour bound to fulfil my wish, and

see that she be well provided for, and removeable at his will. At her death all payment to cease."

It being admitted that a bequest in favour of an animal was valid, two questions were made: first, as to the form of the decree on this point, and, secondly, as to the disposition of the surplus not required for the mare. KNIGHT BRUCE, V.-C., said (11 L.J.Ch. 177)

" . . . that so much of the £50 as would be required to keep the mare comfortably, should be applied by the executor, and that he was entitled to the surplus. He must give full information, whenever required, respecting the mare; and if the mare were not properly attended to, any of the parties interested in the residue might apply to the court. The decree on this point ought to be, that £50 a year should be paid to the executor during the life of the mare, or until further order; he undertaking to maintain her comfortably; with liberty for all parties to apply."

Now the points which I wish to make are (i) that it was there admitted that a bequest in favour of an animal was valid, and (ii) that there were persons interested in residue who, having regard to the decree made, would have had no difficulty in getting the terms of the " bequest " enforced. *Mitford v. Reynolds* (4) related to a sepulchral monument and to horses, and there again there was a remainderman on behalf of charity to see to the enforcement of the directions, and an administration action was on foot.

In *Re Dean* (5) a testator devised his freehold estates, subject to and charged with an annuity of £750 and to a term of fifty years granted to his trustees, to the use of the plaintiff for life, with remainders over, and he gave to his trustees his horses, ponies and hounds. And he charged his said freehold estates with the payment to his trustees, for the term of fifty years, if any of the said horses and hounds should so long live, of an annual sum of £750. And he declared that his trustees should apply the said annual sum in the maintenance of the horses and hounds for the time being living, and in maintaining the stables, kennels and buildings inhabited by the said animals in such condition of repair as his trustees might deem fit, and, in consideration of the maintenance of his horses, ponies, and hounds being a charge on his said estate as aforesaid, he gave all his personal estate not otherwise disposed of to the plaintiff absolutely. NORTH, J., said (41 Ch.D. 556):

" Then it is said, that there is no cestui que trust who can enforce the trust, and that the court will not recognise a trust unless it is capable of being enforced by someone. I do not assent to that view. There is not the least doubt that a man may if he pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid, although it is difficult to say who would be the cestui que trust of the monument. In the same way I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same to keeping that monument in repair, say, for ten years, is, in my opinion, a perfectly good trust, although I do not see who could ask the court to enforce it. If persons beneficially interested in the estate could do so, then the present plaintiff can do so; but, if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively enforce it."

This is the best case in the series from the point of view of counsel for the trustees

of the 1945 settlement, because NORTH, J., did, undoubtedly, uphold the particular directions, whether or not they could be "actively enforced". But, putting it at its highest, he merely held that there were certainly classes of trusts, of which this was one, in which that objection was not fatal. He did not suggest that it was not generally fatal outside the realm of charity.

In *Pirbright v. Salwey* (6) a testator, after expressing his wish to be buried in the inclosure in which his child lay in a certain churchyard, bequeathed to the rector and churchwardens of the parish church £800 consols, the interest and dividends to be derived therefrom to be applied, so long as the law for the time being permitted, in keeping up the inclosure and decorating the same with flowers. It was held by STIRLING, J., that the gift was valid for at least a period of twenty-one years from the testator's death, and, semble, that it was not charitable. In *Re Hooper* (7) a testator bequeathed to his executors and trustees money out of the income of which to provide, so far as they legally could do so, for the care and upkeep of certain graves, a vault and certain monuments. MAUGHAM, J., said ([1932] 1 Ch. 39):

"This point is one to my mind of doubt, and I should have felt some difficulty in deciding it if it were not for *Pirbright v. Salwey* (6) . . . That was a decision arrived at by STIRLING, J., after argument by very eminent counsel. The case does not appear to have attracted much attention in text-books, but it does not appear to have been commented upon adversely, and I shall follow it."

In *Re Hooper* (7), and probably also in *Pirbright v. Salwey* (6), there was a residuary legatee to bring before the court any failure to comply with the directions. But I think that MAUGHAM, J., regarded both these cases as exceptions from the general principle.

Last in this group is *Re Thompson* (8). I have included this case because, although it relates to the furtherance of fox-hunting and thus moves away from the subject-matter of the group and much nearer the present case, it is expressly founded on *Pettingall v. Pettingall* (3), and it is, indeed, a most instructive case. The testator bequeathed a legacy of £1,000 to a friend to be applied by him in such manner as he should think fit towards the promotion and furthering of fox-hunting and devised and bequeathed his residuary estate to Trinity Hall in the university of Cambridge. An originating summons was taken out by the executors to determine whether the legacy was valid or failed for want of a definite object or for uncertainty or on other grounds. During the course of the argument, counsel for the friend observed:

"True, there is no cestui que trust who can enforce the application of the legacy, but that is immaterial: *Re Dean* (5). The object to which the legacy is to be applied is sufficiently defined to be enforced."

But CLAUSON, J., interposed ([1934] Ch. 343):

"The college, as residuary legatees, seem to have an interest in the legacy, as, but for the trust for its application, they would be entitled to it. The procedure adopted by KNIGHT BRUCE, V.-C., in *Pettingall v. Pettingall* (3), cited in JARMAN ON WILLS, 7th ed., vol. 2, p. 877, might be followed in this case."

And in his judgment he said (*ibid.*, 344):

"In my judgment the object of the gift has been defined with sufficient clearness and is of a nature to which effect can be given. The proper way for me to deal with the matter will be, not to make, as it is asked by the summons, a general declaration, but, following the example of KNIGHT BRUCE, V.-C., in *Pettingall v. Pettingall* (3), to order that, upon the defendant Mr. Lloyd [the friend] giving an undertaking (which I understand he is willing to give) to apply the legacy when received by him towards the object expressed in the testator's will, the plaintiffs do pay to the defendant

Mr. Lloyd the legacy of £1,000; and that, in case the legacy should be applied by him otherwise than towards the promotion and furthering of fox-hunting, the residuary legatees are to be at liberty to apply."

I understand CLAUSON, J., to have held, in effect, that there was somebody who could enforce the purpose indicated because the college, as residuary legatees, would be entitled to the legacy but for the trust for its application, and they could apply to the court to prevent any misapplication or breach of the undertaking given by Mr. Lloyd. I infer from what the learned judge said that he would not have upheld the validity of this non-charitable purpose if there had been no residuary legatee, and no possibility of making such an order as was made in *Pettingall v. Pettingall* (5).

Lastly, I was referred to *Re Price* (9), where a testatrix by her will gave one half of her residuary estate to the Anthroposophical Society in Great Britain

" . . . to be used at the discretion of the chairman and executive council of the society for carrying on the teachings of the founder, Dr. Rudolf Steiner."

At first sight this case would appear to be a strong card in the hand of counsel for the trustees of the 1945 settlement. The first part of the judgment proceeds on the footing that the purposes were not charitable. The society was residuary legatee and there was no room for such an order as was made in *Re Thompson* (8). There was nobody who could have enforced the carrying out of the purposes. On closer inspection, however, it will be found that this point was not raised in argument or referred to in the judgment and the decision was based on *Re Drummond* (10), which is a different class of case. As the present case cannot, on any view, be assimilated to *Re Drummond* (10), I need not further consider *Re Price* (9).

Let me, then, sum up the position so far. On the one side, there are LORD PARKER's two propositions with which I began. These were not new, but merely re-echoed what SIR WILLIAM GRANT, M.R., had said § Ves. 405 in *Morice v. Bishop of Durham* (11) as long ago as 1804: "There must be somebody, in whose favour the court can decree performance". The position was recently re-stated by HARMAN, J., in *Re Wood* (12), where he said [1949] 1 All E.R. 1101: "a gift on trust must have a *cestui que trust*", and this seems to be in accord with principle. On the other side is a group of cases relating to horses and dogs, graves and monuments—matters arising under wills and intimately connected with the deceased—in which the courts have found means of escape from these general propositions, and also *Re Thompson* (8) and *Re Price* (9), which I have endeavoured to explain. *Re Price* (9) belongs to another field. The rest may, I think, properly be regarded as anomalous and exceptional and in no way destructive of the proposition which traces descent from or through SIR WILLIAM GRANT, M.R., through LORD PARKER OF WADDINGTON, to HARMAN, J. Perhaps the late SIR ARTHUR UNDERHILL was right in suggesting that they may be concessions to human weakness or sentiment: see UNDERHILL'S *LAW OF TRUSTS AND TRUSTEES*, 8th ed., p. 79 (10th ed., p. 97). They cannot, in my judgment, of themselves (and no other justification has been suggested to me) justify the conclusion that a court of equity will recognise as an equitable obligation affecting the income of large funds in the hands of trustees a direction to apply it in furtherance of enumerated non-charitable purposes in a manner which no court or department can control or enforce. I hold that the trusts here in question are void on the first of the grounds submitted by counsel for the trustees of the settlement of 1951 and counsel for the Attorney-General.

The second ground on which the relevant trusts are challenged is uncertainty. If (contrary to my view) an enumeration of purposes outside the realm of charities can take the place of an enumeration of beneficiaries, the purposes must, in my judgment, be stated in phrases which embody definite concepts, and the means by which the trustees are to try to attain them must also be prescribed with a

sufficient degree of certainty. The test to be applied is stated by LORD ELDON, L.C., in *Morice v. Bishop of Durham* (11) as follows (10 Ves. 539):

"As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that it can be under that control; so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust: a trust therefore, which, in case of maladministration could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided, that the court can neither reform maladministration, nor direct a due administration."

See also *Re Macduff* (13), per LINDLEY, L.J. ([1896] 2 Ch. 463).

Counsel for the trustees of the 1945 settlement argued that this test was not properly applicable to trusts declared by deed, but I can see no distinction between a will and a deed in this respect. Applying this test, I find many uncertain phrases in the enumeration of purposes in sched. III of the 1945 settlement, e.g., "different sections of people in any nation or community", in para. 1; "constructive policies", in para. 2; "integrity of the Press", in para. 3; "combines", in para. 5; "the restoration . . . of the independence of . . . writers in newspapers", in para. 6; and "benevolent schemes", in para. 7. Counsel for the trustees of the 1945 settlement suggested that, in view of the unlimited discretion bestowed on the trustees (subject only to directions from the settlors), the trustees would be justified in excluding from their purview purposes indicated by the settlors but insufficiently defined by them. But I cannot accept this argument. The purposes must be so defined that, if the trustees surrendered their discretion, the court could carry out the purposes declared, not a selection of them arrived at by eliminating those which are too uncertain to be carried out. If, for example, I were to eliminate all the purposes except those declared in para. 4, and to decree that those declared in para. 4 ought to be performed, should I be executing the trusts of the settlement? But how, in any case, could I decree in what manner the trusts applicable to income were to be performed? The settlement gives no guidance at all. Counsel for the trustees of the 1945 settlement suggested that the trustees might apply to the court *ex parte* for a scheme. It is not, I think, a mere coincidence that no case has been found outside the realm of charity in which the court has yet devised a scheme of ways and means for attaining enumerated trust purposes. If it were to assume this (as I think) novel jurisdiction over public, but not charitable, trusts, it would, I believe, necessarily require the assistance of a custodian of the public interest analogous to the Attorney-General in charity cases who would not only help to formulate schemes but could be charged with the duty of enforcing them and preventing maladministration. There is no such person. Accordingly, in my judgment, the trusts for the application of income during "the specified period" are void also for uncertainty. But while I have reached my decision on two separate grounds, both, I think, have their origin in a single principle, namely, that a court of equity does not recognise as valid a trust which it cannot both enforce and control. This seems to me to be good equity and good sense.

Order accordingly.

Solicitors: *Janson, Cobb, Pearson & Co.* (for all parties other than the Attorney-General); *Treasury Solicitor* (for the Attorney-General).

[Reported by R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

PERRY v. PERRY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), March 3, 4, 19, 20, April 7, 1952.]

Divorce—Desertion—Condonation—Termination of desertion—Sexual intercourse during the statutory period—No intention by deserting wife to return—Matrimonial Causes Act, 1950 (c. 25), s. 1 (1) (b).

Divorce—Evidence—Undefended suit—Undesirability of leading questions.

The parties were married in 1939, and in May, 1951, the husband presented a petition for divorce alleging that his wife had deserted him from July, 1944, to the date of the petition. In December, 1949, the wife asked the husband for financial assistance. He thereupon visited her and during the period from that date to March, 1950, he went to see her once a fortnight. On each visit he asked her to resume married life with him, but she refused. On either two or three of these occasions he had sexual intercourse with her, as a result of which she gave birth to a child on Dec. 6, 1950, but at no time did the wife resile from her firm and constant intention never to return to her husband.

HELD: (i) the doctrine of condonation or some analogous principle did not apply to the matrimonial offence of desertion as defined in the Matrimonial Causes Act, 1950, s. 1 (1) (b), so as to make sexual intercourse between the spouses within the period of three years immediately preceding the petition an absolute bar to a decree founded on desertion for that period.

Bartram v. Bartram ([1949] 2 All E.R. 270), applied.

Viney v. Viney ([1951] 2 All E.R. 204), not applied.

Reasoning of WILLMER, J., in *Whitney v. Whitney* ([1951] 1 All E.R. 301), approved.

(ii) though sexual intercourse was beyond doubt a most important incident in the marital relationship, an act, or two or three acts, of intercourse could not be regarded as proof of the resumption of marital relationship where a wife, though participating in such acts, in all other respects repudiated the relationship, and, accordingly, on the facts of the present case the wife had not resumed cohabitation so as to interrupt or terminate the period of desertion.

(iii) mutual intention to resume cohabitation could be proved by evidence, but there was no authority that as regards desertion there existed some strict rule which distinguished the case of a petition by a husband from that of a petition by a wife and compelled the court to conclude against the husband if any act of sexual intercourse had (with knowledge and in the absence of fraud) been proved.

Abercrombie v. Abercrombie ([1943] 2 All E.R. 465), distinguished.

Observations by SIR RAYMOND EVERSLED, M.R., and JENKINS, L.J., regarding the undesirability of leading questions being put to witnesses in undefended divorce cases.

AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-682, paras. 1004-1009; and FOR CASES, see DIGEST, Vol. 27, pp. 339, 340, Nos. 3184-3203, and Digest Supps.

Cases referred to:

- (1) *Viney v. Viney*, [1951] 2 All E.R. 204; [1951] P. 457; 115 J.P. 397.
- (2) *Whitney v. Whitney*, [1951] 1 All E.R. 301; [1951] P. 250; 115 J.P. 71.
- (3) *Bartram v. Bartram*, [1949] 2 All E.R. 270; [1950] P. 1; [1949] L.J.R. 1679; 113 J.P. 422; 2nd Digest Supp.
- (4) *Pratt v. Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; Digest Supp.
- (5) *Cramp v. Cramp & Freeman*, [1920] P. 158; 89 L.J.P. 119; 123 L.T. 141; 27 Digest 338, 3179.

- (6) *Henderson v. Henderson & Crellin*, [1944] 1 All E.R. 44; [1944] A.C. 49; 113 L.J.P. 1; 170 L.T. 84; 2nd Digest Supp.
- (7) *Blundford v. Blundford*, (1883), 8 P.D. 19; 52 L.J.P. 17; 48 L.T. 238; 27 Digest 338, 3175.
- (8) *Maslin v. Maslin*, [1952] 1 All E.R. 477; 116 J.P. 136.
- (9) *Parce v. Paine*, [1903] P. 263; 73 L.J.P. 1; 89 L.T. 588; 27 Digest 347, 3285.
- (10) *Mummery v. Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 111 L.J.P. 58; 166 L.T. 343; 2nd Digest Supp.
- (11) *Weatherley v. Weatherley*, [1947] 1 All E.R. 563; [1947] A.C. 628; [1947] L.J.R. 869; 176 L.T. 434; 111 J.P. 220; 2nd Digest Supp.
- (12) *Abercrombie v. Abercrombie*, [1943] 2 All E.R. 465; 169 L.T. 340; 107 J.P. 200; 2nd Digest Supp.
- (13) *Robinson v. Gosnold*, (1794), 6 Mod. Rep. 171; 87 E.R. 927.
- (14) *Rosell v. Rosell*, [1900] 1 Q.B. 9; 69 L.J.Q.B. 55; 81 L.T. 429; *subsequent proceedings* (1903), 89 L.T. 288; 27 Digest 246, 2172.
- (15) *Danforth v. Danforth*, (State of Maine) (1895), 33 Atlantic Reps. 781.
- (16) *Kennedy v. Kennedy*, (State of Illinois) (1877), 87 Illi. Reps. 250.
- (17) *Dickerson v. Dickerson*, (State of Texas) (1919), 207 South Western Reps. 941.
- (18) *Burk v. Burk*, (State of West Virginia) (1883) 21 West Virginia Reps. 445.
- (19) *Andrews v. Andrews*, [1938] Queensland Reports 72.
- (20) *Upton v. Upton*, [1919] Victoria Reports 612.
- (21) *Timms v. Timms*, [1925] Victoria Reports 597.
- (22) *Struthers v. Struthers*, [1943] South Australia Reports 89.
- (23) *Fairey v. Fairey*, [1947] South Australia Reports 69.
- (24) *Roberts v. Roberts & Temple*, (1917), 117 L.T. 157; 27 Digest 339, 3182.
- (25) *Pulford v. Pulford*, [1923] P. 18; 92 L.J.P. 14; 128 L.T. 256; 27 Digest 307, 2846.
- (26) *Statham v. Statham*, [1929] P. 131; 98 L.J.P. 113; 140 L.T. 292; Digest Supp.
- (27) *Beeby v. Beeby*, (1799), 1 Hag. Ecc. 789; 162 E.R. 755; 27 Digest 338, 3181.
- (28) *Lane v. Lane*, [1952] 1 All E.R. 223; [1952] P. 34.

APPEAL by the husband from an order of His Honour JUDGE EMLYN JONES, sitting as commissioner in divorce, dated July 6, 1951, dismissing the petition of the husband for divorce on the ground of the wife's desertion.

Bingham and Sproule Bolton for the husband.

Colin Duncan and Brian T. Neill for the Queen's Proctor.

The wife did not appear.

Cur. adv. vult.

April 7. The following judgments were read:

SIR RAYMOND EVERSLED, M.R.: This appeal is from an order of His Honour JUDGE EMLYN JONES (sitting as commissioner in divorce) dismissing a husband's petition for divorce on the ground of the wife's desertion. The husband and wife were married on July 2, 1939, and there is one child of the marriage born (in circumstances hereafter mentioned) on Dec. 6, 1950. The petition was presented on May 15, 1951, and alleged that the wife had (within the terms of s. 1 (1) (b) of the Matrimonial Causes Act, 1950) deserted the husband without cause for a period of "at least three years", namely, ever since July 6, 1944, "immediately preceding the presentation of the petition". There is no doubt of the facts. The wife did not appear to oppose the petition. Of the husband's evidence the judge said:

"The husband impressed me, and I place this on record, as a truthful and completely honest man, and he told me that even now he was anxious to

effect a reconciliation with his wife. It is clear to me that he loved her and still does."

The judge proceeded:

"Upon these facts I am satisfied and so hold that the wife was guilty of desertion on or about July 6, 1944. I am also satisfied that the state of desertion, thus commenced, continued up to the presentation of the petition in the ordinary sense of the word 'desertion'. That is to say, both the fact of separation and the necessary animus on the wife's part so continued. By 'separation' I mean here only that there was no full resumption of cohabitation in a matrimonial home. Of the wife's animus I need only say that I find that at no time since July, 1944, has she formed any intention to resume married life."

So far, the case appears plain and straightforward, but it also appeared that in December, 1949, the husband received a letter from the wife asking him for financial assistance. He thereupon, and during a period which lasted till the end of March, 1950, went to see her once a fortnight. On these occasions the husband, as the commissioner found, asked the wife to return. She refused. It also appeared that on either two or three occasions during this same period the husband had sexual intercourse with his wife, and it was as a result of one or other of these connections that the child of the marriage was born. As appears from the passage which I have read the commissioner found that at the time these acts of intercourse took place the wife did not in any way resile from her firm and constant intention never to return to her husband. Indeed, on Nov. 8, 1950, she wrote to him as follows:

"Bob, it isn't any use asking me to live with you again because I have fully made up my mind I never will. It is nearly six years since you and I parted and I have never felt at any time as if I wanted to return to you. You know we never get on well together. The love was all on your side. I made a big mistake when I married you. I am sorry, but never ask me again. Goodbye."

It will be observed that that letter was written within a month of the birth of the child conceived as a result of the intercourse in the spring, but that the wife did not even inform her husband of her condition. On these facts the commissioner felt himself bound, by the reasoning of the Divisional Court in *Viney v. Viney* (1), to hold that the acts of intercourse had necessarily put an end to the period of desertion which had begun nearly six years before, and, further, that such earlier desertion could not be revived by the wife's continuing desertion after March, 1950, so as to enable the husband to allege at the date of his petition that the necessary requirements of s. 1 (1) (b) of the Matrimonial Causes Act, 1950, had been satisfied. The commissioner was further of opinion that the decision in *Viney v. Viney* (1) bound him to regard *Whitney v. Whitney* (2), relied on by the husband, as having been wrongly decided by WILLMER, J.

The question raised is clearly one of difficulty and importance, and counsel for the husband has reviewed the history of the law relating to condonation and to the matrimonial offence of desertion. He has invited us to conclude that, neither on authority nor on principle, is the former applicable to the latter, at least in a case where the alleged condonation has occurred before the presentation of the petition, that is, before the desertion has, by the necessary intendment of the statute, ripened, so to speak, into an offence entitling the deserted spouse to repudiate the marriage and pray for its dissolution. The wife did not appear on the appeal, and we, accordingly, requested the Queen's Proctor to attend before us and assist the court by such arguments as he thought it proper to adduce. We are indebted to counsel for the arguments which he has presented to us for the Queen's Proctor. They were to the effect that the commissioner rightly dismissed the petition.

Counsel for the husband will not, I hope, regard me as unkind if, before I deal with the arguments in the case, I first revert to a matter to which I drew attention during the argument, namely, the form of the questions put to the husband during his examination-in-chief. This examination-in-chief consisted from first to last of a series of questions put (without any comment or objection, be it said, by the judge) in a form so leading as might fairly be said to have deprived the answers, which consisted substantially of the word "Yes", varied occasionally by the phrase: "That is right", of any cogency whatever. I give a few examples which related to matters vital to the husband's case.

"Q.—Was the object of your going to ask her to resume cohabitation ?

A.—Yes. Q.—You asked her on different occasions to come back ? A.—Yes.

Q.—Was she adamant about her refusal ? A.—Yes. Q.—In your mind I think you were wanting to lead up to a reconciliation ? A.—That is right.

Q.—At those meetings when you went to see her you asked her on each occasion whether she would be willing to come back to you ? A.—I did.

Q.—On each occasion did she point blank refuse ? A.—That is right.

Q.—You only had intercourse on two or three occasions, although you saw your wife on a number ? A.—That is right."

I have referred to this matter in the hope that, since this case is likely to be regarded as of some significance, my judgment may prove an effective vehicle to convey to those concerned in the practice and administration of divorce—and I refer not only to counsel, but to judges—and, particularly, in cases where the petitions are undefended, that when all allowance is made for the nervousness of witnesses this form of questioning is not only undesirable but wrong, and is liable to disable any judgment founded on evidence so given. I add, as regards the present case and as regards the view taken by the commissioner of the husband, that at the end of his examination by his counsel the commissioner asked the husband a number of questions himself on the answers to which he obviously in large measure based his findings.

Desertion, which, if it had subsisted for the requisite period, was made a ground for dissolution of marriage by the Matrimonial Causes Act, 1937, was not an offence known to the ecclesiastical or common law founding a decree of separation. Before the Matrimonial Causes Act, 1857, the only remedy for desertion was a suit for restitution of conjugal rights. By s. 16 of the last-mentioned Act, however, "desertion without cause for two years and upwards" was made a ground whereon either spouse might obtain a decree of judicial separation, and by s. 27 desertion "without reasonable excuse" for a like period became, if coupled with adultery, a ground for dissolution of marriage at the suit of a wife: see *RAYDEN ON DIVORCE*, 5th ed., at p. 99. It is not in dispute that the period of desertion now required by the Matrimonial Causes Act, 1950 (which is in the same terms as that introduced into the Matrimonial Causes Act, 1937) must be a single period continuing up to the date of presentation of the petition, in the latter respect differing from the periods of desertion specified in the Act of 1857. Terms broken by one or more periods of resumed cohabitation which in total amount to three years or more will not suffice. In the present case, therefore, the five and three-quarter years of desertion from July, 1944, before the period of the acts of sexual intercourse are disqualified since they did not end with the presentation of the petition nor can the period from March, 1950, after the acts of intercourse, to May 15, 1951, which admittedly did so end, but is in duration but thirteen or fourteen months, be added to that which preceded the acts of intercourse.

It is, therefore, clear that desertion as a ground for divorce differs from the statutory grounds of adultery and cruelty in one important respect. The offence founding the cause of action is not complete—is (as it were) inchoate—until the action is constituted. If one spouse has committed adultery or has treated the other with cruelty, the latter has an accrued right to petition for divorce.

He or she may at once repudiate the marriage and is no longer bound to affirm it and reinstate the offending spouse. The deserted spouse has no such right, no such election. If the deserting spouse genuinely desires to return, his or her partner cannot refuse reinstatement. It is, moreover (as DENNING, L.J., observed in *Bartram v. Bartram* (3)), contrary to public policy that the deserted spouse, desiring a resumption of cohabitation and bound to affirm the marriage, should be embarrassed in efforts for reconciliation. It is because of these essential characteristics that, according to counsel for the husband, what is known as "condonation" cannot be properly applicable to the offence of desertion prior to presentation of the petition. Counsel for the Queen's Proctor has not, indeed, contended to the contrary. The burden of his argument is not that an act, or, as in this case, two or three acts, of sexual intercourse should be taken to amount to "condonation" by a husband of a deserting wife (involving directly or by analogy the conditions and consequences attaching to "condonation" as applied to adultery or cruelty), but rather that such an act or acts must involve necessarily such a resumption of cohabitation, of the marital relationship, that the preceding desertion is altogether ended and its consequences wiped away.

Notwithstanding the concession of counsel for the Queen's Proctor as regards "condonation" it will be necessary for me to consider its character and implication hereafter, having regard to the views expressed in *Viney v. Viney* (1). It is convenient, first, to observe that it is clear—and also agreed between counsel—that "desertion" postulates both (i) the factum of separation and (ii) a continuing animus deserendi on the part of the deserting spouse. In light of the observations of the House of Lords, and particularly LORD MACMILLAN, in *Pratt v. Pratt* (4) ([1939] 3 All E.R. 438) it may also be relevant to consider the state of mind of the deserted spouse, the husband. In the circumstances of the present case, as found by the judge, nothing is added to the case by any such consideration. It follows, however, as counsel for the Queen's Proctor emphasised, that the absence at any time of *either* the fact of separation *or* the intent to desert necessarily puts an end to the desertion; and, though the judge in this case found the wife's animus deserendi to have continued without break up to May 15, 1951, it is the case for the Queen's Proctor that the acts of intercourse that occurred are inconsistent with separation in fact or in law at the time they occurred.

The conception of condonation as understood in England is older than that of divorce according to statute, to which it is now related. Historically it could not have been applied to continuing desertion as a ground for divorce, but that is no necessary reason why it should not be applied now. It is unnecessary for me to refer to any of the older material to which counsel for the husband drew attention, for the implications of condonation have recently been authoritatively stated, for example, by McCARDIE, J., in *Cramp v. Cramp & Freeman* (5) ([1920] P. 158) and, more particularly, by VISCOUNT SIMON, L.C., in *Henderson v. Henderson & Crellin* (6) ([1944] 1 All E.R. 45). It involves, in the language of VISCOUNT SIMON, L.C., forgiveness confirmed or made effective by reinstatement. By the law of England it is no less clearly established that the so-called "forgiveness" is conditional—conditional on the "condoned" spouse thereafter fulfilling in all respects the obligations of marriage—so that, if any matrimonial offence is afterwards committed by him or her—whether or not the same as that "condoned" and whether or not in itself giving ground for divorce—the "condonation" ceases to have effect. The offence "condoned" and all its consequences are for all purposes "revived". It was this characteristic which caused McCARDIE, J., in *Cramp v. Cramp* (5) to observe that the word "forgiveness" (at least as it is understood in the Christian religion) was misleading as an interpretation of "condonation", and that the real import of the latter was "a conditional waiver of the right of the injured spouse to take matrimonial proceedings". So, in the present case counsel for the Queen's Proctor was

content to submit that by "condonation" was implied a "conditional sacrifice of an accrued right".

At any rate, the notion of "forgiveness made effective by reinstatement" implies, in my judgment, a right of election on the part of the injured spouse and does not fit the case of a deserted spouse who must always, until presentation of the petition at least, affirm the marriage and be ready to take back the deserting spouse. It is, moreover, naturally applicable to an act committed or a course of conduct rather than to a state of mind, which is the second characteristic of desertion. Finally, the conditional quality of "condonation" and the liability of the condoned offence to be "revived" by subsequent misconduct cannot be made to fit with continuing, but (as regards remedy) incomplete, desertion, for it seems to be established that a period of desertion once terminated cannot afterwards be relied on, when added to a later period of desertion or otherwise, to satisfy the requirements of s. 1 (1) (b) of the Matrimonial Causes Act, 1950. In this connection it is to be noted that under the Act of 1857 where a husband had committed adultery and had also committed the offence of desertion without reasonable cause for two years, but the wife had condoned the adultery, subsequent matrimonial misconduct by the husband was held to revive not only the adultery but the desertion: *Blandford v. Blandford* (7).

Whatever, therefore, may be the situation where acts which in the case, for example, of adultery would have constituted condonation have taken place after presentation of a petition for divorce on the ground of desertion (as occurred in *Maslin v. Maslin* (8), on which I express no opinion) the conception of condonation has, in my judgment, no application, either in strictness or by analogy (save, perhaps, indirectly to the extent later mentioned in regard to resumed cohabitation), to a current period of desertion. I do not forget that desertion, though of a character not sufficient to give grounds for divorce, is, nevertheless, a matrimonial offence. Even if such an offence could be said to be "condoned" by some act or conduct not involving a resumption of the marital relationship, such a condonation would be in principle "conditional" so that the offence would be for all purposes revived by subsequent misconduct: see *Blandford v. Blandford* (7), and see, as regards the old so-called "statutory desertion", *Paine v. Paine* (9).

It follows from what I have said that I have formed a view different from that which I understand to have been entertained by LORD MERRIMAN, P., and HAVERS, J., in *Viney v. Viney* (1). For, although in reference to his own previous decision in *Mummery v. Mummery* (10) the President said ([1951] 2 All E.R. 206):

"The question was whether the desertion theretofore established was interrupted, or, alternatively, condoned . . ."

he seemed to treat, as also did HAVERS, J., the matter afterwards as turning solely on condonation or to have regarded the two alternatives as being in truth the same. He continued (*ibid.*):

"The two things which it is, in my opinion, vital to remember in *Mummery v. Mummery* (10) . . . are these (i) that it was the wife who was the petitioner, not the husband, and (ii) that there was no bilateral intention to resume cohabitation."

He then refers to *Henderson v. Henderson & Crellin* (6), observing that that case (*ibid.*, 207)

" . . . re-emphasised in unmistakable manner the essential difference between the position of a husband and that of a wife in relation to evidence of sexual intercourse as proof of condonation."

On such a matter I express with the utmost diffidence a view different from that of LORD MERRIMAN, P., but, in my judgment, with the question, aye or no, has there been condonation on the part of the injured spouse "bilateral" (by which I understand is meant "common" or "mutual") intention has nothing to do.

As the House of Lords decided in *Henderson v. Henderson & Crellin* (6) sexual intercourse is conclusive proof of condonation of adultery by a husband who has knowledge of the adultery and in the absence of fraud by the wife, whatever may have been in fact the intention of either spouse. That it may not be so in the case of an injured wife depends on the proposition that the situations of a husband and wife are not entirely the same. Historically they plainly were not, and modern legislation may be said not effectively to have been capable of eliminating all biological differences. Still, the difference in situation is not obvious in a case where the wife has voluntarily left her husband and has for years been living entirely separate from and independent of him.

I add that my conclusion is, as I think, reinforced by the circumstance that by s. 4 (2) (b) of the Matrimonial Causes Act, 1950, condonation of adultery or cruelty is expressly made a bar to a decree, but there is no reference to condonation in relation to desertion, as there is not, though the reason may be different, in relation to continuing unsoundness of mind made a ground of divorce by s. 1 (1) (d). It is true that there is no reference to condonation as regards a petition by the wife on the ground that her husband has been guilty of rape, sodomy or bestiality, but in those cases condonation may clearly be made applicable by analogy, and in any case condonation was regarded by the ecclesiastical courts prior to 1857 as a bar to divorce *a mensa et thoro* on the ground of bestiality no less than on the grounds of adultery or cruelty.

There remains, however, the question—the main argument of counsel for the Queen's Proctor—whether an act of sexual intercourse, or at least two or three acts such as were proved in the present case, should be treated against a husband petitioner as constituting such a resumption of the marital relationship as puts a stop, for good and all, to the precedent period of desertion by the wife. There is no doubt that resumption of marital relationship or resumption of cohabitation (for the purpose I treat the two formulae as synonymous) puts an end to desertion. The proposition has been clearly recognised by Parliament: see, for example, the Summary Jurisdiction (Married Women) Act, 1895, s. 7, the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2), and the Matrimonial Causes Act, 1937, s. 6 (3), re-enacted by the Matrimonial Causes Act, 1950, s. 7 (3). Approaching the matter as *res integra* and without regard to authority, I should have thought that the question whether cohabitation or marital relationship has or has not been resumed is a question of fact and degree to be determined according to common-sense principles.

Sexual intercourse is beyond doubt a most important incident in the relationship, though its significance will obviously vary, for example, according to the age of the spouses. Still, I should not have thought (again treating the matter without reference to authority) that an act, or two or three acts, of intercourse without more could sensibly be regarded as necessarily determining the question, and I should also have thought that mutual or "bilateral" intention was in this matter essential. Without attempting a definition, the implication of desertion is a rejection of all the obligations of marriage. It has been held by the House of Lords in *Weatherley v. Weatherley* (11) that absolute refusal of sexual relations by one spouse, who in other respects fulfils the duties of marriage, could not amount to desertion, and, if this is so, it does not seem to me shocking or unreasonable that participation in one or two acts of intercourse by a husband or wife, who in all other respects repudiated the marital relationship, should not be regarded as necessarily constituting a resumption of such relationship. If this view be right, then on the facts found in the present case I should conclude that there had been no such resumption.

In my judgment, the *prima facie* view which I have expressed is supported by the authorities. More particularly I think that, on authority, mutual intention is of the essence of the matter. LORD MERRIMAN, P., so stated in *Mummery v. Mummery* (10), and his view was expressly confirmed by the Court of Appeal

in *Bartram v. Bartram* (3). In that case BUCKNILL, L.J., said ([1949] 2 All E.R. 272):

"In the present case, the husband has established actual desertion by the wife for many months. That being so, it seems to me that the husband is entitled to say that the desertion once established continues until it is proved that it has been brought to an end. The wife does not suggest for one moment that she brought it to an end. The question is: Do the facts proved establish that it was brought to an end? In my view, it can only be brought to an end if the facts show an intention on the part of the wife to set up a matrimonial home with the husband. If the facts do not establish any intention on the part of the wife to set up a matrimonial home, the mere fact that, as a lodger, she went to live under the same roof as her husband, because she had nowhere else to go, does not remove the desertion which she had already started and which continued to run."

According to ASQUITH, L.J. (*ibid.*, 273):

"Having regard to those and other proved circumstances in the case, it seems to me wrong to hold that the three years period was interrupted by any resumption of cohabitation, for such resumption involves, in the language of LORD MERRIMAN, P., in *Mummery v. Mummery* (10), a bilateral intention on the part of both spouses to set up a matrimonial home together. In my view, the facts proved in this case negative any such intention on the part of the wife who was not a free agent but was acting under the spur of . . . necessity . . ."

I have already referred to the judgment to the like effect of DENNING, L.J. *Bartram v. Bartram* (3) is binding on this court and on principle, in my view, concludes the present case in the husband's favour.

We were referred to a number of other cases, but none of them, in my judgment, so qualifies the effect of *Bartram v. Bartram* (3) as to compel me to hold that the acts of intercourse proved in the present case must be treated, as against the husband, as conclusive of the resumption of the marital relationship. That such acts will be evidence of such a resumption I do not doubt, and it may even be (on an analogy to this limited extent from condonation) that they will weigh somewhat more heavily against a husband than a wife. Mutual intention must, in my view, on proper evidence be proved, and I find no authority, pace the Divisional Court in *Viney v. Viney* (1), that there is as regards desertion some strict rule which distinguishes the case of a petition by a husband from that of a petition by a wife and compels the court to conclude against the former if any act of sexual intercourse has (with knowledge and in the absence of fraud) been proved. The decision in *Abercrombie v. Abercrombie* (12) by no means turned on the fact that there had been acts of sexual intercourse, but rather on the fact that to such extent as the limitations of the circumstances imposed on them the two spouses had in truth resumed matrimonial relationship. In *Robinson v. Gosnold* (13) HOLT, C.J., expressed the opinion that an act of intercourse with a wife who had deserted re-imposed on a husband liability for her debts. The opinion was obiter and given long before desertion for a period continuing to the date of presentation of the petition was made a ground of divorce. In *Rowell v. Rowell* (14) the question was of a somewhat different character, whether the essential condition of a deed of separation had been determined by what LORD RUSSELL OF KILLOWEN, C.J. (presiding in this court), called "casual and intermittent connection". The court answered the question negatively and the reasoning at least lends, in my judgment, and has been regarded as lending, support to the view at which I have arrived. Though I have ventured to differ from certain of the views expressed by the Divisional Court in *Viney v. Viney* (1) (which was an adultery case), I must not be taken to be suggesting that on its facts that case was wrongly decided, nor to be deciding that also on its facts

WILLMER, J., rightly decided *Whitney v. Whitney* (2), but I am unable to agree with the Divisional Court that in the last named case WILLMER, J., misdirected himself on the law.

There remains the point that—particularly having regard to the birth of the child in December, 1950—it is contrary to common sense to suppose that at the time of the proved acts of intercourse and of the conception of the child its parents were separated in fact and truth. I am unable to agree. If the right view is that there must be some reality of resumed cohabitation to stop the running of desertion, common sense is by no means offended by my conclusion. The question is of the inference to be drawn from acts of intercourse. To that question the birth of the child appears to me to be an irrelevant misfortune. The quality of the acts of intercourse cannot be affected by the accident of their result. Nor can I think that it would as a matter of public policy be desirable that matters of this kind should involve possible questions of dispute about the use of contraceptives.

The industry of counsel enables them to put before us references to the relevant law in the United States of America and Australia, and out of respect to that industry I should like to conclude this judgment by some references to that law. In America the matter seems to be regarded as doubtful. In the *CORPUS JURIS SECUNDUM*, vol. 27, s. 59, it is stated:

“Offenses which may be condoned. It has been held that the doctrine of condonation applies to all charges of matrimonial misconduct, although it has also been held that the doctrine is inapplicable to causes of a continuing character. Condonation has been held to apply to adultery and to desertion.”

See also BISHOP (1891 ed., s. 1773). Of the cases cited *Danforth v. Danforth* (15), *Kennedy v. Kennedy* (16), and, perhaps, *Dickerson v. Dickerson* (17) support the view I have expressed. On the other side is *Burk v. Burk* (18) decided in West Virginia in 1883, but it may be said that the judges in the last case were expressing the strong view then held in that State as regards all divorce. The president of the court began his judgment (21 West Virginia Reps. 449):

“This will be the first reported divorce case in this State. We would gladly wish that it might be the last.”

The material part of his judgment is as follows (*ibid.*, 453):

“To constitute ‘desertion’ within the meaning of the statute, there must be a combination of two things: an intention to desert, and an actual breaking off of the matrimonial cohabitation. The matrimonial cohabitation cannot be broken off by the mere fact of living in separate houses, while the husband constantly or at any time occupies the marriage-bed. If such a thing could be for a moment tolerated, then a man would have a legal warrant for the space of three years to make his wife his mere mistress, an act as shocking to the law as it is to morality and religion.”

Of the Australian cases cited, in *Andrews v. Andrews* (19), decided by the full Court of Queensland, and in *Upton v. Upton* (20) and *Timms v. Timms* (21), both before the full Court of Victoria, the husband was in each case the deserter. The decisions were uniformly to the effect that the desertion was not stopped or condoned by “casual” acts of intercourse on the ground that the matrimonial relationship had not thereby been re-established. In the South Australian case of *Struthers v. Struthers* (22) the question did not directly arise since there had been clearly a resumption of full cohabitation. But SIR MELLIS NAPIER, C.J., in delivering the judgment of the full court, referred to the other Australian cases apparently without disapproval and without distinguishing between the cases of a deserting husband and a deserting wife. He said ([1943] South Australia Reps. 92):

“We have referred to the cases which show that desertion is not terminated or interrupted by casual acts of intercourse or casual visits, without

any return to the routine of common life, or anything resembling 'the re-establishment of the matrimonial relationship' (*Timms v. Timms* (21)). There may be condonation which is not followed by cohabitation, and it would be contrary to public policy to treat a casual return, for the purpose of exploring the possibilities of reconciliation, as a resumption of cohabitation."

- A —language anticipating that used seven years later by DENNING, L.J., in *Bartram v. Bartram* (3). On the other hand, in the later South Australian case of *Fairey v. Fairey* (23), REID, J., held that in the case of a deserting wife a single act of intercourse amounted to condonation on the husband's part. He relied, however, on the fact that by the express terms of s. 11 of the South Australian Matrimonial Causes Act condonation is applicable, indifferently, to all grounds of divorce, thereby distinguishing his case from the cases decided in Victoria where by the local Marriage Acts condonation is not expressly made a ground for refusing a decree in a suit for divorce based only on desertion. *Fairey v. Fairey* (23) is thus no less inapplicable to a case decided under the Matrimonial Causes Act, 1950, of this country. It appears, therefore, that the weight of the American and Australian authority cited to us is consonant with the view which is, in my judgment, correct in principle and which in any case *Bartram v. Bartram* (3) binds us to adopt. For the reasons which I have stated I think that the appeal should be allowed and that the husband is entitled to his decree.

- JENKINS, L.J.: This being an undefended case the evidence comprises only the barest outline of the facts elicited, as is, unfortunately, too often the case in undefended causes, from the petitioner husband largely by leading questions. [His LORDSHIP stated the facts.] The learned commissioner formed a most favourable view of the husband as a truthful and completely honest man, and his conclusion on the facts was that the wife was entirely to blame, and was guilty on July 6, 1944, of desertion which

- E "continued up to the presentation of the petition in the ordinary sense of the word desertion. That is to say both the fact of separation and the necessary animus on the wife's part so continued."

He added:

- F "By 'separation' I mean here only that there was no full resumption of cohabitation in the matrimonial home. Of the wife's animus I need only say that I find that at no time since July, 1944, has she formed any intention to resume married life."

- G After considering the authorities bearing on the question whether sexual intercourse between spouses during the period of three years immediately preceding the presentation by one of them of a petition for divorce based on desertion under s. 1 (1) (b) of the Matrimonial Causes Act, 1950, precludes the granting of a decree on that ground, the learned commissioner regarded himself as bound, by what was said in the House of Lords in *Henderson v. Henderson & Crellin* (6) as to the irrevocable effect of condonation by intercourse on the husband's part, and having regard also to the reasoning of the Divisional Court in *Viney v. Viney* (1) and the disapproval therein expressed of *Whitney v. Whitney* (2), where a husband was granted a decree notwithstanding intercourse with the deserting wife within the three years period, to dismiss the petition, which he accordingly did.

- H From that decision the husband now appeals, and the questions to be considered are substantially: (i) whether the mere fact of sexual intercourse between a deserted and a deserting spouse, without anything more towards the resumption of cohabitation in the full sense, is consistent with the continuance of the state of desertion, and, therefore, does not preclude the granting to the deserted party of a decree based on three years' desertion on a petition presented within three years after such intercourse (a) if the deserted party is the husband, and (b)

if the deserted party is the wife; and (ii) whether the doctrine of condonation or some analogous principle applies to the matrimonial offence of desertion as defined in s. 1 (1) (b) of the Matrimonial Causes Act, 1950, so as to make sexual intercourse between spouses within the three years period an absolute bar to a decree founded on desertion for that period, at all events where the deserted party is the husband.

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Apart from authority, I, speaking for myself, would have been disposed to regard sexual intercourse between a deserted and a deserting spouse as in itself essentially inconsistent with the continuance of the state of desertion between them, and thus interrupting the statutory period of desertion whether the deserted party was the husband or the wife. There is, to my mind, an element of repugnancy in the conception of a husband and wife, while in the act of having sexual intercourse with each other as husband and wife, being, nevertheless, in a state of desertion. It is well settled that cohabitation without actual sexual intercourse may condone adultery, whereas sexual intercourse with knowledge of the facts does in itself inevitably condone it, at all events where the husband is the injured party, even if there is nothing more in the way of resumption of cohabitation in the full sense. It seems to me, *prima facie*, unreasonable that an act which is accorded such a decisive effect as an affirmation by the injured party of the married state for the purposes of condonation should be able to take place consistently with the uninterrupted continuance of a state of desertion, which while it continues amounts to a negation of the married state. Suppose the case of a wife who is in desertion and has committed adultery. With knowledge of the adultery the husband seeks her out and has intercourse with her. This is decisive as a condonation of, and affirmation of, the marriage, notwithstanding the adultery. The husband, by his conduct, has taken his wife back as his wife, adulteress though she has been. How can it consistently be said that, although he has taken her back and reinstated her as his wife, she has not come back to him, but has been continuously, even during the decisive act of intercourse, in a state of desertion from him?

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This illustration, at all events where the husband is the deserted party, reinforces the conclusion to which, apart from authority, I would, speaking for myself, be disposed to come—that sexual intercourse between a deserted and a deserting spouse, even when unaccompanied by resumption of cohabitation in other respects, puts an end to or interrupts the period of desertion. In other words, I would, speaking for myself, be inclined, apart from authority, to hold that while desertion is terminated by resumption of cohabitation in the full sense it does not follow that desertion can only be terminated by such resumption, and that sexual intercourse in itself, irrespective of any resumption of cohabitation in other respects, does suffice to terminate it, as being essentially inconsistent with the continuance of a state of desertion. I would add that my inclination so to hold would be stronger in the case of a deserted husband than in the case of a deserted wife by reason of the more cogent application to the case of a deserted husband of the comparison I have sought to draw with the effect of sexual intercourse for the purposes of condonation.

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The question is, however, by no means free from authority, and we have been referred to a large number of cases, including several from the United States of America and Australia, bearing directly or indirectly on it. I do not propose to embark on any protracted review of all these decisions, as reference to only a few of them will suffice to indicate the course which, in my judgment, this court is bound by authority to take. I will begin with *Rowell v. Rowell* (14) where it was held by this court that the fact that intercourse had taken place between spouses living apart under a deed of separation was not of itself conclusive evidence that the separation had come to an end so as to make the deed of no effect, or in particular so as to put an end to the husband's obligation under the deed to pay a weekly sum to the wife during their joint lives if they

should so long live separate from one another. Although that case was concerned with a contractual separation under a deed, and not with desertion, and the question, therefore, was whether, by reason of the mere fact of sexual intercourse, unaccompanied by any resumption of cohabitation in other respects, the parties had ceased to "live separate and apart from each other" within the meaning of the deed, there is no doubt that it has been regarded as authority for the proposition that sexual intercourse between a deserted and a deserting spouse does not of itself put an end to desertion.

In *Mummery v. Mummery* (10) LORD MERRIMAN, P., founding himself to a great extent on *Rowell v. Rowell* (14), held that a single act of intercourse between a deserted wife and a deserting husband consented to by the wife in the hope of effecting a reconciliation with the husband, who for his part never intended to live with her again, and, in fact, left her the next morning and never returned, did not operate as a condonation of the desertion prior to the act of intercourse or break the continuous desertion for upwards of three years immediately preceding the presentation of the wife's petition. LORD MERRIMAN, P., said ([1942] 1 All E.R. 555):

"... a resumption of cohabitation in the full sense of the word puts an end to a state of desertion, and that not merely because it condones the previous desertion for whatever time that offence has lasted, but also because a resumption of cohabitation is the exact negation of a state of desertion. The two things cannot exist together. In this case, of course, it is completely clear that, apart from whatever may be the legal effect of what happened on that particular night, the husband had not the slightest intention of resuming cohabitation in the ordinary sense of the word. On any view of the matter, even assuming that I am bound to hold that cohabitation was resumed or that the offence had been condoned on that occasion, it is plain that the husband resumed a state of desertion again the next day. I think . . . that the question for decision is whether or not the fact that they spent the night together, and for that night resumed marital relations in the usual sense, is conclusive evidence of the fact that there had been a resumption of cohabitation so as to condone the previous desertion and bring the state of desertion to an end. If the fact that sexual intercourse has taken place between the parties is conclusive, there is nothing more to be said about it. The wife does not suggest . . . that her consent to that act was obtained by fraud, so that the issue raised in *Roberts v. Roberts & Temple* (24) does not arise. It seems to me that the whole question turns on what cohabitation means, and what a resumption of cohabitation means. Now, LORD MERRIVALE said more than once that no judge has ever attempted a comprehensive definition of desertion and that no judge would ever succeed in doing so. Amongst the descriptions of desertion which he gave was one which has always appealed to me. He said that desertion was a withdrawal, not from a place, but from a state of things (*Pulford v. Pulford* (25) ([1923] P. 21)). Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so. At least a resumption of cohabitation must mean resuming a state of things—that is to say, setting up a matrimonial home together. That involves, so it seems to me, a bilateral intention on the part of both spouses so to do. The question, then, is: Does coming together for a single night raise an irrebuttable presumption that the parties have resumed cohabitation even for that short time? Put in another way, does it raise an irrebuttable presumption that the wife, in consenting to that state of things, has condoned the previous desertion? . . . I think that it would lead to an absurd state of things if one were bound to hold that that is so."

After describing as "praiseworthy" every legitimate attempt by a wife to regain her husband's affection and pointing out that the mere occurrence of

meetings arranged with a view to effecting a reconciliation obviously would not compel the court to hold that the state of desertion was brought to an end, LORD MERRIMAN, P., continued (*ibid.*):

"Why, then, should a wife who goes a step further in the hope of effecting a reconciliation, and allows her husband to sleep the night with her, be held to have condoned the offence and to have resumed cohabitation when it is clear, beyond the slightest shadow of doubt, that the husband at the same time had no intention . . . of resuming cohabitation? I do not think that I am obliged so to hold. I think the law is that, as regards the wife at any rate, an act of sexual intercourse is not conclusive on the question of condonation; and that it does not raise an irrebuttable presumption that cohabitation has been resumed. I think I am justified in holding, if not obliged so to hold, on the authority of *Rowell v. Rowell* (14)."

The President then proceeded to cite at some length from the judgments in that case and expressed his conclusion thus (*ibid.*, 556):

" . . . I think that I am justified in holding here that there has been neither condonation nor a resumption of cohabitation which interrupts this period of desertion, and that the wife is entitled to her decree."

The judgment in *Mummery v. Mummery* (10) received the unqualified approval of this court in *Bartram v. Bartram* (3), and must, therefore, be regarded as an authority binding on us, and it seems to me to establish the proposition that in order to terminate or interrupt the state of desertion between a deserted and a deserting spouse there must be a resumption of cohabitation, that is to say, the setting up of a matrimonial home together pursuant to a "bilateral", which I take to mean a "common" or "mutual", intention to do so. Indeed, in *Bartram v. Bartram* (3), DENNING, L.J., went further and said ([1949] 2 All E.R. 273):

" . . . I would say in such a case the period of desertion does not cease to run unless, and until, a true reconciliation has been effected . . . Any other view would greatly hamper attempts at reconciliation, because it would mean that the deserted party would be disinclined to take the other back for fear of losing his legal rights in case the reconciliation was unsuccessful."

It seems to me necessarily to follow that mere acts of sexual intercourse between a deserted and a deserting spouse, not accompanied by any setting up of a matrimonial home together or by any intention on the part of the deserting spouse to do so, do not terminate or interrupt the state of desertion.

In *Mummery v. Mummery* (10) LORD MERRIMAN, P., was careful to preserve the possible distinction between the case of a deserted wife (which was then before him) and the case of a deserted husband, having in mind, no doubt, the question of condonation (to which I will return) and the much greater weight attributable to sexual intercourse as condonation by a husband than as condonation by a wife. For my part, if I have rightly stated the ratio decidendi in *Mummery v. Mummery* (10) as expressly approved in *Bartram v. Bartram* (3), it seems to me, setting aside for the moment the question of condonation, to leave no room for any such distinction. If what is indispensably necessary to end or interrupt desertion is the resumption of cohabitation in the sense of the setting up of a matrimonial home together accompanied by a common intention on the part of both spouses to do so, then mere sexual intercourse between a deserted and a deserting spouse unaccompanied by any such setting up, or common intention to do so, cannot end or interrupt the state of desertion, whether the deserter is the husband or the wife, and whether or not the intercourse leads (as in the present case) to the birth of a child.

In *Whitney v. Whitney* (2) WILLMER, J., following *Bartram v. Bartram* (3) and *Mummery v. Mummery* (10), held a husband entitled to a decree on the

ground of desertion by his wife for the statutory period of three years notwithstanding sexual intercourse with his wife on some half dozen occasions during that period, the intercourse having taken place on week-end visits made by the husband to the wife in attempts to effect a reconciliation, and the wife on her part never having had any intention of setting up a matrimonial home, but having on the contrary since her initial act of desertion maintained her deter-

A mination to live separate and apart from her husband. Subject to what I will say below on the question of condonation, I think that on the authorities WILLMER, J., was right in so holding. In *Viney v. Viney* (1), however, a Divisional Court, consisting of LORD MERRIMAN, P., and HAVERS, J., disapproved *Whitney v. Whitney* (2) on the ground that the husband in that case must be taken to have condoned the desertion, and referred at some length to the re-statement of the doctrine of condonation and the conclusive effect for that purpose of sexual intercourse on the part of an injured husband contained in the speech of VISCOUNT SIMON, L.C., in *Henderson v. Henderson & Crellin* (6). Both *Henderson v. Henderson & Crellin* (6) and *Viney v. Viney* (1) were cases of adultery, the application to which of the doctrine of condonation in the strict sense is undoubted. The same can, in my view, however, by no means be said in relation to desertion of the kind here in question, that is, the continuing and, so to speak, ambulatory offence of desertion for a period of at least three years immediately preceding the presentation of the petition, which can never become complete until the petition is actually presented, as distinct from, for example, the desertion by a husband for a period of two years (completed at any time) which under s. 27 of the Matrimonial Causes Act, 1857, in conjunction with the husband's adultery entitled the wife to a divorce, and which, as appears from *Blandford v. Blandford* (7), could be the subject of condonation and revival. Clearly, unless the doctrine of condonation or some analogous principle is applicable to the new statutory offence of desertion for the period of three years immediately preceding the presentation of the petition, the strictures passed in *Viney v. Viney* (1) on the decision in *Whitney v. Whitney* (2) are not well founded.

E This brings me to the consideration of the second of the two questions stated earlier in this judgment, that is, whether the doctrine of condonation or some analogous principle does apply to desertion as defined in s. 1 (1) (b) of the Matrimonial Causes Act, 1950. Counsel for the Queen's Proctor, who on the first question supported in argument substantially the view above expressed as the view I would myself, apart from authority, have been disposed to prefer, did not contend as regards the second question that the doctrine of condonation in the strict sense applies to desertion as defined in s. 1 (1) (b), and, in my view, the difficulties in the way of so applying it are really insuperable.

I will not attempt to add any definition of my own to the various statements of the doctrine of condonation to be found in the authorities; but I think it may, at all events, be said that condonation properly so called does, at all events, involve (i) an election by the injured spouse to affirm the marriage notwithstanding the condoned offence, and (ii) the possibility of revival of the condoned offence by any further matrimonial offence on the part of the guilty spouse. Now, it is the essence of the offence of desertion that the deserted spouse should all the time be affirming the marriage; otherwise desertion ceases and becomes (in effect) separation by consent. There is thus no question of election on the part of the deserted spouse to affirm or disaffirm it. He or she has no option but to affirm. Further, the offence of desertion for a period of three years immediately preceding the presentation of the petition, once condoned, could never be revived, because the continuous period of desertion required by the statute would be irretrievably broken. For these reasons it seems to me that the doctrine of condonation in its strict sense is inappropriate and inapplicable to the offence of desertion as defined in s. 1 (1) (b) of the Act of 1950.

Counsel for the Queen's Proctor did, however, submit, and I was attracted by the submission, that by analogy to the doctrine of condonation in the strict sense a deserted spouse, or at all events a deserted husband, who chooses to have sexual intercourse with the deserter must be treated as having conclusively affirmed the marriage and waived or remitted the deserting spouse's desertion for any period preceding the act of intercourse. In the end I find myself forced to the conclusion that this view cannot stand consistently with the ratio decidendi in *Mummery v. Mummery* (10) as approved in *Bartram v. Bartram* (3). If sexual intercourse without resumption of cohabitation in other respects does not put an end to or interrupt the state of desertion, then the state of desertion and the offence of the deserting party continues notwithstanding the intercourse, and there is no room for the application of the doctrine of condonation or any analogous principle. To apply it would be as much as to say either that the state of desertion can be brought to an end and can be interrupted by sexual intercourse alone without any setting up by the spouses of a matrimonial home together and without any mutual or common or bilateral intention to do so (which the ratio decidendi in *Mummery v. Mummery* (10), as approved in *Bartram v. Bartram* (3), in my view, forbids), or else that the offence of desertion can be condoned, although it continues without a break before during and after the act relied on as constituting condonation, which seems to me impossible. Accordingly, in deference to the authorities rather than by my own inclination, I would allow this appeal.

HODSON, L.J.: The question of law which falls to be determined is whether a husband who has been deserted by his wife can succeed in a petition for divorce if during the three years before the petition he has had sexual connection with her. This question was answered in the negative by the learned commissioner, who, in doing so, followed the dicta of LORD MERRIMAN, P., and HAVERS, J., in *Viney v. Viney* (1) which disapproved a decision of WILLMER, J., in *Whitney v. Whitney* (2), where the same question was answered in the affirmative. The reasoning on which LORD MERRIMAN, P., founded himself is plain and logical. Desertion is a matrimonial offence. A husband who has sexual relations with his erring spouse with knowledge thereof cannot be heard to say that he has not condoned the offence: *Henderson v. Henderson & Crellin* (6). Therefore, desertion prior to sexual relations is manifestly condoned by a husband. This is so although in the case of a wife who has been deserted and submits to the embraces of her husband in an endeavour to secure his return, condonation will not inevitably be found against her if she seeks to rely on a period of desertion before as well as after such an event: see *Mummery v. Mummery* (10). This conclusion is permissible since the doctrine of condonation where a wife submits to her husband, he being the wrongdoer, operates in a different way from that in which it operates where the position is reversed and the wife is the wrongdoer: *Henderson v. Henderson & Crellin* (6).

Counsel for the Queen's Proctor has contended for a negative answer to the question, but he has not put the case in the same way. He admits that the doctrine of condonation does not apply except by analogy to what may be called a current period of desertion as opposed to a period which of itself provides a complete cause of action. He contends that the act of voluntary sexual intercourse is, however, conclusive evidence of a termination of desertion, and that neither party can be heard to say after such an act that cohabitation has not been resumed. Accordingly, he says *Mummery v. Mummery* (10) was wrongly decided because once the sexual act is proved the factum of separation has gone. He contends that the act cannot be referable to anything else but living together as husband and wife. In my judgment, the argument, although it has considerable force, is not consistent with authority. It is now, I think, too late to say that acts of intercourse per se operate to terminate desertion.

Assistance is, I think, derived from *Rowell v. Rowell* (14), a decision of this court upon the construction of a deed of separation expressed to operate during the joint lives of the parties "if they should so long live separate from each other". The question there was whether the deed ceased to operate because the sexual act had taken place; in other words, must the parties be held to have ceased to live separate from each other because this event had occurred? The question was answered in the negative. In my opinion, this involves a conclusion that the parties had not ceased to live apart, which is the same thing as had not "resumed cohabitation", to use the formal language employed by the legislature in the Summary Jurisdiction Acts. I conceive that the result of this case would have been the same whichever spouse was setting up the deed. This case was followed by LORD MERRIMAN, P., in *Mummery v. Mummery* (10), which was a desertion case. The last decision has been regularly followed and expressly affirmed by the Court of Appeal in *Bartram v. Bartram* (3). In the latter case the particular point was not in question, but the significance of the acts of intercourse can hardly have been overlooked by the members of the court. In any event I would respectfully accept the decision of LORD MERRIMAN, P., in *Mummery v. Mummery* (10) and the reasoning on which it is based with one qualification. In *Mummery v. Mummery* (10) the President expressly reserved the point now in question by using the words "as regards the wife at any rate", thus showing plainly that he had in mind the impact of the doctrine of condonation on sexual intercourse by a husband with an erring wife.

This brings me to consider the question whether the court is bound to hold that the husband is precluded by his act of having had sexual relations with his wife from relying on desertion preceding that act because he has thereby condoned her desertion. In the first place there is no authority binding on this court to this effect. The actual decision of the Divisional Court in *Viney v. Viney* (1) is not open to criticism since the offence there under consideration was adultery, so that condonation of adultery only was directly in question. The observations on the question now before the court were obiter dicta. Cases under the old law such as *Blandford v. Blandford* (7), and *Paine v. Paine* (9), where condonation was applied to completed desertion giving rise in each case to a cause of action, are not directly in point. The same may be said of *Maslin v. Maslin* (8), a recent decision of HAVERS, J., where, intercourse having taken place after a petition based on desertion had been presented by the husband, the petition was dismissed. The absence of any reference to condonation in the section of the Matrimonial Causes Act, 1950, dealing with divorce for desertion is of significance but not conclusive, particularly as sodomy, which is also omitted from the offences barred by condonation, is held to be in the same position as adultery: *Statham v. Statham* (26), per GREER, L.J. ([1929] P. 145).

I think the key to the problem is to be found in an examination of what is meant by condonation in the legal sense. Since offences condoned are capable of revival condonation is not equivalent to forgiveness in the theological sense. It may be said that it implies merely that the legal remedy for the time being is waived: see *Beeby v. Beeby* (27) where LORD STOWELL said (1 Hag. Ecc. 793 and 797):

"Now condonation is forgiveness legally releasing the injury . . . In general it is a good plea in bar; it is not fit that a man should sue for a debt which he has released . . ."

Nevertheless, there is always an element of true forgiveness: see *Henderson v. Henderson & Crellin* (6) per VISCOUNT SIMON, L.C. This element involves, in my judgment, the factor of choice. The husband must be held to have made such a choice when he has sexual relations with his wife after his right of action against her has accrued. On the other hand, the choice whether to forgive or not is not open during a current period of desertion to the deserted spouse who is asked to receive back his erring partner. Whether he forgives her or

not he must take her back and thereafter her desertion is at an end. If he will not receive her, he becomes himself a deserter. He cannot say: "You have deserted me. I will not forgive you for running away, and, therefore, you cannot return". During the whole of the current period he must affirm the marriage. In the case of a completed period of desertion, now only after the presentation of a petition, in the case of adultery and in that of cruelty, he can disaffirm the marriage as soon as the offence is committed.

Accordingly, in my opinion, as I ventured to suggest in *Lane v. Lane* (28), when considering a current period of desertion the primary question is: Aye or No, "is it terminated?"—not "is it condoned?" It can be terminated by a resumption of cohabitation involving a mutual or, as it has been called, a bilateral act, or it can be terminated by the deserter returning or even offering to return provided the offer is not one which for some reason the offeree is entitled to refuse, but it is not necessarily terminated as a matter of law by the sexual act. So to hold would, in my judgment, put difficulties in the way of attempted reconciliations, which would be regrettable, and for that reason I think it would be against the public interest if one were driven to such a conclusion. I am glad not to be so driven. At the same time the facts in each case must be carefully considered because if it be found that there has really been a mutual coming together for however short a time it is clear that in such a case desertion has been terminated. The case under consideration is in itself on its own facts not free from difficulty, but I have come to the conclusion that on the facts as found there was no mutuality, and the appeal should be allowed.

Appeal allowed.

Solicitors: *Kinch & Richardson*, agents for *Percy Hughes & Roberts*, Birkenhead (for the husband); *Treasury Solicitor* (for the Queen's Proctor).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

STAPLEY v. GYPSUM MINES, LTD.

[COURT OF APPEAL (Singleton, Birkett and Morris, L.J.J.), March 13, 14, 17, 18, 19, April 7, 1952.]

Negligence—Breach of statutory duty—Breach fault of deceased jointly with fellow workman—Liability of employers in respect of death of deceased.

The deceased and a fellow workman, both employed by the defendants in their mine, were of equal status, neither being in charge of the other, and both were directed by a foreman of the defendants to bring down an unsafe roof under which they were proposing to work. After attempting unsuccessfully to bring down the roof, they jointly agreed to cease their efforts and to carry on with their normal work. As a result of the unsafe condition of the roof the defendants were in breach of their duty under regs. 7 (3) and 14 (1) of the Metalliferous Mines General Regulations, 1938, and the deceased and his fellow workman were in breach of their duty under reg. 15, the duty in each case being to secure safe conditions in the mine. Shortly after resuming work the deceased was killed by a fall of roof. In an action by his widow against the defendants under the Fatal Accidents Act, 1846, *SELLERS, J.*, found in her favour on the ground that the defendants were liable for the negligence and/or breach of duty on the part of the deceased's fellow workman and gave judgment for her for half the amount which he would have awarded if the deceased had not been partly responsible. On appeal,

HELD: the deceased's own negligence and/or breach of duty, and not that of the defendants, was the substantial cause of the deceased's death; there was no negligence or breach of duty on the part of the deceased's fellow workman for which the defendants could be made responsible; and, therefore, the widow's claim must be dismissed.

AS TO EFFECTIVE CAUSE OF INJURY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 590-594, paras. 843-845; and FOR CASES, see DIGEST, Vol. 36, pp. 24, 25, Nos. 118-124.

Cases referred to:

- A (1) *Smith v. Baveystock & Co., Ltd.*, [1945] 1 All E.R. 531; 2nd Digest Supp.
- (2) *Cakebread v. Hopping Bros. (Whetstone), Ltd.*, [1947] 1 All E.R. 389; [1947] K.B. 641; [1948] L.J.R. 361; 177 L.T. 92; 2nd Digest Supp.
- (3) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (4) *Gallagher v. Dorman, Long & Co., Ltd.*, [1947] 2 All E.R. 38; 177 L.T. 143; 2nd Digest Supp.
- B (5) *Flower v. Ebbw Vale Steel, Iron & Coal Co.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; *revsd. on other grounds* H.L., [1936] A.C. 206; Digest Supp.
- (6) *Dew v. United British S.S. Co., Ltd.*, (1928), 98 L.J.K.B. 88; 139 L.T. 628; Digest Supp.
- (7) *Beal v. Gomme (E.), Ltd.*, (1949), 65 T.L.R. 543; 2nd Digest Supp.
- C (8) *Davies v. Swan Motor Co. (Swansea), Ltd.*, [1949] 1 All E.R. 620; [1949] 2 K.B. 291; 2nd Digest Supp.
- (9) *Harvey v. Road Haulage Executive*, [1952] 1 K.B. 120.
- (10) *Vyner v. Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 547; [1946] K.B. 50; 115 L.J.K.B. 119; 173 L.T. 330; 110 J.P. 76; 2nd Digest Supp.
- D (11) *Potts (or Riddell) v. Reid*, [1942] 2 All E.R. 161; [1943] A.C. 1; 111 L.J.P.C. 65; 167 L.T. 301; 2nd Digest Supp.
- (12) *Lochgelly Iron & Coal Co., Ltd. v. M'ullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463; Digest Supp.
- (13) *Lees v. Dunkerley Brothers*, [1911] A.C. 5; 80 L.J.K.B. 135; 103 L.T. 467; 4 B.W.C.C. 115; 34 Digest 496, 4096.
- (14) *Admiralty Comrs. v. North of Scotland & Orkney & Shetland Steam Navigation Co., Ltd.*, [1947] 2 All E.R. 350; *sub nom. Boy Andrew (Owners), Ltd. v. St. Rognvald (Owners), Ltd.*, [1948] A.C. 140; [1948] L.J.R. 768; 2nd Digest Supp.
- E (15) *Grant v. Sun Shipping Co., Ltd.*, [1948] 2 All E.R. 238; [1948] A.C. 549; [1949] L.J.R. 727; 2nd Digest Supp.

F APPEAL by the defendants, and CROSS-APPEAL by the plaintiff, from an order of SELLERS, J., dated Dec. 20, 1951, awarding the plaintiff damages for negligence or breach of statutory duty causing the death of the plaintiff's husband, the damages being reduced by one half on account of the fault of the deceased. The plaintiff claimed under the Fatal Accidents Act, 1846. The learned judge found in favour of the plaintiff on the ground that the defendants were liable for the negligence or breach of statutory duty of their employee who was working with the deceased, both of whom were charged with the duty of making safe the roof of the mine from the fall of which the deceased met his death.

G *Percy Lamb, Q.C.*, and *Friend* for the defendants.
Jukes for the plaintiff.

Cur. adv. vult.

H April 7. The following judgments were read.

SINGLETON, L.J.: John Stapley and John Dale were miners who worked together for the defendant company in their gypsum mine. The former was a breaker, and the latter was a borer; they were of equal rank and status; Stapley had considerably longer experience than Dale; he was a good workman, though slow. The place at which they were to work on Aug. 21, 1950, was No. 9 stope; the way to the stope was along that which was known as the twitten. In accordance with their practice they tapped the roof as they approached the

stope (where there was a fault) and they found that the roof was drummy, which was an indication that it was dangerous, and that there might be a fall. This is often found after there has been shot-firing. They drew the attention of the foreman to it, and he gave them the order: "Fetch it down", which was understood as meaning: "Do not work under it until you have got it down". For half an hour or so they tried to get it down by using a pick, but they did not succeed, and they decided to get on with their normal work. Dale went into the twitten to bore some holes. If the order had not been given by the foreman—in other words, apart from the danger arising from the roof—Stapley's work would have been to break up the gypsum into small pieces. After half an hour Dale returned to the stope, and, as he did not see any light, he looked for Stapley and found him dead in the stope under a fall of roof. By him there was a pitcher or short drill.

On Nov. 16, 1950, this action was commenced by the widow of Stapley, in which she claimed damages on behalf of herself and her children against her husband's employers alleging negligence and breach of statutory duty. The action was heard by SELLERS, J., at the Lewes Assizes, and on Dec. 20, 1951, he gave judgment for the plaintiff for £1,512 10s. damages, holding that the accident was due to the conduct of both Stapley and Dale in failing to do that which the foreman had told them to do, in failing to report to the foreman, and in deciding together to continue their work with the roof in the state in which they knew it to be. In accordance with these findings, he gave judgment for one half of the amount which he would have awarded if Stapley had not been partly responsible. It is not clear to me whether the finding of the judge is based on negligence or on breach of statutory duty. He did not find in favour of the plaintiff on any of the particulars of claim as originally pleaded, but at the end of the evidence he allowed an amendment which became No. 10 of the particulars, and which is:

"The said Dale, their servant, failed to bring down the said roof by firing or boring holes for firing, and/or failed to report to the said Church [the foreman] his inability to bring down the said roof."

The judgment is founded on this. The defendants appeal to this court against the judgment of SELLERS, J., and there is a cross-appeal by the plaintiff.

It is abundantly clear that at the time of this unfortunate accident both Stapley and Dale were acting contrary to the order of the foreman and in breach of regulations to which I shall have to refer. The judge found that

"they were working there as men of equal status as regards this obligation; one was not in charge of the other. They were working together, and it seems to me that they were both responsible for the events which happened, and in those circumstances one can only say that the man Stapley, unfortunately, by his own act, brought about the loss which his widow and children have suffered, but equally so did the act of Dale. Either of them could have avoided this accident if they had done that which it was proper for them both to do."

He accepted the evidence of Dale that they had abandoned any attempt to bring down the roof and had agreed together to carry on with their work. He thought all the facts pointed to the definite view that at the time of the accident Stapley was carrying on with his ordinary work as if the roof under which he was working had been made secure, and was secure. Furthermore, SELLERS, J., was satisfied that both men understood the order given to them by the foreman and that it was their task to take out as much as was necessary to make the roof safe. There were three ways in which that could have been done. They were all known to the two men, and the processes were quite familiar to them.

In his judgment the learned judge says:

"Apparently the customary preparatory way in any event is to use a pick and see if one can get the point of the pick underneath the offending piece

A of roof to loosen it and bring it down. If the roof is more stubborn a pinch-bar may be used to bring it down. That is the second method. The third one is to bore holes and to get a shot-firer, who is of a still higher grade and works in conjunction with these two men, to put his shot in and blast it down, just as the gypsum itself is blasted down. All those three ways were known. It was suggested in the course of this case on behalf of the plaintiff, mainly by the evidence of a witness called Field, that there ought to have been someone there, that Mr. Church ought to have remained there, because of the particular circumstances that prevailed, and superintended the task which he had imposed upon these two men, Stapley and Dale. I did not find Mr. Field a very satisfactory witness. I thought he was too much of the advocate rather than the witness who was speaking as to matters of fact and experience with which he was familiar. I am not of the view that it was in the circumstances necessary for Mr. Church, who had other routine duties to do, to remain there and see this work done. The plea that has been made, that there was a lack of supervision, is rejected by me on the evidence which has been given here."

C This last observation was in regard to the suggestion that this was a bigger fall than usual. The evidence showed that you cannot tell just how much will come down in such a case and that there was nothing unusual. On the evidence I think the judge was right in finding that there was no lack of supervision. Both men were experienced, and their duty was to report to the foreman (or to the shot-firer) if they could not carry out the order they had been given. That seems to be clear from the evidence given on behalf of the plaintiff by Dale, Mann and D Jenkinson. The two men worked together, and one or other ought to have reported; neither ought to have worked under the drummy, or faulty, roof.

E The Metalliferous Mines General Regulations, 1938 (S.R. & O., 1938, No. 630) (made under s. 86 of the Coal Mines Act, 1911, as applied to Metalliferous Mines by the Mining Industry Act, 1920) were made for the safety of those working in mines of this character, and they impose duties on owners, and on those working in the mine. The most important for the purpose of this case are:

" 7 (3) The roof and sides of every travelling road, outlet and working place shall be made secure, and no person, unless engaged in repairing or investigating the safety of the workings shall travel on or work in any travelling road or working place which is not so made secure . . . "

F " 14 (1) The owner or agent shall carry out the provisions of the Acts, the regulations, and the special rules and to the best of his power enforce the observance thereof, and he shall give such directions as may be necessary to ensure compliance with those provisions and to secure the safety of the mine, and the safety, health and proper discipline of the persons employed . . . (7) If any danger is revealed by the examination or inspection, steps shall be taken at once to remove it and except for that purpose any G person exposed to the danger shall be withdrawn . . . "

H " 15 (1) Every person employed at the mine shall comply with the provisions of the Acts, the regulations and the special rules and any regulations made by the owner or agent in pursuance thereof and with such directions concerning safety and discipline as may be given to him by those in authority over him. (2) Every workman employed in the mine shall, before commencing work, and during the course of it, especially after blasting, make a careful examination of his working place, and so far as practicable remove any or secure any loose rock, stones or ground which might be dangerous. (3) Every person employed at the mine who notices anything that appears unsafe, or likely to cause danger, shall remedy the matter if it is within the scope of his duty, and if not shall withdraw forthwith from the place of danger and report the matter to the owner, agent, or other responsible official . . . (10) No person shall negligently or wilfully

do anything likely to endanger life or limb in the mine, or negligently or wilfully omit to do anything necessary for the safety of the mine or of the persons employed therein."

The order given by the foreman was to ensure that reg. 7 (3) was complied with; it was fully understood by both men; it was a direction under reg. 14 (1). In disregarding it the men were in breach of regs. 15 (1) and (3) as well as of reg. 14 (3). The foreman's report (made under reg. 14 (5)) contains the words "men warned of roof and told to dress down and make safe." He said he made the report before he was called to the scene of the accident. Apart from the regulations, it was clear from the evidence of the witnesses, Mann and Jenkinson, called for the plaintiff, and the foreman, Church, called on behalf of the defendants, that no man ought to work under a roof such as this had been found to be or after the order which had been given.

What, then, was the cause of Stapley's death? It can be put in more than one way. It was caused by a fall of roof at the place at which he was working. He and his companion knew of the condition of the roof, and had been given an order to bring it down. In deciding on the course they took they acted in disregard to the regulations and in disobedience of the order, and in going to work under that roof in its dangerous condition Stapley was exposing himself to the very danger which regs. 7 (3) and 15 (3) are designed to avoid. Thus, it can fairly be said that Stapley's death was brought about by his breach of the regulations, and, particularly, by his going to work under a faulty roof after the order which had been given. *SELLERS, J.*, considered that it was equally through the act of Dale, and on that ground he held that the employers were responsible in the action to the extent of one half of the damages which would have been recoverable if Stapley had not been at fault.

I will consider the claim based on negligence first. Stapley and Dale, having failed to get the roof down with a pick, decided to carry on. "It was an agreement between us", said Dale. The judge found that they had abandoned any attempt to bring down the roof and had agreed together to carry on with their work. How, then, can there be any question of negligence between the two? There is no liability for negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the injured party and not merely to others. Stapley by his agreement, or arrangement, with Dale appears to me to have absolved Dale from any duty of care towards him in regard to this roof. I do not think that if Stapley had suffered injury as a result he could have recovered damages against Dale in an action based on negligence, and a claim against the employers on the ground of negligence by Dale would meet with the like answer. For those reasons I do not consider that the claim can succeed in so far as it is based on negligence.

The claim based on breach of statutory duty presents more difficulty. In *Smith v. Baveystock & Co., Ltd.* (1) the court had to consider a claim by an experienced circular saw operator, one of whose fingers passed under the guard and was injured. It was contended on his behalf that, though the adjustment of the guard was left to him, it remained the adjustment of the employers, for which they must take the responsibility if the operator suffered injury thereby. The court concluded that there had been no breach of statutory duty, but it is interesting to see that *LORD GODDARD*, in the course of his judgment, said of the plaintiff ([1945] 1 All E.R. 534):

"He cannot take advantage of his own wrong and say to his employer: 'Although you left me to adjust it and I did not adjust it, therefore I am going to claim damages against you'."

And *DU PARCQ, L.J.*, said, on the assumption that there had been a breach of statutory duty (*ibid.*, 535):

"I think [the defendants] are entitled to say: 'The fault is really yours and not ours. We were quite entitled to rely on you. True, if somebody else

had been injured by any failure on your part to fulfil your obligation we should have had to pay the penalty, we should have been responsible to him. We cannot rid ourselves of our obligation. But it is quite absurd to think that if you, who are really the person to blame because you were reasonably and properly entrusted by us with this duty, failed to carry it out, therefore, we have got to pay damages to you'."

A Stapley and Dale were both men of experience; they knew what was to be done, and they knew how to do it; they did not need supervision. If Stapley alone had been responsible for the breach of statutory duty, I think it is clear that his widow could not have recovered damages, but it is said that the accident was due equally to the conduct of Dale, and that for that the employers are responsible. It is true to say that no one can waive the performance of a statutory

B duty. Still, is a man who is injured through breach of a duty which he owes to all others working in a mine in a better position as against his employers if he can say: "Yes, I acted in complete disregard to the regulations, but I did so in agreement with another employee" ? It ought not to be so. If ten men working together in a mine come to an arrangement that they will pay no heed to statutory regulations and all ten are injured as a result of a joint breach, are they all

C entitled to damages against the mine owners ? I cannot help feeling that, if such a position arose, damages ought not to be recoverable, for the injuries would be the result of an illegal agreement or of an agreement to do something in breach of regulations made for the safety of all persons working in the mine.

However, no such point as this was pleaded or argued. Counsel for the

D defendants submitted that the death of Stapley was caused by his own breach of statutory duty, and that it mattered not that another man was a party to the breach. Each was an experienced man, and each owed a duty to himself and to the employers, as well as to other workmen. Each was under a duty to report. Moreover, Stapley himself went into the place of danger and was killed. That was a further breach of duty by Stapley, it was said, and the fact that the two men had decided to leave the roof and continue with their ordinary work

E did not affect the position. There is great force in this submission. On the other hand, it is claimed that the employers (through Dale) were in breach of the regulations, or of their statutory duty, as the judge found. If this is the right view, it becomes necessary to consider s. 1 (1), of the Law Reform (Contributory Negligence) Act, 1945. "Fault" in that section includes breach of statutory duty, and thus, if the plaintiff has a right to damages, the damages recoverable

F are to be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. The action is against employers, and questions arise beyond those which normally arise when it is a case of deciding the responsibility of the drivers of two motor cars which have come into collision. One has to consider the responsibility of a man who was properly entrusted with the performance of a statutory duty and who decided

G not to perform it. Can it be said that his responsibility is less because his decision was arrived at by arrangement with a man of equal rank ? There was nothing more the employers could reasonably be expected to do. As between Stapley and them the responsibility for the damage was surely on Stapley unless it can be said that it was reduced to some small extent because of the agreement between him and Dale. I do not see that it can be right to say that Stapley's

H responsibility is only one half. I should regard him as wholly, or almost wholly, responsible in considering the position as between him and the employers, and if I had to decide the question under s. 1 (1) of the Act of 1945, I should not place more than a nominal proportion of the responsibility on the employers, though I observe that TUCKER, L.J., in *Cakebread v. Hopping Bros. (Whetstone), Ltd.* (2) appears to have thought ([1947] 1 All E.R. 395) that in such circumstances ninety per cent. of the blame might fall on the workman and ten per cent. on the employer. I appreciate that there is a statutory duty on the employers, but

if they have properly placed on the employee the task of performing it, and the failure is his, I do not see why their proportion of the responsibility should be more than nominal. To place a higher proportion on them would not seem to be just and equitable. Thus, whichever way I look at the case, I feel that the claim ought not to succeed, for nominal damages would not help the plaintiff.

In *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (3) LORD WRIGHT, having described an action for breach of statutory duty as a common law action based on the purpose of the statute to protect the workman and as belonging to the category often described as strict or absolute liability, said, in speaking of contributory negligence as a defence to such an action ([1939] 3 All E.R. 739):

“If the matter had been free from authority I should, I think, have thought it simpler to hold that a workman’s claim for injury caused by breach of the employer’s statutory duty to fence and like duties, is only barred by blameworthy conduct on the man’s part of such gravity and so directly causing the accident as in the judgment of the judge or jury to be properly described as the substantial cause of the accident and to shift the responsibility to him.”

The conduct of Stapley appears to me to fall within these words. Moreover, Stapley acted in breach of the regulations, and it was his act, in working under the faulty roof, after the order which had been given to him, which brought about his death.

The plaintiff’s position in this action is just the same as would have been that of her husband if he had survived and had brought an action against his employers, and the more I consider it the more I am driven to the conclusion that the action ought not to succeed. I do not overlook the fact that the two men had decided to get on with their work in the belief (or in the hope) that the roof would not fall. The regulations are for the general safety of those who work in a place of this kind, and if two men of equal status arrange to disregard them and injury results to one as a result, he cannot blame his employers; it is his fault and not theirs; the real cause of the injury is not their breach of statutory duty; it is his. For the reasons I have given I would allow the appeal of the defendants and dismiss the cross-appeal of the plaintiff, as to which I need say nothing further having regard to the view I have expressed. In my opinion, judgment should be entered for the defendants.

BIRKETT, L.J.: The facts in these two appeals have been fully stated in the judgment that has just been delivered, and it is not necessary to repeat them. Both appeals are concerned with the same questions and may be thus stated. On the facts of this case, are the defendants liable to the plaintiff, and, if so, for what amount of damages?

The claim was made for damages for negligence and breach of statutory duty, and in the particulars delivered with the statement of claim the allegations of negligence and breaches of statutory duty were fully set out under nine separate headings. The statement of claim was amended when the final speech of the learned counsel for the plaintiff was nearing its close, and was made at the suggestion, and, indeed, the insistence, of the learned judge. Counsel for the plaintiff had submitted that the amendment was not necessary, but ultimately he asked leave to amend. That amendment indicates very clearly the view taken by the learned judge, and reads in this way: “The said Dale, their servant, failed to bring down the roof by firing or boring holes for firing, and/or failed to report to the said Church, the foreman, his inability to bring down the said roof.” The liability of the defendants is thus founded by the learned judge on the breach of duty by Dale, although he held that the breach of duty by Stapley deprived the plaintiff of half the amount of damages she would otherwise have been awarded.

The first important question to be answered is whether the breach of duty in the circumstances of this case can give a cause of action to the plaintiff against

A the defendants. It is submitted by counsel for the defendants that the breach of duty of Dale cannot do so. SELLERS, J., found that Dale and Stapley were equal in status, and that one of them was not in charge of the other. He also found that they were working together; that they were both responsible for the events which happened; that Stapley by his own act brought about the loss which his widow and children suffered, but equally so did the act of Dale; and that either of them could have avoided this accident if they had done that which it was proper for them both to do. He came to these findings because he was satisfied that both men had seen that the roof was drummy, and they both understood that it was their job to obey the order of Church to "fetch it down" in order to make the roof safe. The learned judge said:

B "It seems to me that the real fault bringing about this most regrettable accident was the conduct of both Stapley and Dale in failing to do that which the foreman Church had told them to do; or if they could not have done that, in failing to report to Church that they could not get it down; or perhaps more important still, in deciding together to continue their work with the roof in the state which they knew it to be."

C On this last point, which the judge thought was "perhaps more important still", he said:

D "It seems to me that when Stapley, having discussed the matter with Dale, decided to continue his ordinary work . . . he went on to work in a place which was not made secure, and that there was in fact a breach of reg. 7 (3), but it was a breach, of course, brought about by the act of Stapley himself . . ."

Both men were presumed to know the regulations, and the evidence of Dale supports and confirms this.

E I am of opinion that, had the facts of the case been that Stapley *alone* was concerned in the events that happened, the plaintiff could not have succeeded in her action against the defendants. The breach of statutory duty by the defendants would have been a breach solely because of the breach by Stapley to whom the statutory duty had been properly delegated. His failure to obey the lawful orders of Church, the foreman, to bring the drummy roof down, or to report the actual state of affairs to Church, and to avoid working under the roof until it had been brought down, would have defeated the plaintiff's claim altogether. At one stage of the case counsel for the plaintiff conceded this, but was later inclined to withdraw from it. The defendants, in my opinion, would not be liable to the plaintiff, because the breach of duty complained of in the employers was the breach of duty by Stapley himself.

F In *Gallagher v. Dorman, Long & Co., Ltd.* (4) WROTTESELEY, L.J., delivering the judgment of the court, which was composed of LORD GREENE, M.R., LYNSEY, J., and himself, said ([1947] 2 All E.R. 41):

G "Where, however, the person injured as a result of the breach of the statutory duty is the employee to whom the employer has properly delegated the performance of that duty, and the breach of duty is caused by the act or omission of such employee, such employee cannot be heard to say that his injury was caused by the breach of the statutory duty and not caused by his own act or omission: *Smith v. Baveystock & Co., Ltd.* (1)."

H In claims for breach of statutory duty against employers, if the person injured or killed was himself the actual offender, the employers would not be liable to him or to his representatives. Further, contributory negligence is a defence to a claim against an employer for breach of statutory duty (though since June 15, 1945, the defence may be limited); and, of course, in any particular case the contributory negligence may not be co-extensive with the breach of duty.

Various cases were referred to in the argument before us—in particular, *Flower v. Ebbw Vale Steel, Iron & Coal Co.* (5). In the Court of Appeal, which

upheld the judgment of LAWRENCE, J., SCRUTTON, L.J., said ([1934] 2 K.B. 145):

"As to the question of law, in my opinion this court is bound by its own decision in *Dew v. United British S.S. Co., Ltd.* (6), in which all the members of the court, as I read the judgments, stated that contributory negligence of a plaintiff was a defence to an action for an admitted breach of a statute . . . Holding as I do that there was evidence on which the learned judge could find that there was contributory negligence on the part of the plaintiff, and not therefore being able to interfere with his decision to that effect, I am still less able to interfere with it when he adds that the act which he has found to be negligent was also in breach of definite instructions. For these reasons, I think the learned judge came to the right conclusion when he declined to give the verdict for the plaintiff on the ground that the damage of which the plaintiff complained was substantially caused by his own contributory negligence and breach of instructions."

In *Cakebread v. Hopping Bros. (Whetstone), Ltd.* (2) comes the passage to which my Lord has already made reference ([1947] 1 All E.R. 395), and I only refer to it for this reason, that in that case there is a paragraph in the headnote which reads:

"Per TUCKER, L.J.: Different considerations might arise in a case where there was no breach of statutory duty on the part of the employers, the workman having himself failed to adjust properly a properly constructed guard and there being adequate supervision in the factory. Assuming, without deciding, that any question of contribution by the employers could arise under the Act of 1945, in such a case, blame might be apportionable as to ninety per cent. on the workman."

It is quite plain from that case, and from another case which TUCKER, L.J., decided, namely, *Beal v. E. Gomme, Ltd.* (7), that in that case TUCKER, L.J., was emphasising the importance of the Law Reform (Contributory Negligence) Act, 1945, as it might conceivably affect these cases. The learned lord justice said in *Beal's* case (7):

"I do not think it necessary to express a view, as to the effect, if any, of reg. 23. I think that the plaintiff was guilty of negligence which contributed very materially to the injuries that he suffered. I do not think that it is a ninety-nine per cent. case . . ."

for the reasons which he gives. So, in addition to the passage cited by my Lord, where the learned lord justice had spoken about ninety per cent., he also has in mind that what my Lord referred to as the nominal damages might amount to ninety-nine per cent., and all that would appear, in his view, to turn on the meaning of the Act of 1945.

I am further of opinion that, if both Stapley and Dale had been killed in the circumstances of the present case in doing together what Stapley did alone when he resumed work under the roof and the widows of Dale and Stapley had brought separate actions against the defendants, both actions would have failed. On the findings of fact by SELLERS, J., both actions could not be distinguished from a case where only one man was concerned, and where that man was solely responsible for the breach of duty. On the decision of SELLERS, J., in the present case it would seem that both widows could recover half of the damages suffered, the widow of Dale alleging breach of statutory duty by the employers through Stapley, and the widow of Stapley alleging breach of statutory duty through Dale, but both widows failing to recover the whole amount because of the particular breach of duty by Stapley and Dale in resuming work under the still drummy roof that they had failed to fetch down. The passage in the judgment that would seem to bring about this result is :

"Substantially the employers here are responsible for the negligence of their servant Dale in this matter, and the result, as I see it, is that the accident to

Stapley was brought about by the *separate* acts of negligence of himself and Dale, and that both he and the employers must be held responsible therefor."

This passage is a little obscure. It may mean that SELLERS, J., is saying that the negligence of Dale was the reason the roof fell, and the death of Stapley was due to the fall of the roof, but Stapley's negligence was to be found in his working under the roof at the time the roof actually fell, or it may mean that Stapley's disobedience to the orders of Church to fetch the roof down and Dale's disobedience in the same matter are to be regarded as "separate acts" and they are both equally responsible for the fact that Stapley resumed work under a drummy roof, but Stapley was additionally responsible for resuming work under the drummy roof. It is necessary to use words with some precision of meaning when considering the cause of this accident to Stapley. It may be said that the fall of the roof was the "cause" of the accident, and that fall was due to the disobedience of Dale to the orders of Church, for had he obeyed the order and brought the roof down, no accident would have happened, and, therefore, Dale cannot be dismissed from any consideration of the "cause" of the accident. The amendment of the statement of claim makes the defendants responsible for Dale's failure to bring the roof down and his failure to report, although the learned judge says in his judgment:

"I think that is so; I think he (Dale) did, but I think also so did Stapley . . . and the employers must be held to some extent liable for it."

He was there referring to the breach of reg. 7 (3).

Now, there is no doubt that the men were charged with the statutory duty jointly, and the learned judge so finds. Whatever may be attributed to Dale by way of breach of duty can be attributed to Stapley with equal force. If Stapley had not failed in his statutory duty the drummy roof would have been brought down whatever Dale did or did not do. Why, then, because one of the two men is killed should the breach of duty be attributed to Dale the survivor in order to make the employers liable? It was a joint duty, not the duty of Dale alone, but by the amendment the learned judge indicated that he was deciding the case as though Stapley had nothing to do with the breach of duty that resulted in the drummy roof being left without being brought down, though he recognised that Stapley was equally to blame. The two men had mutually agreed to disobey the orders of Church, and in so doing they committed offences against the Metalliferous Mines Regulation Acts of 1872 and 1875, punishable by fine and imprisonment. It seems to me to be impossible to say that the employers were guilty of a breach of statutory duty because of the default of Dale without saying in the same breath that they were at the same time guilty of the same breach because of the default of Stapley.

But I think this appeal can be decided on another ground. It seems clear that if the inquiry to be made is: What was the cause of Stapley's death?, then the answer must be that it was his own breach of duty in resuming work under the drummy roof. If he had not done that, it is obvious that he would not have been killed. The contributory negligence of Stapley would be a good defence to a claim made against the employers for breach of statutory duty, and it would have to be considered whether there was any other contributory cause. As LORD WRIGHT said in *Caswell's case* (3) ([1939] 3 All E.R. 740), some carelessness or inattention is not enough, for then the breach of the statute is the effective cause of the injury. But in the present case the effective cause of the death was because Stapley resumed work in breach of the order given by Church, with knowledge that the drummy roof had not been brought down, but with the knowledge that drummy roofs were dangerous, notwithstanding his erroneous view that because the roof would not come down with the methods he and Dale had employed (and without calling on the shot-firer to bring the roof down) the roof might be regarded as safe. That the roof was in fact dangerous permits

of no doubt, for it came down of itself with disastrous results within thirty minutes.

In *Davies v. Swan Motor Co. (Swansea), Ltd.* (8) DENNING, L.J., said ([1949] 2 K.B. 323):

"The plaintiff's negligence in leaving the obstruction there is a continuous negligence, which continues after the oncoming driver sees it. But the fact that he does see it may mean in some cases that the obstruction is not the cause of the accident. For instance in the case I have put it is, of course, plain that if the defendant actually saw the parked vehicle in good time and purposely ran into it—or, indeed, what comes to the same thing, if he, seeing its position, drove recklessly on that account, careless whether he hit it or not—his conduct would be so powerful a factor in producing the damage that the presence of the parked vehicle would not be itself a cause of the damage. The sole cause could be the purposeful or reckless act of the defendant."

Then the learned lord justice goes on to deal with the situation if it was not so deliberate. In *Harvey v. Road Haulage Executive* (9) DENNING, L.J., uses the same language, and he adds further words to the same effect.

If the true test is: Who caused the death? (see SALMOND ON THE LAW OF TORTS, 10th ed., p. 452), then the answer must be: Stapley himself, and Stapley alone.

Before the passing of the Law Reform (Contributory Negligence) Act, 1945, no court could have found the defendants liable on these facts: see *Smith v. Baveystock & Co., Ltd.* (1) and *Vyner v. Waldenberg Bros., Ltd.* (10). That Act has said that, if the plaintiff's negligence is one of the causes of his damage, he does not fail altogether. His damages are reduced. The negligence and breach of duty of Stapley are clear. The breach of duty on the part of the employers arises because they delegated the duty to two men who deliberately disobeyed the lawful orders of Church, and Stapley was one of them. When the duty is imposed on two jointly its breach is a joint tort. The duty is imposed on employers, and they may delegate it to two jointly. Can it be said that the employers are liable because Dale was guilty of breach of duty, and, therefore, the defendants are liable to Stapley, who was equally the delegate of the employers and equally the person guilty of breach of duty? I am of opinion that the effective cause of Stapley's death was his own breach of statutory duty, or, alternatively, his own negligence and any breach of duty by Dale, even if it should be held that it was Dale's breach of duty that left the roof in a dangerous state, was no contribution to the death of Stapley in any legal definition of that term. Without the fall of the roof, of course, there could have been no death, and in that sense the fall of the roof contributed to the accident. But the view I take is that the breach of duty in not bringing the roof down was equally that of Stapley, and for the purpose of this case may be regarded as solely that of Stapley, when it is the widow of Stapley claiming damages against the defendants; and, in any event, the cause of the death of Stapley was the breach of duty in resuming work under the drummy roof when he had been ordered not to do so: see *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (5).

I think the appeal of the plaintiff fails altogether. Counsel for the plaintiff submitted that the defendants were in breach of their statutory duty because of inadequate supervision. I think the finding of SELLERS, J., disposes of this. He submitted that the order of Church to "fetch down the roof" was given to Dale alone and not to Stapley. The evidence is overwhelmingly against any such contention, as is the judge's finding, but it is significant that the submission is made.

It follows that the plaintiff is not entitled to succeed for the full amount of damages awarded by the learned judge, and that the damages are not inordinately

low, inasmuch as, in my opinion, the plaintiff is entitled to none. I would allow the appeal of the defendants, and dismiss the appeal of the plaintiff.

MORRIS, L.J.: There are two ways in which liability is said to fall on the defendants. One is that they were themselves in breach of their statutory duties, and the other is that Dale was in breach of his statutory duties and that the defendants are vicariously liable. On the findings of fact of the learned judge there can be no doubt that there were breaches of statutory duty. It becomes necessary to examine what they were and how they arose, and to consider whether any of such breaches caused the death of Stapley.

It has been laid down in a series of decisions in the House of Lords that an employer's obligation to comply with statutory provisions for the safety of his employees is, in general, absolute. An employer does not relieve himself of his obligation by showing that he has appointed reasonably competent persons to perform the obligation, but that they failed to do so. Furthermore, as LORD PORTER said in *Potts (or Riddell) v. Reid* (11) ([1942] 2 All E.R. 176):

"... negligence is the failure to use the requisite amount of care required by the law in the case where a duty to use care exists. At common law the degree required is that expected of the 'reasonable man'. When a statutory duty is imposed, if it be absolute, the degree required is the fulfilment of the statutory obligation. If it be not fulfilled, the person upon whom the duty is imposed is negligent . . ."

In the earlier case of *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (12) LORD WARRINGTON OF CLYFFE said as follows ([1934] A.C. 13):

"Section 49 of the Coal Mines Act, 1911, is in the following terms:—'The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure.' This involves, it will be noted, an absolute obligation on the owner to make secure the roof and sides referred to, and a further obligation that no person shall work in a travelling road or working place which is not so made secure. As to the law on the subject of the liability of owners for breach of obligations imposed by statute for the protection of those employed by them, I think the following propositions are supported by authority:— (1) If the obligation is to do or abstain from doing a particular thing and on the construction of the statute the obligation is created for the protection of a particular class, e.g., workers in a mine or factory, then a member of that class injured by the non-performance of the obligation is entitled to sue the owner in an ordinary action founded on personal negligence. (2) The fact that the obligation has not been performed is in itself evidence of personal negligence on the part of the owner. (3) That the owner cannot relieve himself of his obligation by saying that he has appointed reasonably competent persons and that the breach is due to negligence on their part, nor was it open to him at common law to plead common employment. (4) There appears to be no material difference in this respect between the law of England and that of Scotland."

In the same case LORD ATKIN said (*ibid.*, 10):

"If in violation of the statute the roof was not made secure, the failure to perform the statutory duty was negligence either of the employer or of his servants. No one can I think doubt that if the obligation to observe statutory precautions is imposed upon a servant, the servant's breach is negligence. The servant would be liable to his fellow servant for injuries caused by such breach: see *Lees v. Dunkerley Brothers* (13)."

Now, the facts of the present case show that the defendants were in breach of statutory duty. They did not comply with regs. 14 (1) and 7 (3) of the Metaliferous Mines General Regulations, 1938. The roof of the working place was not made secure. The facts as found further show that Stapley and Dale were in breach of statutory duty. They were in breach of the duties in the circumstances imposed on them by reg. 15, paras. (1), (2), (3) and (10).

If negligence or breach of statutory duty is established, it next becomes necessary to consider whether the death of Stapley was caused thereby, for, as LORD MACMILLAN said in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (3) ([1939] 3 All E.R. 732):

"The mere fact that at the time of an accident to a miner his employers can be shown to have been in breach of a statutory duty is clearly not enough in itself to impose liability on the employers. It must be shown that the accident was causally associated with the breach of statutory duty."

The defendants, being a limited company, could only perform their duties by appointing persons to carry out those duties. In the present case they appointed Dale and Stapley. If Dale and Stapley failed to carry out the duties, it would follow that the defendants failed to comply with their statutory obligations, and if as a result some injury were caused to some other person, the defendants would make no answer in law by saying that they had reposed confidence in the reliability and competence of the two men. The problem which is raised in the present case concerns the position of the defendants where, following on a failure of the two men to do what they were instructed to do, mischance has befallen one of them. It is a melancholy feature of the case that the facts show, as the learned judge held, that disaster would not have overtaken Stapley had he and Dale done that which they ought to have done. The matter must be examined and decided on that footing even though the view may be held that Stapley, who was described by the learned judge as a good, steady workman, may have been well-motivated and may have been urged by zeal for his work. Here was no case of irresponsible, or impetuous, or contumacious conduct. The distressing circumstance remains that he in fact disobeyed an order to dislodge the unsafe roof with the corollary or the implied order not to proceed to do ordinary work under the roof until it was made safe.

I proceed to consider the matter on the basis that it was fitting for the defendants to entrust the task of coping with the unsafe roof to Dale and Stapley. This assumption requires testing in view of some of the submissions advanced on behalf of the plaintiff. If Dale and Stapley were inept, or inexperienced, or ill-qualified to make the roof secure, then different considerations might apply.

Dealing first with the defendants' breach of their statutory obligations, the matter can fairly be tested by considering the position on the assumption that Stapley alone had been required to make the roof safe, that that was a proper arrangement, and that Stapley had been injured, but not killed, all other circumstances being as found by the learned judge. If Stapley had claimed damages and had asserted that he was hurt because the roof was not made secure, he would have been met by the answer that the roof was insecure only because he had failed to carry out a legitimate instruction to him to make it secure. In reason and in common sense it seems to me that such answer would effectively dispose of his claim. If the above assumptions be varied to include, as was the fact, that Dale and Stapley together were told to make the roof safe, then a claim by Stapley would have been met by a similar answer. Would it have availed Stapley to reply that though he may have failed, so also had Dale? On the findings of the learned judge as to their respective obligations (which findings I see no reason to reject), then, in my judgment, the answer is in the negative. The learned judge said:

"... I have considered the evidence, and while, taking their respective duties, one may have been more highly skilled, I think they were working

there as men of equal status as regards this obligation; one was not in charge of the other. They were working together, and it seems to me that they were both responsible for the events which happened, and, in those circumstances, one can only say that the man Stapley, unfortunately by his own act, brought about the loss which his widow and children have suffered, but equally so did the act of Dale. Either of them could have avoided this accident if they had done that which it was proper for them both to do."

Accepting these findings as set out in the careful judgment of the learned judge, I do not find myself sharing the view that the conclusion to be drawn is that, as two men were instructed and as they both failed, the employers should be liable to the extent of one half of the loss suffered by one of them. There were no duties imposed on Dale which were wider than, or different from, or more extensive than, those imposed on Stapley. The responsibilities of the two men, as regards making the roof secure, were co-extensive. No greater fault or failure can be imputed to Dale than to Stapley, nor any fault or failure which was not also, and to the same extent, that of Stapley. In these circumstances, in a suit by Stapley the same answer would avail his employers as would have availed them if there had not been anyone jointly appointed with Stapley to make the roof secure.

In my judgment, the cause of Stapley's death was that an insecure roof fell on him. If it can be asserted that the defendants were in breach of statutory duty in failing to make the roof secure, so that the death "was causally associated with the breach of statutory duty", then the effect and degree of Stapley's contributory negligence would have to be considered. His "share in the responsibility" would require assessment. But before this stage is reached it must be shown that Stapley would (if death had not ensued) have been entitled to sue and recover damages in respect of the defendants' breach of statutory duty. It is relevant to bear in mind the wording of s. 1 of the Fatal Accidents Act, 1846. It is as follows:

" . . . Whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

In my judgment, Stapley could not have asserted as against the defendants that they were in breach of statutory duty if the reason for so asserting was that Stapley had neglected to do that which he was properly told to do. Nor could he so assert by saying that someone else shared his fault if the responsibilities of that other person merely marched with his and did not overlap or overtop them.

It is necessary to consider whether it was legitimate to have detailed Dale and Stapley for the task of making the roof secure. It was pleaded that there was a failure properly to supervise Stapley. As to this the learned judge said:

"I am not of the view that it was in the circumstances necessary for Mr. Church, who had other routine duties to do, to remain there and see this work done. The plea that has been made, that there was a lack of supervision, is rejected by me on the evidence which has been given here."

From the way in which this topic is dealt with by the learned judge, I form the view that a somewhat different emphasis on the matter was placed as the argument developed before us. It was said that Dale had not had experience of boring on the site of a fault, and had not previously had to bring down a faulty roof so located, with the result that on the occasion in question he was presented

with a problem to cope with which he was ill-equipped. The testimony of Mr. Mann was to the effect that Dale and Stapley should not have been left on their own to get down the faulty roof, and that they lacked the necessary experience. The evidence of Mr. Church, on the other hand, was that Dale and Stapley had previously coped with a roof in exactly similar circumstances, and that the task he gave them was not beyond the scope of their duties during a normal day's work. The learned judge considered the evidence with care, and I think that it must be regarded as implicit in what he holds that he rejected the view that it was not legitimate to have entrusted the duty of dealing with the roof to Dale and Stapley. A

It has next to be considered whether the defendants can be held vicariously responsible for breaches of statutory obligation personal to Dale as opposed to those personal to themselves. A convenient way of testing the matter is on the supposition that Stapley, having been injured but not killed, sued Dale for damages. On the facts as found by the learned judge, it would seem to be somewhat surprising if Stapley could have recovered against Dale. In approaching this matter it is desirable to do so, in the first place, by considering whether there is any liability in Dale. It is only if there is some liability in Dale that it becomes necessary to consider the extent of the contributory negligence of Stapley. The opening words of s. 1 of the Law Reform (Contributory Negligence) Act, 1945, are: B

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person . . ."

The word "fault" is defined by s. 4 of the Act to mean C

"negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence." D

It must, accordingly, first be decided whether, if Stapley had been injured but not killed, the other facts being as found, he could successfully have sued Dale by asserting that Dale's breach of statutory duty gave rise to a liability in him in tort to Stapley. If it did, then in the present case Stapley's share in the responsibility for the damage might be regarded as so considerable as to reduce Dale's liability to a small fraction of what it otherwise might be. But before any such inquiry is reached it has to be established that there is liability in Dale. Stapley's own conduct has now to be regarded from the point of view of causation. Could Stapley assert as against Dale that he was injured because Dale failed to carry out his statutory obligations? In my judgment, he could not. Dale and Stapley had duties imposed on them jointly, and there was no failure on Dale's part which was not also and equally a failure on Stapley's part. The result is that Stapley could not point to any omission or dereliction on Dale's part which was not fully and wholly his own, and, accordingly, he could not assert that Dale had caused his injuries. Stapley would be in the difficulty that he could not prove that it was Dale's error of omission rather than his own error of omission that brought about his injuries. E

In giving evidence Dale used the word "agreement" in reference to the event when he and Stapley abandoned the task of bringing down the roof and proceeded with their ordinary work. I do not consider that their "agreement" should be considered as denoting more than their concurrence in a joint decision to abandon their duty to make the roof secure. But thereafter any injury resulting to one or both because the roof was not made secure was no more attributable to the breach of statutory duty of the one than of the other. There was no element of causation emanating from Dale that did not also emanate from Stapley. Neither, therefore, could prove that any injury was caused by the omission of the other. Applying the test approved by VISCOUNT SIMON in his speech in the *Boy Andrew* case (14) ([1947] 2 All E.R. 353), and by LORD DU F

PARCQ in his speech in *Grant v. Sun Shipping Co., Ltd.* (15) ([1948] 2 All E.R. 246), the inquiry becomes one as to whether Stapley could show that Dale's breach of statutory duty had anything to do with causing Stapley's injuries. It seems to me that where Stapley's own conduct by way of non-feasance provides a totality of cause, it cannot be demonstrated by Stapley that Dale's non-feasance came into account or had any effect. Stapley could not discharge the burden which would be on him of proving that his injuries were either wholly or partly caused by Dale. There does not appear to be evidence of any negligent conduct in Dale other than that comprehended within his breaches of statutory duty. No acts of commission are alleged against him, nor are omissions, beyond those equally and concurrently attributable to Stapley. For the reasons which I have indicated, I have felt impelled to the conclusion that there could be no recovery at the suit of the plaintiff against the defendants.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Blyth, Dutton, Wright & Bennett*, agents for *Menneer, Idle & Brackett*, St. Leonards-on-Sea (for the defendants); *Rowley, Ashworth & Co.* (for the plaintiff).
[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

Re POZOT'S SETTLEMENT TRUSTS. WESTMINSTER BANK, LTD. v. GUERBOIS AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), March 24, 25, 26, 1952.]

Will—Forfeiture clause—Income payable until vested in some other person—Beneficiary an enemy—Payment of income to Custodian of Enemy Property—Trading with the Enemy Act, 1939 (c. 89), s. 7 (1)—Trading with the Enemy (Custodian) Order, 1939 (S.R. & O., 1939, No. 1198), art. 1 (i) (ii).

By her will, dated Feb. 16, 1937, a testatrix, who died on June 6, 1941, directed, in exercise of a power of appointment conferred on her by her marriage settlement, that the trustees should pay the income of an equal one-third share of the trust funds to G. during her life " . . . unless some act or event shall have been done or happened during my life whereby if the same income belonged absolutely to her such income or some part thereof would at my death be or become vested in or charged in favour of some [other] person or until some act or event shall be done or happen within twenty-one years after my death whereby if the same income belonged absolutely to her such income or some part thereof would have become so vested or charged . . . " On the failure or determination during the life of G. of the said trust the trustees were directed to hold the said income on other trusts. At all material times the testatrix and G., being resident in the south of France, were, by virtue of the Trading with the Enemy Order, 1940, "enemies" within the meaning of the Trading with the Enemy Act, 1939, s. 2 (1).

HELD: the term "vested" as used in the will had the significance of the passing of some proprietary interest and related to the life interest given to G.; the Act of 1939 (having regard especially to s. 7 (1) thereof) and the orders made thereunder (in particular the Trading with the Enemy (Custodian) Order, 1939), made a clear distinction between vesting and payment; by art. 1 (i) and (ii) of the order of 1939 the income which would have been payable to G. was payable to the Custodian of Enemy Property, but the proprietary right to the life interest did not vest in the Custodian, whose right to receive the income depended essentially on the circumstance that the proprietary interest was vested in an enemy; and, therefore, the condition for the operation of the forfeiture clause had not arisen.

Fraenkel v. Whitty ([1947] 2 All E.R. 646), overruled.

FOR THE TRADING WITH THE ENEMY ACT, 1939, s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 26, p. 337.

Cases referred to:

- (1) *Fraenkel v. Whitty*, [1947] 2 All E.R. 646; [1948] Ch. 55; [1948] L.J.R. 322; 2nd Digest Supp.
- (2) *Re Westby's Settlement*, [1950] 1 All E.R. 479; [1950] Ch. 296; 2nd Digest Supp.
- (3) *Re Greenwood*, [1901] 1 Ch. 887; 70 L.J.Ch. 326; 84 L.T. 118; 44 Digest 1234, 10665.
- (4) *Coverdale v. Charlton*, (1878), 4 Q.B.D. 104; 48 L.J.Q.B. 128; 40 L.T. 88; 43 J.P. 268; 43 Digest 386, 116.
- (5) *Re Münster*, [1920] 1 Ch. 268; 89 L.J.Ch. 138; Digest Supp.
- (6) *Re Gourju's Will Trusts*, [1942] 2 All E.R. 605; [1943] Ch. 24; 112 L.J.Ch. 75; 168 L.T. 1; 2nd Digest Supp.
- (7) *Re Hall*, [1943] 2 All E.R. 753; [1944] Ch. 46; 113 L.J.Ch. 76; 169 L.T. 387; 2nd Digest Supp.
- (8) *Re Sartoris's Estate*, [1892] 1 Ch. 11; 61 L.J.Ch. 1; 65 L.T. 544; 5 Digest 666, 5914.

APPEAL by the third and fourth defendants to an originating summons against an order of VAISEY, J., dated May 1, 1951.

Following *Fraenkel v. Whitty* (1), VAISEY, J., held that by virtue of the Trading with the Enemy Act, 1939, and the orders made under s. 7 thereof, the income of certain trust funds had become vested in a person other than the appointees under the will of Doris Muriel Guerbois, deceased, and, therefore, the defeasance clause in the said will operated to determine the interests of the appointees.

C. Montgomery White, Q.C., and *E. G. Wright* for the third and fourth defendants, two of the daughters of the testatrix.

Pennycuik, Q.C., and *W. F. Waite* for the infant defendants, the grandchildren of the testatrix.

Droop for the plaintiffs, the trustees of the marriage settlement of the testatrix.

The first and second defendants (the parents of the infant defendants) were not represented.

SIR RAYMOND EVERSLED, M.R.: The first point raised in this case is in form an appeal from VAISEY, J., but in substance it is an appeal from ROXBURGH, J., in *Fraenkel v. Whitty* (1). The question, put briefly, is whether the effect of the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, of Sept. 16, 1939 (S.R. & O., 1939, No. 1198), as amended, operated in the circumstances of the present case to cause a forfeiture of the life interests appointed by the will of Madame Doris Muriel Guerbois (to whom I will refer hereafter as "Doris"), pursuant to the terms of the settlement made on her first marriage (with M. Francis Louis Frederic Pozot) in which the proceedings are entitled? If this question is answered affirmatively (as VAISEY, J., answered it, following the decision of ROXBURGH, J., in *Fraenkel v. Whitty* (1)), a further question arises on the construction of the will of Doris, by which the appointment was made, as to the present effect of that forfeiture.

The settlement on the first marriage of Doris is dated Aug. 2, 1910, and was made pursuant to an order of EVE, J., under the Infant Settlements Act, 1855. By the effect of it, so far as relevant, certain funds (specified in the schedule to the settlement and now worth, we are informed, some £12,000) were settled so that the income of the fund was payable to Doris for her life and subject thereto were held on trust for the children or remoter issue of the marriage as Doris should by deed or will appoint and in default of appointment equally for the children of the marriage as therein stated. There was a power to Doris (inter alia) to appoint in favour of an after-taken husband, and this power was exercised to the extent of a one-fourth part of the income of the fund in favour

of the second husband of Doris who is the first defendant in the action. It was provided that the settlement of all rights taken thereunder should be determined according to the law of England, and there is no question in the present appeal that the problem that is now presented to the court has to be solved by reference exclusively to English law.

The plaintiffs are the trustees of the settlement. The second, third and fourth defendants are the three children (all daughters) of the first marriage of Doris. Mr. Pozot, her first husband, died in July, 1927, and in the following year Doris married the first defendant to the action, M. Fernand Louis Guerbois. She herself died on June 6, 1941. After her death, the first defendant, her widower, proceeded to go through a form of marriage with the second defendant, one of the three children of Doris and, therefore, one of his own step-daughters. The remaining five defendants (all being infants) are the issue of the first and second defendants. One was, in fact, born during the subsistence of the marriage between the first defendant and Doris, and another was born after the death of Doris, but before the ceremony of marriage between his parents. At all material times Doris and all her three daughters were resident in the south of France, and during the second world war were subject to the government associated with the name of the late Marshal Petain. By a decree promulgated by the marshal or by his authority, the marriage of the first defendant to his step-daughter was declared valid by the law of France, and the decree also legitimated those two of the infant defendants who were born before the marriage of the first and second defendants. After hearing evidence, VAISEY, J., held that for all the purposes of the settlement and the appointment made thereunder, the five infant defendants must be treated as lawful issue of the second defendant, and there is no appeal against that finding. The other two children of Doris by her first marriage, viz., the third and fourth defendants, have married since the proceedings were started, but there is no issue, as yet, of these children and there was no issue of the marriage of Doris and the first defendant.

The power of appointment conferred on Doris by the settlement of 1910 was exercised by her by an English will dated Feb. 16, 1937. After making the provision above-mentioned for the first defendant, her second husband, the will provided as follows:

"As to one equal third share of the said trust funds and of the said other and future acquired property the said trustees or trustee shall pay the income of the said one equal third share to my said daughter Georgette Alphonsine Marguerite Pozot [the third defendant] during her life unless some act or event shall have been done or happened during my life whereby if the same income belonged absolutely to her such income or some part thereof would at my death be or become vested in or charged in favour of some [other] person or until some act or event shall be done or happen within twenty-one years after my death whereby if the same income belonged absolutely to her such income or some part thereof would have become so vested or charged and after the failure or determination during the life of the said Georgette Alphonsine Marguerite Pozot of the trust hereinbefore declared of the said income in her favour the said trustees or trustee shall during the remainder of her life hold the said income upon the trusts and for the purposes upon and for which the same could for the time being be held if she were then dead. And from and after the death of my said daughter the said trustees or trustee shall stand possessed of the capital and income of the said one equal third share in trust for the children or child of my said daughter Georgette Alphonsine Marguerite Pozot . . ."

in manner therein provided. The will then proceeded to deal with the other two third shares of the trust funds, under corresponding trusts, substituting for the name of Georgette the name of one of the other two daughters of Doris.

There was a final disposition in the appointment expressed to take effect in the event of the "failure" of the trusts of any one-third share, on which provision the second question to which I have earlier alluded turns. As a result of the order made by VAISEY, J., the present position is that the income of the entire trust fund is now payable to or for the benefit of the five infant children of the second defendant (who, by the Official Solicitor, are respondents to the appeal), and no part of such income is payable to either of them, the third or fourth defendants (who are the appellants in this court), but the interest of the five infant defendants is liable to be reduced on the birth of further children to the second defendant and also on the coming into existence of children of the third or fourth defendants respectively.

I have stated that Doris and her three children were at all material times resident in what was known as unoccupied France during the late war and so all of them became "enemies" within the meaning of the trading with the enemy legislation at all material times, including the time of the death of Doris on June 6, 1941. The first question, as I have already indicated, is whether the effect of the Trading with the Enemy Act, 1939, and the orders made thereunder was, on the death of Doris, to cause an immediate forfeiture of the limited interest given to each of her daughters by the appointment made by Doris by her will, on the ground that in each case the income appointed (if belonging absolutely to such daughter) would have become "vested in, or charged in favour of some person"? It is clear that the words "some person" must mean some person other than the named daughter and that the Custodian of Enemy Property appointed pursuant to the trading with the enemy legislation was and is such a person. It is clear also that nothing turns on the alternative words "or charged in favour of". The matter, as the arguments have proceeded, turns on the proper interpretation of the earlier words "vested in".

One other matter I can dispose of briefly and at once. The relevant appointment consists, as will be remembered, of two parts. The first one-third of income given to Georgette is given to Georgette "unless some act or event shall have . . . happened during my life whereby", etc., or, alternatively, is given to her "until some act or event shall be done or happen within twenty-one years after my death whereby", etc. Counsel for the infant defendants has said that, if the facts are such as do not bring the case within the first limb of the provision to which I have alluded, then at any rate a forfeiture is brought about by the second. I cannot agree that the second part has any application in any circumstances in the present case. It seems to me tolerably clear that the Trading with the Enemy (Specified Areas) Order, 1940, which made the Act apply as regards unoccupied France, was an "act or event" which happened during the life of Doris such as would, at Doris's death, cause the rest of this part of the clause to operate if the word "vested" is satisfied by the effect of the trading with the enemy legislation in other respects. If, however, this part of the clause did not take effect because there would have been no "vesting" within the meaning of the will, then, in my opinion, there is no question that the second alternative part of the clause is also ineffective. In my judgment, nothing that happened after Doris's death can in any circumstances be regarded as an "act or event" within the meaning of the words used.

The whole question, then, turns on the significance of the two words "vested in". In approaching this problem, I agree with counsel for the infant defendants that it is not legitimate to give words in this will a strained construction in order to avoid a particular result on the ground that the particular problem which has arisen was not envisaged by Doris at the time when she made her will. On the other hand, it is nevertheless legitimate to bear in mind that forfeiture clauses are given a strict construction by this court. In the recent case of *Re Westby's Settlement* (2), in delivering the leading judgment, I referred ([1950] 1 All E.R. 483) to the proposition which I have mentioned and used this language, which I hope I

shall be forgiven for quoting, in reference to a decision of FARWELL, J., in *Re Greenwood* (3):

“ ‘First of all, we must bear in mind that the courts do not construe gifts on forfeitures so as to extend their limits beyond the fair meaning of the words unless they are actually driven to it. Forfeitures are not regarded with favour, and there can be no particular desire to extend the terms of a forfeiture clause to a gift such as the present.’ ”

I think, therefore, as a premise to what follows, that it is necessary to give to this clause not an unnatural or strained construction but a strict one, bearing in mind that the language used is the technical language of lawyers or equity draftsmen who are employed in drawing wills or appointments of this character. Certainly the word “vested” to such persons may be regarded as a term of art, and it has as such, in my judgment, undoubtedly the significance of a passing of some proprietary interest.

I referred during the argument to the definition in STROUD'S JUDICIAL DICTIONARY, 2nd ed., p. 2181, and to the passage cited from *Coverdale v. Charlton* (4). The relevant passage is:

“ ‘To “vest” generally means, to give the property in’ (per BRETT, L.J., *Coverdale v. Charlton* (4) 48 L.J.Q.B. 132). ‘It may be useful to refer to the history of the word “vest”, as it is a word which has acquired a definite meaning, carrying with it definite legal consequences’.”

Then there are references to its use in the Lands Clauses Consolidation Act, 1845, the Trustee Act, 1850, and the Bankruptcy Act, 1869.

In *Fraenkel v. Whitty* (1), which is, substantially, the case now under appeal, ROXBURGH, J., who had to construe a deed of covenant which contained language directed to a forfeiture substantially identical with the words which are contained in Doris's will, came to the conclusion to which he did because he thought that the effect of the trading with the enemy legislation was to produce a result, if not in strict parlance a vesting as understood by lawyers, at least having a practical result equivalent to a vesting. In my judgment, that was not a legitimate way to construe such a clause as this. The words in this will are “or become vested in”, not “or so held as to be in effect vested in” or other words of similar wide and general import.

I must now, however, turn to the Trading with the Enemy Act and the orders made thereunder, so that I can make clear the reasons for my conclusion. The Act of 1939, by s. 7 (1), provides:

“With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint custodians of enemy property for England, Scotland and Northern Ireland respectively, and may by order—(a) require the payment to the prescribed custodian of money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy . . . (d) confer and impose on the custodians and on any other person such rights, powers, duties and liabilities as may be prescribed as respects—(i) property which has been, or is required to be, vested in a custodian by or under the order, (ii) property of which the right of transfer has been, or is required to be, so vested, (iii) any other enemy property which has not been, and is not required to be, so vested, or (iv) money which has been, or is by the order required to be, paid to a custodian . . . ”

Paragraph (e) covers the requirement of payment of fees. In sub-s. (4) it is provided that

“any order under this section shall have effect notwithstanding anything in any Act passed before this Act.”

Section 4, to which counsel for the third and fourth defendants attached some importance, relates to negotiable instruments and choses in action belonging to enemies, and provides (briefly) that no assignment of a chose in action given by or on behalf of an enemy shall, except with the sanction of the Treasury, be effective so as to confer on that person any rights or remedies or interest whatever.

From what I have read, this much, I venture to think, is quite clear—that there is in this Act the clearest distinction between vesting, on the one hand, and payment of money, on the other, and it is to be noted that this Act differs in this respect from the Trading with the Enemy Act, 1914, passed on the occasion of the first world war. Under the latter Act vesting orders were made, and had to be made, by the court. Under this Act it is provided that the Board of Trade may, indifferently, make vesting orders and orders requiring payment. But for present purposes the essential matter is the clear distinction which I think is to be found in the language of Parliament between vesting, on the one hand, and payment, on the other. By “vesting”, in such a context, I have no doubt that Parliament was signifying an operation which would pass to the Custodian a proprietary interest in the subject-matter vested, and the significance of s. 4 (I do not desire to make too much of it, as, indeed, counsel did not desire to make too much of it) is that it seems to indicate that, notwithstanding that there may have been orders for payment, under the sanction of the Treasury the assignment of a chose in action is contemplated, and there could, of course, be no assignment of anything unless the assignor had in him something to assign. It is, perhaps, merely an emphasis on the distinction which I think is clear in the Act between vesting and payment.

The Trading with the Enemy (Custodian) Order, 1939, art. 1 (i), is a general direction in exercise of the Board of Trade's power under s. 7 of the Act of 1939:

“Any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, and any money which is to be deemed for the purposes of the Act to be money which would, but for the existence of a state of war, be so payable, shall be paid to the Custodian.”

Paragraph (ii) descends to the particular and expands what para. (i) has provided:

“Without prejudice to the generality of the foregoing paragraph, there shall be paid to the Custodian in particular any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy, by way of . . . (i) payment arising under any trust, will or settlement.”

There is no doubt that that provision would cover, on the face of it, money arising under the settlement contained in the deed of 1910 and the appointment of 1937. Paragraph (iv) has a significance in the argument, and it provides:

“Any money required to be paid under the foregoing paragraphs of this article to the Custodian, shall be paid . . . (c) in any other case, within fourteen days after the day on which the money becomes payable or would, but for the existence of a state of war, become payable.”

Pausing there, the effect is (as I follow it) that where, under the terms of a trust, the trustees have in hand at any particular point of time money which, by the terms of the trust, becomes then payable by the trustees to the beneficiary, if that beneficiary is an enemy the money has to be paid to the Custodian, not immediately, but within fourteen days after the date which I have mentioned. By art. 2 of the order the Board of Trade is given power, in any case where it appears to them to be expedient so to do, to make a vesting order as regards the enemy property therein mentioned. I need not for the present refer to any more of the original order except art. 7, which provides (as amended by the

Trading with the Enemy (Custodian) (No. 2) Order, 1942 (S.R. & O., 1942, No. 342)):

"There shall be retained by the Custodian fees equal to two per centum of (a) the amount of moneys paid to him, and (b) the value of any property which is vested in him or of which the right of transfer is vested in him."

Again, as I think, the clearest distinction is drawn throughout that order between vesting, on the one hand, and payment, on the other. The order is made, as its introductory paragraph states, under s. 7 of the Act of 1939, and, following the dichotomy between vesting and payment, it may, I think, be safely asserted that the provisions of art. 1 (ii), which particularly relates to the question of money, are made under the terms of s. 7 (1) (a) as being orders requiring payment, whereas the powers contemplated by art. 2 of the order, if exercised, would be made under s. 7 (1) (b) or (c). Furthermore, I think that if and so far as the order requires third parties (in this case, say, Westminster Bank, Ltd.) to pay over moneys to the Custodian, that obligation is imposed on Westminster Bank, Ltd., by s. 7 (1) (d) (iii). The distinction is, I think, further emphasised by another important addition to the original order, viz., that now contained in art. 1 (vii) as a result of the addition made by the amending order, the Trading with the Enemy (Custodian) (Amendment) Order, 1941 (S.R. & O., 1941, No. 765), which adds to art. 1, among other things,

"(vii) The Custodian shall have power to sue for and recover any moneys payable to him under this order."

That relates, therefore, to moneys which the order states are payable to the Custodian, and it was thought proper—indeed necessary—to confer specially on the Custodian a statutory power to sue for and recover such money. If and so far as there had been a vesting in the Custodian of the subject-matter out of which the payments arose, no special statutory power to sue would, I conceive, have been necessary.

I hope that, having regard to the importance of the matter, I shall not be thought to be taking too much time on this problem, but in the course of the discussion before ROXBURGH, J., much of the argument (according to the judgment) was directed, first, to the proper effect of the interpretation to be given to the formula "money which would be payable to a person who is an enemy", and, secondly, to the precise effect of this fourteen days' interval which is given between the day when the trustees have, under the terms of their trust, money in hand and payable to a beneficiary, and the time when they become liable to be sued by the Custodian. As regards the first matter, I have no doubt, for myself (and I do not think learned counsel disagreed about it) that the use of the present tense in the phrase "a person" who is an "enemy" in art. 1 (i) and art. 1 (ii), is a reference to the point of time when, to take the case of a trust, the money has become, in the hands of the trustees, payable to that (enemy) beneficiary.

It appears, then, in the case of money, with which we are concerned here, the phrase has this result, that when any money which, under the terms of the settlement and the appointment, would be payable to a person who was, at the date when, under the terms of the trust, it became so payable, an enemy, then a period of fourteen days is, nevertheless, allowed under this order (for obvious administrative reasons) which the payer, the trustee, has before he becomes under the final obligation liable to be sued accordingly to pay over to the Custodian.

A question was raised of what would happen if, after the date when, under the terms of a trust, a sum of money representing a particular piece of income became payable to the beneficiary (being then an enemy), but before the expiration of the fourteen days, or, at any rate, before the time when the money had in fact been handed over, the beneficiary eluded the occupying forces of the enemy and arrived in England, being an Englishman, or not an enemy national,

and claimed to have payment made to himself or herself. It seems to me that the answer to that problem, under the terms of this order, is (and what I am now stating agrees with the conclusion of ROXBURGH, J.) that once the money has become, according to the terms of the trust, payable to a person who is at that point of time an enemy, then it is payable to the Custodian, and the return to these shores of the beneficiary before actual payment would not have the effect of depriving the Custodian of his right to recover that particular item of money. I think that is reinforced by the circumstance that under the terms of art. 3 (iv) of this order it is also provided that the Custodian is entitled to give a good discharge for any sums paid to him pursuant to the order. On the other hand, if the operation were one of vesting during such period as the beneficiary was an enemy, so far as I can see the arrival in this country, before actual payment, of the beneficiary, thereby disembarassing himself or herself from his or her enemy quality, would cause an immediate re-vesting and would then put an end to the right of the Custodian. However, it is, perhaps, at this stage significant to note that, according to the evidence, a material fact in this case is that none of the moneys in question has been handed over to the Custodian, but the Westminster Bank, Ltd., now has certain sums of money in its possession, and has never been, in fact, called on to pay over those moneys to the Custodian. It seems to me that it would be very difficult to say that in the hands of the Westminster Bank any such moneys were "vested" in law in the Custodian. The Custodian may or may not have the right to call on the bank to pay over some or all of the money in the bank's hands. If he has, it is, to my mind, a right dependent on a particular statutory right given to him and not on a proprietary title. I should also add that in point of fact no fees have been charged in respect of this income by the Custodian, so that no question arises of the effect (whatever it might be) of the liability of the income for the provision of such fees.

We were referred to *Re Münster* (5) and *Re Gourju's Will Trusts* (6), cases which came before RUSSELL, J., and SIMONDS, J., respectively, the first being under the Trading with the Enemy Amendment Act, 1914, and the second under the existing Act. The effect of those cases, undoubtedly, is that moneys actually in the hands of the Custodian are treated as held on "statutory suspense": no beneficial interest in them can be asserted by anybody. Certainly, the Custodian cannot be regarded as holding such moneys as trustee or agent for the original enemy beneficiary. That is true, and in that respect I conceive that there is no distinction between the two Acts. It is, no doubt, true also that any money which has in fact been paid to the Custodian and is in his hands may properly be said, according to the ordinary use of language, to be then "vested" in the Custodian—and not vested in him on behalf, as I have said, of the original beneficiary. But the ability so to assert does not, I think, advance the case of the infant defendants.

In considering the construction of the will here in suit the essential formula "income or some part thereof would be or become vested in" must relate in the context to the life interests given, and, therefore, mean that "the right to receive the income would be or become vested", etc., at the death of Doris. At the moment of Doris's death the income in question was not an existing entity in the same sense as a fund of a corpus to which the formula also applies. It is, therefore, this life interest, this right to receive the income of which, if counsel for the infant defendants is right, it must be shown that it vested, or would have been apart from the forfeiture provision, vested in the Custodian as a result of the trading with the enemy legislation to which I have made reference. By the effect of that legislation the Custodian, as I have said, had the right to demand payment to him of that income as it fell due, but he surely had that right, not because some proprietary interest under the settlement from which the income sprang was vested in him, but, on the contrary, because the proprietary interest, the life estate, was vested, not in him, but in an enemy under the legislation, viz., Georgette.

I think, therefore, that there was no such proprietary interest under the trust fund or its income which, by the terms of this legislation, vested in the Custodian. Counsel for the infant defendants argued that where a third party (in this case the Custodian) has a right to receive some part of the income as it accrues under a settlement and to receive and hold it not merely as a trustee or agent for the beneficiary under the settlement, then there is a vesting. That, I think, with all respect to counsel, is an over-simplification of the matter and disregards the fundamental distinction that I have tried to state by the language I have used, that the Custodian's right to receive the income depends essentially on the circumstance that a proprietary interest in the investments is not vested in him but in "an enemy" within the meaning of the legislation. The difference and distinction, I doubt not, is a somewhat narrow one, but I think or hope, at any rate, that it is clear and sensible to a lawyer.

During the case I have drawn attention, by way of illustrating the distinction, to the point arising from what I call the fourteen days' interval in art. 1 (iv) (c) of the main order, and I have also drawn attention to the addition to the order of the right to the Custodian to sue, given in the case where the order requires payment to him of particular moneys, and not, of course, and properly not, directed to the case where the proprietary interest from which the money springs is vested in the Custodian. In the course of our discussions JENKINS, L.J., further illustrated the distinction thus. Suppose, in reference to one of the investments held by the trustees of the settlement, there was a bonus issue of shares distributable, according to the terms of the settlement, to the tenant for life. It is, I suggest, manifest that, under the terms of this order as it stands, the Custodian would have no claim whatever to those shares, for they are not "money" and they are not covered by the direction for payment. If, on the other hand, there had been a vesting in the Custodian of the proprietary interest from which such a bonus issue sprang, then, of course, the Custodian would be entitled to the shares as the fruit of the subject-matter vested in him. Recent legislation has after all made us familiar with the distinction, which might have been obscure to our ancestors, between the position of those who are given statutory rights, having no proprietary interest, and those who have proprietary interests conferring privileges which are for practical purposes no different from the statutory rights. I quoted during the course of the argument the instance of the Minister who requisitions property. He has, in respect of the property so requisitioned, for all practical purposes all the advantages and privileges of a tenant—the right to possess and the right to exclude others from possession—but he has no estate or interest in the property whatever and cannot, therefore, confer any estate or interest on any other person. The same may be said to be the situation of the phenomenon of this age commonly known as the statutory tenant.

I turn, therefore, finally to the judgment of ROXBURGH, J., in *Fraenkel v. Whitty* (1). That was a case in which the forfeiture clause arose under a deed of covenant, but, as I have said, the language was not in any material respect dissimilar from the present. In particular, though it comprehended the two alternatives "vested in or charged in favour of", it did not, as the present case does not, include the other words, so frequently seen in covenants of this kind, "or payable to"; but, as I have already said, the learned judge came to the conclusion that a forfeiture was incurred because, under the terms of the order I have read, if the particular annual sums had belonged absolutely to the recipient they would have vested in the Custodian in the sense that they would have been held so as to be payable to him in a sense which made it in all respects the same thing as though they were vested. I do not think that in so stating I am doing injustice to the judgment. ROXBURGH, J., said ([1947] 2 All E.R. 648):

"Accordingly, the event which happened would have caused the June instalment to be payable to the Custodian within fourteen days of its due

date, and, if not paid, would have rendered the settlor liable to a penalty. It would have vested in the Custodian the right to sue for it and to give a good discharge for it. It would have put him in a position as strong as, or, indeed, stronger than, that of a legal assignee. It is difficult to see what more could have been done to 'vest' that instalment in him, short of actual payment, and the context shows that in the deed 'vest' cannot refer to actual payment. No vesting order under the Act could have given the Custodian more than he got. In my judgment, the word 'vest' in this deed is used to indicate just such a situation as the Act would have brought into being in relation to the June instalment, and there would have been a vesting of it in the Custodian."

With all respect to the learned judge, I am unable to accept that reasoning. I do not think it true that the event which happened would have vested in the Custodian, within the meaning of the deed in question, the right to sue for it. It would have had that effect only in the sense that under the terms of the order the Custodian had a statutory right to sue if not paid, but I do not think that there is such a vesting as is comprehended by the proper use of that word, and, although I do not at all dissent from the view that for practical purposes the Custodian may have been in as good a position as if there had been a vesting, that does not seem to me to involve the conclusion that there was a vesting.

The learned judge then says (*ibid.*):

"In reaching this conclusion, I have assumed that the phrase 'would be payable', when used in art. 1 (i) of the order, means 'would be payable at the date of the order or would thereafter become payable', and that, once money has become payable, its character is fixed, and it must be paid to the Custodian, whatever may be the subsequent history of the person to whom it became payable."

There is then a long paragraph in which he proceeds to deal with what he states to have been the argument of Mr. Danckwerts for the view now put forward by counsel for the third and fourth defendants. I confess that I have felt considerable difficulty in comprehending this paragraph. To Mr. Danckwerts is attributed an argument, as a premise to his whole case, which required the construction of the simpler words "would be payable" in s. 7 (1) (a) of the Act of 1939 as meaning

"would be payable at the date of the order or would thereafter become payable and would continue to be payable",

so as to produce the result (contrary to what, I think, is the true result) that if, before actual payment under the terms of art. 1 of the order of 1939, an enemy beneficiary returned to this country disembarassed of his or her enemy character, the right of the Custodian to require payment would come to an end. I do not think that is a right conclusion, and if and so far as Mr. Danckwerts made it the basis of the argument against that which commended itself to ROXBURGH, J., I agree with ROXBURGH, J., in his rejection of it. I cannot, indeed, avoid altogether the suspicion that, if such was the argument put forward, the learned judge may well have been influenced strongly towards the conclusion that he reached by the fallacy in the argument that he described as the alternative. My difficulties are increased by the circumstance that the law reporters, in stating what Mr. Danckwerts' argument, in fact, was, do not attribute to him the unfortunate and (as I think) erroneous premise which, in the judgment it appears ROXBURGH, J., thought had been the foundation of his case.

Whatever may be the solution of the particular problem, however, I have, for the reasons which I have attempted to state, felt compelled to differ in this matter from ROXBURGH, J., and I am bound to say that I think his conclusion in *Fraenkel v. Whitty* (1) was incorrect. The result in the present case is that the foundation of VAISEY, J.'s conclusion is gone, and I think that the appeal

on this first question should succeed. In other words, I think that the question answered affirmatively by VAISEY, J., should have been answered negatively, and the result is that the other question raised in the appeal no longer arises. We have considered whether, in the circumstances, we ought to express our view on it, but, as it appears to turn almost entirely on the construction of this particular document, it does not seem to us necessary to pursue that matter, and, therefore, I do not propose to say anything about it. In my judgment, on the first point the appeal succeeds and the order made below should be reversed accordingly.

JENKINS, L.J.: I agree, but as we are differing from ROXBURGH, J., and from VAISEY, J., who followed ROXBURGH, J., on a point of some difficulty and importance, I may, perhaps, be excused for adding a few observations of my own. The question in the case is whether the complex of events comprising the outbreak of war between this country and Germany, the passing of the Trading with the Enemy Act, 1939, the making of the Trading with the Enemy (Custodian) Order, 1939, the invasion of France by the German forces and the consequent making of the Trading with the Enemy (Specified Areas) Order, 1940, on July 10, 1940, the making of the Trading with the Enemy (Custodian) (Amendment) Order, 1941, on May 30, 1941 (all of which events happened in the lifetime of the settlor), coupled with the residence of the three income beneficiaries in France, amounted, within the meaning of the appointment, to an act or event done or happening during the life of the settlor whereby, if the income had belonged absolutely to the income beneficiaries, such income would, at the settlor's death, be or become vested in or charged in favour of "some (scilicet, other) person". That, I think, is the question, for I agree with my Lord that if the events here under consideration cannot be shown to have brought about a determination of the life interest under the first branch of the provision for determination contained in the appointment, it is reasonably plain that no forfeiture can have been brought about by any act or event done or happening within the scope of the second branch.

The question raises, in effect, two points: first, what is the true construction of the provision for determination contained in the appointment, and, secondly, was the effect of the Trading with the Enemy Act, 1939, and of the orders made thereunder on the property in this country of technical enemies, as, for example, the income beneficiaries under this settlement, such as to bring about a forfeiture, having regard to the true construction of the forfeiture provision?

I propose to address myself first to the question of construction. The words are

"unless some act or event shall have been done or happened during my life [the life of the settlor] whereby if the same income belonged absolutely to her [the income beneficiary] such income or some part thereof would at my death be or become vested in or charged in favour of some [other] person."

Clauses of this general description have a fairly long history, and any conveyancer will have seen them in many settlements in a large variety of forms. What may, perhaps, be termed the rudimentary form is a gift to the income beneficiary "until he shall assign or charge or attempt to assign or charge the income or any part thereof". A clause in that form, from the point of view of complete protection, is obviously imperfect, for it would not apply to events in which the income beneficiary played a purely passive role (as, for instance, the event of bankruptcy), and an improvement or enlargement of the clause, as regards the circumstances bringing about the events sought to be guarded against, is sometimes met with in the form of a trust to pay the income to the beneficiary "until any act or event shall be done or suffered by" the beneficiary whereby the result to be prevented would be brought about. That includes the case where the beneficiary plays a passive role. A yet wider form may be framed (as in this case) so as to

depend merely on the doing or happening of some act or event without any qualifying words to indicate who the actor is to be or to suggest at all events permission on the part of the beneficiary. That considerably enlarges the scope of the clause. As to the events which are to occasion forfeiture, as distinct from the circumstances bringing them about, the clause may be framed so as to create a gift over, as already instanced, in the case of an assigning or charging, or attempted assigning or charging. That may not cover all events. I mentioned the possible circumstance of bankruptcy, where, although there is a vesting in the trustee, there may have been nothing amounting to an assignment in his favour. Such events as that are covered, or may be covered, by the use of the word "vested", sometimes in addition to, and sometimes in substitution for, the reference to an assignment or charge. For instance, a common variant is the form used here:

"until some act or event shall be done or happen whereby the income, if belonging absolutely to the beneficiary, would be or become vested in or charged in favour of some other person."

Lest that should not suffice to cover all events, recourse is sometimes had to a wider form, the form "be or become vested in or charged in favour of or payable to some other person". Lastly, I would refer to, perhaps, the widest form of all, the compendious form used in the Trustee Act, 1925, s. 33, where the interest of the principal beneficiary is made to endure until any event happens whereby if the income belonged absolutely to him he would be deprived of the right to receive the same or any part thereof.

Each of these forms has its own scope, and when the question arises whether a forfeiture has occurred under a particular settlement it is necessary to look critically at the language of the particular clause and see whether, having regard to the language of that clause and the nature of the event relied on as bringing about a forfeiture, a forfeiture has been incurred. The words here, as I have said, are "be or become vested or charged in favour of some (scilicet, other) person". It has not been contended before us, nor do I think it could be contended with any reasonable prospect of success, that there has been any charge in this case. The argument is centred on the question whether there has been a vesting of the income or some part thereof in some other person. Now, "vesting" is to some extent, I think, a term of art, and, to my mind, and, I should say, to the minds of most lawyers, it would connote a vesting in point of interest—a transfer of the property, or the passing of a proprietary interest of some sort, to the person in whose favour the vesting is said to take effect. Thus, in my view, the event here contemplated by the words "become vested in some person" is an event amounting to a transfer of the ownership of, or of a proprietary interest in, the income or in some part thereof to some other person. It follows, in my judgment, that no forfeiture was here incurred unless the Trading with the Enemy Act, 1939, and the orders made thereunder, fairly considered, and with their legal consequences properly taken into account, would, apart from the forfeiture provision, have brought about something amounting to a vesting in the Custodian of the income or some part thereof, in the sense of a transfer to the Custodian of a proprietary interest therein.

The argument of counsel for the infant defendants took this form. He said the income beneficiary was entitled to the income of a share of the fund during her life. What did that mean? It meant simply that she had the right to receive the income of the share during her life. The effect of the Trading with the Enemy Act, 1939, and the relevant orders, apart from the forfeiture provision, would have been to give the Custodian the right to receive that income as and when it accrued, so long as the beneficiary continued to be a technical enemy. Therefore, said counsel, the right to receive the income during that period would have become vested in the Custodian. Therefore, the income would have become vested in the Custodian within the meaning of the forfeiture provision in the

appointment. With all respect to counsel, that is, to my mind, an over-simplification. Each of these income beneficiaries had a life interest in a share of the fund. That means, no doubt, a right to the income of that share of the fund during her life. That is an interest well known in equity, and I would describe each of them as the beneficial owner for life of one-third of the fund, and, consequently, a beneficial owner for life of the income accruing and to accrue from the fund. That is the nature of their interest. No doubt, as an owner of such equitable interest each of the income beneficiaries had the right to receive her share of income, and, no doubt, the right to receive the share of income is the most important incident of ownership, but while the owner of an interest in income has a right to receive the income it does not follow that anyone else who, by whatever means and for whatever purpose, is given a right to receive that same income, becomes the owner. The person who is given the right to receive the income may or may not become the owner, but it does not follow that he is the owner because he has the right to receive the income.

My view being, therefore, that "vested in some person" means "vested in point of proprietary interest in some person," it remains to consider the provisions of the Trading with the Enemy Act and orders to see whether (apart from the forfeiture clause) the operation of those provisions was such as to give the Custodian in this case a proprietary interest in the income of these three beneficiaries under the settlement or in some part thereof. I will not traverse again at length the ground already covered by my Lord. The Trading with the Enemy Act, 1939, provides by s. 4 (1):

"No assignment of a chose in action made by or on behalf of an enemy shall, except with the sanction of the Treasury, be effective so as to confer on any person any rights or remedies in respect of the chose in action; and neither a transfer of a negotiable instrument by or on behalf of an enemy, nor any subsequent transfer thereof, shall, except with the sanction of the Treasury, be effective so as to confer any rights or remedies against any party to the instrument."

I cite that provision as a provision to be borne in mind in considering the Trading with the Enemy Orders as showing that, so far as the Act is concerned, it does appear to recognise something in the nature of a proprietary interest remaining in an enemy and capable of being assigned by an enemy, for it is only on that footing that it was necessary to enact by s. 4 (1) that an assignment should not be valid except with the sanction of the Treasury. The only other section of the Act to which I need refer is s. 7, to which my Lord has already made reference. Its provisions are enabling in character, and the relevant operative provisions, in substance, are to be found in the orders made under those enabling provisions. Turning to the Trading with the Enemy (Custodian) Order, 1939, one finds there, as in the Act itself, a clear distinction between two possible courses. The orders contemplated by s. 7 may, on the one hand, require the payment to the prescribed Custodian of money which would, but for the existence of the state of war, be payable to or for the benefit of (to put it shortly) an enemy, as one possible course, or may, on the other hand, vest in the prescribed Custodian such enemy property as may be prescribed. Those are two alternative courses, and I think the fact that they are expressed in that way indicates that the legislature contemplated that an order might require payment of money to the Custodian without thereby vesting any proprietary interest in the money in the Custodian, and that where it was necessary or expedient that the Custodian should be invested with proprietary rights, then that could be done by means of a vesting order.

That distinction is preserved in the Trading with the Enemy (Custodian) Order, 1939. The first observation I would make about that order is that so far as money is concerned it does not use the expressions one would expect to find

in an order transferring a proprietary interest in given sums of money to the Custodian. Article 1 (i) deals with

“Any money which would, but for the existence of a state of war, be payable to or for the benefit of a person who is an enemy . . .”,

and it does not provide that such money is to belong to or vest in the Custodian. It enacts that such money “shall be paid to the Custodian”. So far, then, what seems to me to be done is that the Custodian is given no proprietary interest, but where there is money due and payable to a person who, at the time when the money is due and payable, is an enemy, then the person from whom the money is due is placed under a statutory obligation to pay the money to the Custodian. That state of affairs seems to me to be perfectly consistent with the absence of any proprietary interest in the Custodian. Article 1 (ii) goes on to detail the sources from which the money in question may come and includes “payment arising under any trust, will or settlement”. The effect is that (apart from the forfeiture provision) the Westminster Bank, as trustee of the settlement, whenever it became possessed of any income arising from the trust fund in the form of money, fell under a statutory obligation to pay that money to the Custodian, provided that at the date when it came to hand and was thus immediately divisible among the income beneficiaries, each of the income beneficiaries was still technically an enemy. Again, I think there is nothing in that which postulates any proprietary interest in the Custodian: it is a statutory obligation on the trustees when they have money in hand owing to an enemy beneficiary to pay that money to the Custodian and not to the beneficiary—not because it is money of the Custodian, but because it is money of the beneficiary. It is recognised that the title remains in the beneficiary, and it is because the title is in the beneficiary and the beneficiary is an enemy that the statutory obligation to pay the Custodian is imposed.

When any money has been paid to the Custodian it is true that he has to hold it, under art. 3 of the order, in suspense. He has to hold it, along with any property vested in him under the provisions of any vesting order,

“until the termination of the present war, and shall thereafter deal with the same in such manner as the Board of Trade shall direct.”

He holds the money he receives, and he holds it in suspense in accordance with that provision. But I do not think it follows from the fact that he so holds any money representing income of a trust fund as and when he receives it from the trustees of a settlement, that there has been any vesting in him of the proprietary interest in the income of the trust fund of a beneficiary under the settlement who is an enemy. Furthermore, as my Lord has pointed out, in this case there was never, in fact, any payment at all to the Custodian of any of the income. It was, through inadvertence, as it was put in the affidavit in support of the summons, simply held by the bank and, I think, invested. Considering the matter as if the life interests had been given free of any provision for forfeiture, I think the result follows that the income in question, never having in fact been paid to the Custodian, never became subject to the provisions of art. 3 of the order. It may be that the bank committed a statutory offence in failing to pay this income over, and it may be that the Custodian could have sued the bank and demanded the money, but unless and until the money was in fact paid over to the Custodian, so far as I can see it remained throughout nothing more nor less than income due to beneficiaries who were enemies during the material period and, as such, income which the bank was under a statutory obligation (which it did not perform) to pay over to the Custodian.

I can find no warrant in the order for holding that the Custodian had any proprietary interest in this income. Accordingly, in my view, after giving the best consideration I can to the provisions of the Trading with the Enemy Act, 1939, and the orders made thereunder, and applying what I conceive to be the

true construction of the forfeiture clause, I cannot find that the relevant event has happened on the happening of which the forfeiture was to take effect. I have not overlooked the fact that, by the amending order of 1941, the Custodian was given power to sue for and recover any moneys payable to him under the order. Nor have I overlooked the fact that under art. 3 (iv) of the order of 1939 the receipt of the Custodian for any money paid to him under the order was to be a good discharge. Notwithstanding these two provisions and notwithstanding the statutory obligation to pay money to the Custodian in the circumstances I have mentioned, it does not seem to me that the Custodian's powers, rights and duties, important as they were, and though, taken together, they might put him in a position approximating to that of an owner, were such as to confer on him any proprietary right. I think his position fell short of that of a person in whom the income under this settlement or some part thereof would, apart from the forfeiture provision, have been "vested" within the meaning of the appointment.

The decision to which, in my view, we should come is, I should emphasise, a decision which turns on the true construction of this particular forfeiture clause. There may well be clauses so worded that the effect of the Trading with the Enemy Act, 1939, and the orders made thereunder was to bring about a forfeiture. Examples of that are to be found in the books. There is a case to which my Lord has referred, *Re Gourju's Will Trusts* (6). In that case the settlement adopted the protective trusts defined by the Trustee Act, 1925, s. 33, so that forfeiture was to ensue when any event happened whereby, if the said income were payable during the trust period to the principal beneficiary absolutely, during that period he would be deprived of the right to receive the same or any part thereof. In the face of that language, SIMONDS, J., held that the effect of the Trading with the Enemy Act and orders was to bring about a forfeiture because the effect of them was quite plainly to deprive the principal beneficiary of the right to receive the income. But there are no such words in this appointment.

Again, UTHWATT, J., in *Re Hall* (7) had to consider the case of an annuity bequeathed to an annuitant with a provision for forfeiture if she should alienate or charge the annuity or do or suffer any act whereby it might become vested in or payable to any other person. The learned judge held, and I find difficulty in seeing how he could have held otherwise, that, having regard to the fact that the annuitant was living in France, the effect of the provisions of the Trading with the Enemy Act, 1939, was that the annuity, if not forfeited, would become payable to the Custodian of Enemy Property; and prima facie that meant, I think, that, as the annuity would have become payable to the Custodian of Enemy Property but for the forfeiture clause, the forfeiture clause, containing, as it did, the words "vested in or payable to", would have operated. But the learned judge in that case found himself able to escape that conclusion on the strength of the words "do or suffer any act" and he held that the unfortunate events whereby the annuitant had become a technical enemy were neither acts done by her nor acts suffered by her, placing, in the context, on the word "suffer" the meaning "permit". But in this case the words "or payable" are not present. The words are "vested in", and for the reasons I have given I do not think that the Trading with the Enemy Act and orders would have brought about a "vesting" within the meaning of this forfeiture provision.

I may, perhaps, be excused for referring to *Re Sartoris's Estate* (8). I refer to it because it provides an illustration of a case in which income may become payable to some person other than the income beneficiary, or some person other than the beneficiary may acquire the right to receive the income, although the income is not vested in that other person. The headnote to the case is:

"A testator bequeathed the income of his residuary estate to his son during his life, or until he should assign or dispose of the income or some part thereof, 'or become bankrupt, or do or suffer something whereby the

said income if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person'. In October, 1890, a petition in bankruptcy was filed against the son, and in November, 1890, a receiving order was made. A meeting of creditors was held in December and adjourned till January, when it was adjourned again, and nothing further had been done in the matter:—Held (affirming the decision of CHITTY, J.), that though the income did not vest in the official receiver, it would, by force of the receiving order have become payable to him if it had belonged absolutely to the tenant for life, and that the interest of the tenant for life had determined."

CHITTY, J., said ([1892] 1 Ch. 13):

"Now the first point to be ascertained is, the effect of a receiving order under the Bankruptcy Act, 1883. The material sections are the 9th, which provides that 'on the making of a receiving order, an official receiver shall be thereby constituted receiver of the property of the debtor', and the 70th section, which defines his duties. Sub-section 2 is the more material one, which enacts that for the purpose of his duties as interim receiver, 'the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court'. Upon the Act of Parliament it is quite clear that the debtor's property does not pass to the receiver; but it is equally clear that it is the duty of the receiver to execute his office, and to receive whatever property the debtor may have. If there is property in the debtor's possession, the receiver intervenes by taking possession for the purposes of protecting the property, and seeing that it reaches its ultimate destination, whatever that may be, according to the result of the bankruptcy proceedings. It being plain that there is no vesting of the debtor's property in the receiver, it follows, and has been decided, that notwithstanding the receiving order the bankrupt alone can bring actions for the recovery of property not in his possession, as for instance a debt due to him at law."

Apart from the circumstances that in the present case the Custodian of Enemy Property was given an express right to sue for money which had become payable to him under the provisions of the Trading with the Enemy Orders, it seems to me that those observations provide a reasonably close analogy to the present case. The receiver was under a duty to execute his office and to receive whatever property the debtor might have. Nevertheless, the property did not vest in the receiver. The receiver's duty was to take possession for the purpose of protecting the property and seeing that it reached its ultimate destination, whatever that might be. So, too, it might here be said that the Custodian was under a duty to receive money due to enemies and that persons holding money due to enemies were under a statutory obligation to pay that money to him, and the Custodian was then to hold it in suspense and see that it reached its ultimate destination, whatever that might be, under whatever directions might ultimately, at the conclusion of hostilities, be given by the Board of Trade.

Re Sartoris's Estate (8) is, I think, also instructive in another respect. It will be remembered that the words of forfeiture in that case were "payable to or vested in some other person", and that, for the reasons to which I have referred, CHITTY, J., held that there was no vesting in the receiver. But he drew a sharp distinction between the words "payable to" and "vested in" and held that the income had become payable to the receiver although it had not become vested in him. That, I think, bears out my observations earlier in this judgment as to the difference in effect of different forms of forfeiture clauses. If, here, the words "or payable to" had been present, or if, here, the event of forfeiture had been defined as deprivation of the right to receive the income or some part thereof, the result would, I venture to think, inevitably have been different. But the words we here have to construe are "vested in"; and for the reasons

given by my Lord and those which I have added (I am afraid at undue length) I am of opinion that there was here no vesting in the Custodian within the meaning of the appointment.

MORRIS, L.J.: I am in full agreement with the judgments which my Lords have delivered.

Appeal allowed. Declaration accordingly.

Solicitors: *Michael Kramer* (for the third and fourth defendants); *Official Solicitor* (for the infant defendants); *Caprons & Crosse* (for the trustees).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

R. v. KENT JUSTICES. *Ex parte* MACHIN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Ormerod and Parker, JJ.), April 7, 1952.]

Justices—Indictable offence triable summarily—Need to explain to defendant liability to be committed to quarter sessions for sentence—Summary Jurisdiction Act, 1879 (c. 49), s. 17 (2) and Criminal Justice Act, 1925 (c. 86), s. 24 (2), as amended by Criminal Justice Act, 1948 (c. 58), sched. IX.

The applicant, having consented to be dealt with summarily, was convicted by a court of summary jurisdiction of obtaining credit by fraud and of larceny, and he was committed to quarter sessions for sentence under s. 29 (1) of the Criminal Justice Act, 1948. The court failed to explain to the applicant that he might be so committed, as is required by s. 17 (2) of the Summary Jurisdiction Act, 1879, and s. 24 (2) of the Criminal Justice Act, 1925, as amended by sched. IX to the Criminal Jurisdiction Act, 1948. On an application for an order of certiorari,

HELD: the provisions of the statutes were peremptory, and, therefore, the convictions were bad because the justices, although with the consent of the applicant, had dealt with the cases summarily without complying with those provisions, and the order for certiorari must go and the convictions be quashed.

R. v. Cockshott ([1898] 1 Q.B. 582), applied.

FOR THE CRIMINAL JUSTICE ACT, 1948, s. 29 and sched. IX, see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 1013 and Vol. 28, p. 409, respectively.

Cases referred to:

- (1) *R. v. Cockshott*, [1898] 1 Q.B. 582; 67 L.J.Q.B. 467; 78 L.T. 168; 62 J.P. 325; 14 Digest 130, 1032.
- (2) *R. v. South Greenhoe JJ. Ex p. Public Prosecutions Director*, [1950] 2 All E.R. 42; [1950] 2 K.B. 558; 114 J.P. 312; 2nd Digest Supp.
- (3) *R. v. Middlesex Quarter Sessions. Ex p. Public Prosecutions Director*, [1950] 1 All E.R. 916; [1950] 2 K.B. 589; 114 J.P. 276; 2nd Digest Supp.
- (4) *R. v. Grant*, [1951] 1 All E.R. 28; [1951] 1 K.B. 500; 115 J.P. 36.

MOTION for certiorari to bring up and quash two convictions of obtaining credit by fraud and larceny by a court of summary jurisdiction sitting at Herne Bay, on Aug. 29, 1951.

The applicant was committed by the justices to the East Kent quarter sessions for sentence under s. 29 (1) of the Criminal Justice Act, 1948. He contended that his convictions were bad in law because the court of summary jurisdiction did not explain to him that he might be so committed, contrary to the provisions of the Summary Jurisdiction Act, 1879, s. 17 (2), and the Criminal Justice Act, 1925, s. 24 (2), as amended by sched. IX to the Criminal Justice Act, 1948.

Jupp for the applicant.

Eddie for the Crown.

LORD GODDARD, C.J.: Counsel for the applicant, Peter Lawrence Machin, moves for an order for certiorari to bring up and quash two convictions of the applicant by Kent justices sitting in the St. Augustine's division. The applicant was convicted of obtaining credit by fraud on Aug. 21 and 24, 1951, and of the larceny of two fountain pens, and he was committed to quarter sessions for sentence under s. 29 of the Criminal Justice Act, 1948. Before quarter sessions objection was taken that his convictions were bad, and so they adjourned consideration of the matter to enable it to be argued in this court on an application for an order for certiorari.

By s. 29 (1) of the Criminal Justice Act, 1948, power is given to justices to commit such a person as the applicant to quarter sessions for sentence. Under s. 17 (1) and (2) of the Summary Jurisdiction Act, 1879, a person who is charged before justices with an offence punishable by imprisonment for a term exceeding three months, and under s. 24 (1) and (2) of the Criminal Justice Act, 1925, a person who is charged with an indictable offence which can be dealt with summarily, must be informed of his right to be tried by a jury and must consent to be dealt with summarily, and, further, by the amendments to the sections I have mentioned which are contained in sched. IX to the Act of 1948 it must be explained to him that, if he is convicted by the justices, he may be committed to quarter sessions for sentence under s. 29 of the Act of 1948 if the court, on obtaining information as to his character and antecedents, is of opinion that they are such that greater punishment should be inflicted than they (the justices) have power to inflict. In the present case the procedure prescribed by the earlier Acts was followed, but the applicant was not told of his liability to be committed under s. 29.

There is no question of any advantage having been taken of the applicant. The offences charged against him were undoubtedly offences with which the justices could deal with his consent. He was represented by a solicitor who told the justices that he desired to be dealt with by them. Clearly he consented, but the jurisdiction of justices to deal with cases which are *prima facie* indictable is purely statutory and the provisions of these statutes are peremptory. In 1898 in *R. v. Cockshott* (1) the prisoner had been charged with an offence to which s. 17 of the Summary Jurisdiction Act, 1879, applied, and so he was entitled to be told, before he was called on to plead, that he could go for trial if he liked. *R. v. Cockshott* (1) shows how strictly the court construes such provisions because in that case the solicitor for the prosecution and the solicitor for the defence were both present in court. They talked together and agreed that the case should be dealt with by the justices. Thereupon no one thought it necessary to tell the prisoner of his right to be tried by a jury because he was represented by a solicitor who had agreed to treat the case as a summary case. The court held that the provisions of the statute must be strictly complied with, and, as the prisoner had not been told of his right to be tried by a jury before the trial started, the conviction must be quashed.

Following the reasoning of the court in *R. v. Cockshott* (1), we think we must give effect to the provisions of sched. IX to the Act of 1948, and we must, therefore, hold that the order for certiorari must go and these convictions must be quashed because the justices took on themselves, although with the consent of the applicant, to try the cases summarily without a strict compliance with all the statutory provisions which now allow an indictable offence to be dealt with summarily. It was a very venial offence in the justices and one can well understand their overlooking a provision tucked away in a schedule as this one is, but the applicant is entitled to take advantage of it, and, therefore, we hold the committal and the convictions to be bad. That distinguishes this case from *R. v. South Greenhoe JJ. Ex p. Public Prosecutions (Director)* (2). In that case there had been a strict compliance with the section, but, although the justices had power to convict, for reasons I need not go into now, they had no

power to commit the defendant for sentence and so the committal was bad and the case was sent back to the justices to complete the hearing.

The applicant, technically, has never been in peril and he could now be tried over again. He has been seven months in custody, and in those circumstances—it must be a matter for the prosecution, for this court has no power to give directions on the matter—we think it would not be right in the interests of justice that further proceedings be taken against him for the two cases in which he has been actually convicted. Whether the prosecution consider it right to proceed in the four cases outstanding, which have never been made the subject of a charge, although the applicant wanted them taken into consideration, is a matter for the prosecution.

ORMEROD, J.: I agree.

PARKER, J.: I agree.

Order for certiorari.

Solicitors: *Cunliffe & Airy*, agents for *H. W. S. Homewood*, Canterbury (for the applicant); *W. L. Platts*, county solicitor, Maidstone (for the Crown).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

WATSON v. BRITISH THOMSON-HOUSTON CO., LTD.

[QUEEN'S BENCH DIVISION (Parker, J.), April 2, 3, 1952.]

Factory—Dangerous machinery—Circular saw—Riving knife—Arc of “radius not exceeding radius of largest saw used on bench”—Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), reg. 10 (b) (i).

A circular saw was bought with a twenty-four inch diameter blade, and that blade was replaced when necessary with a new twenty-four inch blade, but with use the diameter of a blade was gradually reduced by the continual sharpening of the tips and re-gulleting (cutting deeper by filing) of the indentations. Owing to market conditions a new blade ordered in February, 1948, was not received until April, 1950, and in consequence, in March, 1950, the diameter of the old blade was only $19\frac{1}{2}$ inches, compared with a diameter of twenty-four inches of the circle of which an arc was formed by the riving knife used to fence it. The distance of the front edge of the riving knife from the teeth of the saw at table bench level was under half an inch in accordance with the requirements of reg. 10 (b) (ii) of the Woodworking Machinery Regulations, 1922, but, owing to the different diameters, the distance horizontally $4\frac{3}{4}$ inches above the table, where the knife met the guard covering the top of the saw, was $1\frac{1}{8}$ to $1\frac{1}{4}$ inches. While he was removing a piece of wood jammed in the machine, the operator's fingers were caught in the saw and he was injured.

HELD: the expression “the largest saw used on the bench” in reg. 10 (b) (i) of the Woodworking Regulations, 1922, did not mean the largest saw capable of being used, designed to be used, at some time used, or constantly used, but the largest saw which could be said to be used on the bench in the light of all the circumstances, including how often such a saw was used as opposed to any other saw. On the facts the largest saw used was a twenty-four inch saw, and there had thus been no breach of the regulations requiring that the edge of the knife nearer the saw should “form an arc of a circle having a radius not exceeding the radius of the largest saw used on the bench”.

ACTION for damages for negligence and breach of statutory duty.

The plaintiff had been employed for twenty-three years by the defendants as a sawyer, and since 1946 he had been in the casemaking department in charge of a cross-cut saw. The saw was a vertical, revolving circular saw with a movable

table on one side and a fixed table on the other for the wood to be cut and the ends or offshoots cut off respectively. The surfaces of the tables were approximately level with the centre of the saw. There was a guard on top of the saw which was supported by a pillar and which came over a riving knife at the back, the operator facing the front edge of the saw. The curve of the riving knife followed the curve of the circumference of the saw and served to keep cut portions of the wood apart and prevent their jamming and also as a fence to prevent the operator's hand from coming into contact with the saw. On Mar. 13, 1950, when about to clean the saw, the plaintiff noticed an offshoot of wood jammed between the pillar which held the guard over the saw and the riving knife. He put his right hand forward to try to remove it, but the end of the wood caught in the teeth of the saw, which was still revolving, and dragged his hand in contact with the blade, causing the middle and index fingers to be severed through the middle phalanges. At the time of the accident the radius of the saw was $9\frac{3}{4}$ inches and the radius of the circle of which the riving knife formed an arc was twelve inches. The gap between the riving knife and the teeth of the saw at table level was seven-sixteenths of an inch and at $4\frac{3}{4}$ inches high, where the riving knife disappeared under the guard, it was, horizontally, approximately $1\frac{1}{2}$ or $1\frac{1}{8}$ inches. The plaintiff contended that the largest saws used on the bench were of a radius considerably less than that of the circle of which the riving knife formed an arc, and that the defendants were, therefore, in breach of reg. 10 (b) (i) of the Woodworking Machinery Regulations, 1922, and that they were negligent in not providing a safe system of work by reason of the difference between the radius of the saw and of the arc of the riving knife.

Denny for the plaintiff.

Berryman, Q.C., Bassett, Q.C., and Anwyl-Davies for the defendants.

PARKER, J., stated the facts and continued: Regulation 10 of the Woodworking Machinery Regulations, 1922, provides:

"Every circular saw shall be fenced as follows . . . (b) Behind and in a direct line with the saw there shall be a riving knife, which shall have a smooth surface, shall be strong, rigid, and easily adjustable and shall also conform to the following conditions:— (i) The edge of the knife nearer the saw shall form an arc of a circle having a radius not exceeding the radius of the largest saw used on the bench. (ii) The knife shall be maintained as close as practicable to the saw, having regard to the nature of the work being done at the time, and at the level of the bench table the distance between the front edge of the knife and the teeth of the saw shall not exceed half an inch."

From that it is plain that the riving knife is part of the fencing of the machine. The idea is that the curve of the riving knife should follow the curve of the circumference of the blade and should remain as close to the teeth as is reasonably practicable so as to afford the smallest possible gap between the edge of the riving knife and the teeth. The regulation provides that, at table level, the edge of the riving knife shall not be more than half an inch away from the teeth. There is no question that that was done. The regulation also contemplates, by sub-para. (i), that for some reason it may not be practicable always to have fitted a riving knife of which the arc forms a part of a circle of the same radius as the saw. Whether that is due to difficulties of changing riving knives when changing saws or to the riving knife being fitted by the manufacturer to the machine, I do not know, but the effect is that an employer does all that is necessary under the regulation in the way of fencing if, as sub-para. (i) says, the edge of the knife nearer the saw forms an arc of a circle having a radius not exceeding the radius of the largest saw used on the bench.

The wording of reg. 10 (b) (i) is curious, and it is very difficult to say what it actually means. I am satisfied, however, that it does not mean "capable of being used," or "designed to be used." It does not say the largest saw the

A machine is capable of taking, or for which it is designed to be used, and such construction would produce the very odd result that a factory occupier might order a machine capable of taking a twenty-four inch blade and deliberately, thereafter and for all time, only use an eighteen inch blade. If that were right the riving knife, which is part of the fencing, might for all time leave a gap of inches at the point at which it went under the guard. I am also satisfied that the paragraph does not mean "has at some time been used". Again it does not say so, and again the curious position would result of a purchaser being able to use a twenty-four inch saw for a week or two and for the rest of the machine's life only an eighteen inch saw because the machine worked better with it. Nor does the paragraph mean "used daily or constantly used" because, again, it does not say so.

B The question is largely a matter of degree—how often the twenty-four inch saw is used as opposed to another saw in the sense of at what intervals and how often throughout a day, or whatever the period being considered is. The question to be asked is whether in the light of all the circumstances the twenty-four inch saw, in a general sense, is used on the bench. Whatever the true view is, I am satisfied that in this case it cannot be said that a twenty-four inch saw was not used on this bench within the regulation. The machine was bought in 1930 with C purchases of replacements can be proved (two new twenty-four inch blades in 1945 or 1946 and an order for a new twenty-four inch blade in February, 1948, the blade not being delivered owing to market conditions till April, 1950), it shows purchases of twenty-four inch saws, and I am entitled to infer, on the evidence, D that when the blades were replaced, they were replaced by twenty-four inch blades. In the intervals between purchases, the blades, no doubt, would be of varying diameters from time to time, going down, as they did in this case, from twenty-four inches to the 19½ inches of the blade at the time of the accident, through the continuous sharpening of the tips and the re-gulleting (cutting deeper by filing) of the indentations. But it does not seem to me that it can be said that E twenty-four inch saws were not used on the bench within the meaning of this regulation merely because, for a time, they became of less diameter and for another period of time (albeit a long time owing to market conditions) a twenty-four inch replacement was not obtainable. Accordingly, I do not think that in this case there has been any breach of the regulations.

HIS LORDSHIP found that there had been no negligence on the part of the defendants at common law.

Judgment for the defendants.

Solicitors: *Rowley, Ashworth & Co.* (for the plaintiff); *Stuart H. Lewis* (for the defendants).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

BARKER v. BARKER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), March 6, April 7, 1952.]

Divorce—Maintenance of wife—Secured maintenance—General charge on all husband's assets—Covenant under seal to pay annual sum—Matrimonial Causes Act, 1950 (c. 25), s. 19 (2).

On the dissolution of their marriage a husband was ordered to secure to the wife for her life until further order the annual sum of £300 less tax by "a general charge on all of [the husband's] assets" with a provision for reference to the conveyancing counsel of the court to settle the necessary deed or deeds in default of agreement between the parties.

HELD: (i) the order directing a general charge on all the husband's assets was oppressive in effect, uncertain in operation, difficult of enforcement, and of doubtful validity, and it was difficult to resist the conclusion that an order in that form offended against the principle that orders should not be made to bring pressure to bear on a husband or on other persons to make provision for a wife which otherwise they could not be required to make;

Howard v. Howard ([1945] 1 All E.R. 91), applied.

(ii) under s. 19 (2) of the Matrimonial Causes Act, 1950, it was not open to the court to make an order for security in the form of a covenant under seal by the husband to pay the specified annual sum during the life of the wife with or without a charge of the annual sum in question on specified assets;

(iii) the present order could not stand, and in lieu thereof the husband would be ordered to secure to the wife £100 per annum by a charge on certain shares with a proviso that that annual sum was to be paid only out of the income of the shares or of any investments from time to time representing the same and that the charge should be non-cumulative.

AS TO ORDERS FOR MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 798, para. 1269; and FOR CASES, see DIGEST, Vol. 27, pp. 502-505, Nos. 5379-5396.

Cases referred to:

- (1) *Re Kelcey*, [1899] 2 Ch. 530; 68 L.J.Ch. 742; *sub nom. Re Finn-Kelcey*, 81 L.T. 354; 35 Digest 266, 251.
- (2) *Howard v. Howard*, [1945] 1 All E.R. 91; [1945] P. 1; 114 L.J.P. 11; 172 L.T. 38; 2nd Digest Supp.
- (3) *Medley v. Medley*, (1882), 7 P.D. 122; 51 L.J.P. 74; 47 L.T. 556; 27 Digest 508, 5468.
- (4) *Shearn v. Shearn*, [1931] P. 1; 100 L.J.P. 41; 143 L.T. 772; Digest Supp.
- (5) *Yates (Inspector of Taxes) v. Starkey*, [1951] 1 All E.R. 732; [1951] Ch. 465.

APPEAL by the husband, the respondent in a divorce suit, against orders of COLLINGWOOD, J., and PEARCE, J., dismissing the husband's appeals from orders of Mr. Registrar LONG by which he directed that an annual sum of £300 less tax secured maintenance for the wife be secured by a general charge on all of the husband's assets.

Beyfus, Q.C., and *J. Stirling* for the husband.

Heathcote-Williams, Q.C., and *E. O. Roberts* for the wife.

Cur. adv. vult.

April 7. JENKINS, L.J., read the following judgment of the court. This is an appeal (by special leave of this court) by the husband, Eric Albert Barker, from an order of COLLINGWOOD, J., dated June 14, 1951, dismissing his appeal from an order of Mr. Registrar LONG dated May 1, 1951, and also from an order of PEARCE, J., dated Nov. 13, 1951, dismissing his appeal from a further

order of the same registrar dated Aug. 2, 1951, the two orders of the registrar thus unsuccessfully appealed from having been made on the application of the wife, Ida Irene Behenna Barker, for maintenance consequent on the dissolution, on her petition, of her marriage to the husband on the ground of his desertion.

By his order dated May 1, 1951 (which we will call "the first order") Mr. Registrar LONG directed that the husband should secure to the wife for her life until further order as from the date of the decree absolute (namely, May 12, 1951) the annual sum of £300 less tax until Dudley Eric Reynolds Barker, the child of the marriage, should attain the age of twenty-one years, and thereafter the annual sum of £200 less tax, both sums to be payable by monthly instalments and to be secured on security to be selected by the husband, provided that, in default of agreement as to the nature of the security, either party was to be at liberty to apply to the registrar, and that, in default of agreement as to the form of the necessary deed or deeds, the settling thereof be referred to conveyancing counsel of the court. By the same order it was further directed that the husband should pay to the wife as from the same date during their joint lives until further order maintenance at the rate of £400 per annum less tax by monthly instalments, and as from the same date maintenance for the child until further order at the rate of £120 per annum free of tax by monthly instalments. The husband took exception to the amount of the secured maintenance awarded by the first order, and appealed to the judge in chambers, but COLLINGWOOD, J., who heard the appeal, dismissed it by his order of June 14, 1951, on the ground (as we were told) that the husband's proper course was to apply to Mr. Registrar LONG for any variation of the first order to which the husband considered himself entitled.

On the matter coming before Mr. Registrar LONG again he, by his order of Aug. 2, 1951 (which we will call "the second order") directed that the annual sum of £300 less tax referred to in the first order should be "secured by a general charge on all of" the husband's "assets", with a provision for reference to conveyancing counsel of the court to settle the necessary deed or deeds in default of agreement between the parties. The second order was the subject of a further appeal to the judge in chambers, but PEARCE, J., who heard the appeal, dismissed it by his order of Nov. 13, 1951, though giving the husband liberty to apply within fourteen days to Mr. Registrar LONG as to an alternative method of securing the annual sum of £300.

The husband now appeals from the orders dismissing his appeals from the first and second orders of the registrar. The grounds of his present appeal are substantially, first, that the form of security directed by the second order, namely, "a general charge on all of" the husband's "assets" is wrong in principle, and, secondly, that, having regard to the husband's circumstances, and the nature and value of, and prior charges on, his capital assets, the annual sum of £300, reducible to £200 when the child attains twenty-one, directed to be secured is excessive in amount and has not been fixed in accordance with the principles on which the discretion conferred on the court by the relevant statutory provisions ought to be exercised, and, in particular, is in disregard of "the ability of" the husband. The husband has not been primarily concerned to complain of the total amount which he has been called on to pay or provide, namely, £940 per annum gross (approximately), but he has strenuously contended that on a proper exercise of the court's discretion he should not, and cannot, be called on, at least at the present time, to "secure" to the wife any annual sum approaching £300 or even £200.

Before passing to a consideration of the relevant statutory provisions we will briefly summarise the evidence as to the circumstances of the parties. The wife has no means of her own apart from savings certificates worth (at the date of her affidavit sworn on April 16, 1951) £738 ls. 2d., an insurance policy the surrender value of which then amounted to £301 5s., and furniture and effects valued by her at £100, and she has to maintain the child of the marriage. The

husband was, at the date of his affidavit of means sworn on Feb. 9, 1951, employed by a company at a salary of £2,000. That company is a private company with an issued capital of £15,730 divided into 15,380 ordinary and 350 preference shares of £1 each, held as to five thousand ordinary and two hundred preference shares by the husband, as to 10,280 ordinary and 150 preference shares by his father, and as to the remaining hundred ordinary shares by his mother. The company has been carrying on a large volume of business—according to the figures put in evidence its total sales during the calendar year 1950 amounted to close on £1,000,000—but clearly it is, and has at all material times been, short of working capital. At the end of the same calendar year, 1950, it appears that the company owed to its bankers £114,566, and to trade creditors the still larger figure of £165,600, and we were told in the course of the hearing that since the affidavits before us were sworn a receiver has been appointed by the bank as debenture holder of the company and that the receiver has since his appointment continued the employment of the husband in the company's business at a reduced salary of £1,250 per annum. In addition to his holding of five thousand ordinary and two hundred preference shares of the company the husband owns (i) the freehold house bought in 1946 for £3,250, which is his home, but which is subject to a first mortgage for £3,000 and a second mortgage in favour of his father of £3,750 with arrears of interest amounting at the date of his affidavit of means to £469; (ii) furniture valued at £1,000; (iii) a motor launch valued at £350; (iv) savings certificates worth at the date of his affidavit of means £504, and £750 three per cent. savings bonds, both these assets being charged to a bank to secure an overdraft amounting on July 2, 1951, to £544 6s., making the net value of these two assets about £710; (v) two policies of insurance on his life with an aggregate surrender value as at the date of his affidavit of means of £1,320.

It is, we think, not beside the point since it has a bearing on the affairs of the company, to refer to the circumstances in which the husband's house came to be charged to the extent that it is. At the time of its acquisition the husband's father appears to have advanced to the husband the money required for the purchase, together with a further sum of £500 for its equipment (£3,750 in all), taking an equitable charge by deposit with him (the father) of the deeds of the house. When, at a later stage, it became a matter of urgency to provide further liquid resources for the company, it was arranged that the maximum sum possible should be raised by way of first mortgage on the husband's house and made available to the company. The sum that was procured by this means was £3,000 and thereupon the husband's father released his charge and possession of the deeds to enable the mortgage to be effected, taking himself a second charge for the sum due to him, namely, £3,750. Interest at the rate of $4\frac{1}{2}$ per cent. is payable in respect of the sum due on the first mortgage and interest at $2\frac{1}{2}$ per cent. is payable on the loan from his father to the husband, but at the present time this latter interest is five years in arrear, and, as already mentioned, the sum due in respect thereof at the date of the husband's affidavit of means was £469.

It will thus be seen that (disregarding the house as mortgaged for more than its full value, even if it is permissible to regard its value as being to some extent in excess of its purchase price) the husband's net assets, apart from his holding of shares in the company, consist of the equity of redemption in the savings certificates and savings bonds, £710; the surrender value of the policies, £1,320; the furniture, £1,000; and the motor launch, £350, a total of £3,380, as against which his father must be considered as an unsecured creditor to an extent of £3,000 at least in respect of the deficiency in his security for principal and interest consisting of his second charge on the house. It is further to be observed that none of these assets as they stand produces any income apart from £22 10s. from the savings bonds. On the other hand, the husband is liable for interest on the mortgage and second charge and on the overdraft. It would, however,

A be possible, by realising all these assets and ignoring altogether the father's claim as an unsecured creditor, to provide a fund of, say, £3,000 or (leaving the husband his furniture, of which it would hardly be reasonable to deprive him) of, say, £2,000 which when invested might be expected to provide, say, £70 to £80 per annum for the wife. This would involve stripping the husband of virtually all his capital assets except his holding of shares in the company, besides leaving him over £3,000 in his father's debt. As to the husband's five thousand ordinary and two hundred preference shares of the company they are not producing, and, according to the evidence, never have produced, any income, and, though the company appears to have made a net profit during the calendar year 1950 of £6,825, it is not surprising that, in the circumstances, no part of this sum was or could have been distributed by way of dividend. The future prospects of the company's business are, therefore, at best, problematical, though, in view of the large volume of turnover, there seems at least a possibility that the husband's shares may ultimately turn out to be of value.

B What, in these circumstances, is the proper course to take as regards secured maintenance for the wife during her life and the son during his minority as distinct from unsecured payments during the joint lives of the husband and the wife? The relevant statutory provisions now in force are these. The Matrimonial Causes Act, 1950, by s. 19 provides:

C “(2) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable; and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed. (3) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing sub-section.”

D Any order made under either sub-section of s. 19 may now be subsequently varied by further order, for, by s. 28, it is (so far as relevant) provided:

E “(1) Where the court has made an order under s. 19, s. 20, s. 22, s. 23 or s. 24 (2) of this Act, the court shall have power to discharge or vary the order or to suspend any provision thereof temporarily and to revive the operation of any provisions so suspended . . . (2) The powers exercisable by the court under this section in relation to any order shall be exercisable also in relation to any deed or other instrument executed in pursuance of the order. (3) In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage.”

F Before passing to the more difficult question, what security and for what amount can properly be ordered in the present case, we can dispose quite shortly of the form of security directed by the second order. Whatever else may be right, we must express our disapproval of an order that the sum awarded is to be secured by “a general charge on all of” the husband's “assets”. If the charge ordered to be given in these sweeping and indiscriminate terms is to be understood as comprising all of the husband's assets at the date of the order (or, alternatively, at the date of the deed giving effect to it), then it would include everything that the husband had in the world, even his clothes and personal

effects, the loose change in his pockets, and any balance due to him in respect of salary at the date in question. The whole of his assets at that date (including such items as we have mentioned) would be completely frozen. If, on the other hand, what is intended is a floating charge of like scope, but extending to assets present and future, then its effect would, apparently, be to leave the husband free to deal with his assets as he chose until the wife or trustees as holders of the charge on her behalf intervened to enforce the security when it would attach to every single thing then possessed by the husband. In either case the charge, so far as it related to personal chattels, would be void unless registered as a bill of sale, and (if the security was intended to operate as a floating charge) it would, so far as we can see, necessarily be void under the Bills of Sale Acts as regards the personal chattels comprised therein owing to the impossibility of complying with the statutory requirements as to form and registration.

Counsel for the wife submitted that the "general charge" intended by the second order was a floating charge, and he endeavoured to support it by reference to precedent 272 in the *ENCYCLOPAEDIA OF FORMS AND PRECEDENTS*, 3rd ed., vol. 10, p. 611, and to *Re Kelcey* (1), as showing that general charges of this description were not necessarily invalid or ineffective as to some kinds of property or assets. He admitted the difficulty we have mentioned, but this difficulty, together with the palpable absurdity of including in the charge such things as clothes and personal effects, he sought to surmount by saying that the true intention of the second order was to exclude personal chattels and to leave it to conveyancing counsel to select such assets or types of asset as could appropriately be charged and to settle a suitable form of charge on the assets or types of asset so selected. This surely will not do. It is for the court to specify the assets on which the security is to be given and not to delegate its discretion in the matter to conveyancing counsel. Nor does the second order in fact purport to effect any such delegation. It directs in plain terms a general charge on all of the husband's assets and must be construed as meaning what it says. So construed, it seems to us to direct a charge which would be at once oppressive in effect, uncertain in operation, difficult of enforcement, and of doubtful validity. We find it, indeed, difficult to resist the conclusion that such an order offends against the principle stated by this court in 1945 in *Howard v. Howard* (2), namely, that orders under the sub-section should not be used in *terrorem* in order to bring pressure to bear on a respondent husband (and on other persons) to contrive to make provision for a wife which they could not otherwise be required to do. It follows, therefore, in our view, that the second order cannot stand.

The question then arises what security, if any, should, in all the circumstances of the case, be directed in place of the general charge directed by the second order and for what amount. It is, at first sight, an attractive solution to construe the language of s. 19 (2) as framed in terms sufficiently wide to include an order for security in the form of a covenant by the husband to pay a specified annual sum during the life of the wife with or without a charge of the annual sum in question on specified assets of his. If this were a legitimate application of s. 19 (2), it would provide a convenient method to adopt in a case like the present case in which the husband has assets of considerable potential value, but not for the moment producing any income or being readily convertible into income-bearing assets, and is also possessed of a substantial earned income. A fair result might well be produced in such a case by fixing the total annual amount which the husband could reasonably be required to pay to the wife having regard to the amount of his earned income for the time being, directing the husband to enter into a covenant to pay a suitable proportion of that annual amount to the wife during her life, and, further, directing him to charge any asset capable of being conveniently charged as security for the covenanted sum, but on terms that no steps were to be taken to enforce the charge so long as the covenanted sum was duly paid. Security by way of covenant would also be a convenient and

suitable form of security in the possible case of a husband with no chargeable or readily chargeable capital assets, but possessed of a large income held for his life on protective trusts for his benefit, and, therefore, incapable of being charged. And no hardship would now be caused to a husband by dealing with the question of secured maintenance in this way, for under s. 28 (1) and (2) the amount of the covenanted payment could be reduced or extinguished by the court in the event of his circumstances changing for the worse, while the wife would be accorded some measure of protection against the contingency of the husband's death and the consequent cessation of any unsecured maintenance. As the law stood before the Matrimonial Causes Act, 1950, secured maintenance had to be irrevocably fixed once and for all, and in those circumstances security by way of covenant, as opposed to charge or transfer of assets capable of producing the amount of secured maintenance ordered, would have been fraught with a risk of hardship to the husband which in view of s. 28 no longer obtains.

It appears that such a construction is contrary to the view that has consistently been taken in practice of the effect of the sub-section and its statutory predecessors. Provision for securing a gross or annual sum to a wife was first contained in s. 32 of the Matrimonial Causes Act, 1857, the terms of that section being, so far as relevant, substantially identical with those of s. 19 (2) of the Act of 1950. The Act of 1857 made no other provision for the maintenance of a wife, and there was no power to order payments to be made by a husband to a wife in a divorce case apart from interim orders for payment of money by way of alimony or otherwise such as the court would have ordered in suits instituted for judicial separation. The omission was remedied by the Matrimonial Causes Act, 1866, the second recital in the preamble of which was:

"And whereas it sometimes happens that a decree for dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives."

Section 1 of the Act then proceeded to confer on the court power to order the payment by a husband to a wife of maintenance during the joint lives in terms corresponding to those now comprised in s. 19 (3) of the Act of 1950, with a power for the court, in the circumstances mentioned, thereafter to discharge or modify any such order.

In *Medley v. Medley* (3) the question arose in this court whether the powers contained in s. 32 of the Act of 1857 and s. 1 of the Act of 1866 were cumulative or alternative. The decision was in favour of the latter view, a result which was reversed by s. 1 (2) of the Matrimonial Causes Act, 1907. In the course of their judgments in *Medley v. Medley* (3) the members of the Court of Appeal discussed the proper interpretation to be given to the word "secure" in the Act of 1857 which (though the question was not necessary to the decision of the case) seems at any rate to be inconsistent with the conception that a covenant for payment of an annual sum was comprehended within the "security" contemplated by the Act of 1857. Thus, SIR GEORGE JESSEL, M.R., after referring to the recital which we have quoted from the Act of 1866, concluded that the word "secure" in the Act of 1857 should be given a meaning contrasted with that of the word "pay", and said (7 P.D. 125):

"Therefore it appears to me that it was not intended by the first Act that an order should be made for payment of the allowance directly by the husband to the wife".

Similarly, LINDLEY, L.J., said (*ibid.*):

"I think it is clear that [the word 'secure'] does not include payment, but that the sum gross or annual was to be secured so as to provide a fund for the wife".

As we have said, this view of the limited significance of the word "secure" appears to have been followed ever since: see, for example, per HILL, J., in *Shearn v. Shearn* (4). And there is the further question whether—at any rate in the absence of the clearest words in the statute—it would be in accordance with principle to order a man to enter into a promise (as would be involved in a deed of covenant) to which he had not already assented: see also the distinction drawn between orders to secure and orders to pay by HODSON, L.J., in *Yates (Inspector of Taxes) v. Starkey* (5). We do not, therefore, think that we should now depart (even if it were open to us to do so) from what appears to have been the settled practice of the court in the matter of secured maintenance.

The question, therefore, is: What security (if any) in the form of actual assets can the husband be reasonably required to provide and for what annual amount? As to amount, it seems to us reasonably plain that he cannot now provide assets sufficient to secure £300 per annum or anything like that figure. Nor do we think it reasonable that he should be required to surrender his policies or recover from the bank, with a view to charging them, his savings certificates or savings bonds, or the balances thereof remaining after discharging his overdraft. The house is already charged for something like twice its value, and we see no ground on which the husband's father could in effect be compelled to surrender his second charge. The husband clearly should not be made to sell his furniture. The motor launch might, no doubt, be sold without hardship to him, but the amount is hardly worth troubling about. In substance what is left is his holding of 5,200 shares in the company, which are unrealisable and producing no income at present, but, nevertheless, are of potential value. In all the circumstances we think the best that can be done will be to order the husband to secure to the wife £100 per annum by a charge on the 5,200 shares, with a proviso that this annual sum is to be paid only out of the income of the shares or of any investments from time to time representing the same, such charge to be non-cumulative. We think this form of security is warranted by the section, and, although it has obvious imperfections, it will at all events secure something to the wife in the event of the company recovering from its present difficulties.

We think, therefore, that the appeal should be allowed, that the second order should be set aside, and that the first order should be varied by substituting for the provision made thereby for securing an income to the wife of £300 per annum for her life (reducible as therein mentioned) a provision providing for the sum of £100 per annum to be secured to her for her life in the manner above mentioned, it being, if necessary, referred to conveyancing counsel of the court to settle the necessary instrument of security. In the course of his argument counsel for the husband, as we understood him, was disposed to submit to an order for the payment of unsecured maintenance to the aggregate annual amount of the secured and unsecured maintenance provided for by the first and second orders, so long as the provisions in regard to secured maintenance were discharged. On this basis it would seem that the annual sum ordered to be paid during the joint lives should be increased by £300 (reducible as mentioned in the first order) less such amount as may be provided in any year during the joint lives by means of the security now to be ordered. We are, however, prepared to hear counsel further as to the amount of unsecured maintenance which should be awarded in view of our decision as to the secured maintenance.

Appeal allowed.

Solicitors: *Withers & Co.* (for the husband); *C. M. A. Baker* (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

TAYLOR (formerly RYAN) v. CHELTENHAM & HEREFORD BREWERIES, LTD.

[COURT OF APPEAL (Somervell, Denning, and Romer, L.JJ.), April 7, 8, 1952.]

Practice—Payment out of court—Fatal accident—Damages recovered by widow paid into court—Re-marriage—Right of widow to payment out—R.S.C., Ord. 22, r. 14 (9).

On Mar. 15, 1951, an action by the applicant under the Fatal Accidents Act, 1846, in respect of the death of her husband, was settled on the terms, inter alia, that the defendants paid into court £2,000 to be invested on the applicant's behalf. On Sept. 29, 1951, the applicant re-married, and she then applied to the master for payment out of court of the sum invested on the ground that, on re-marriage, she ceased to be the "widow of the person killed" within the meaning of R.S.C., Ord. 22, r. 14 (9), and, that the court no longer had control over the money.

HELD: the words "widow of the person killed" in Ord. 22, r. 14 (9), were words of identification of an individual and not of status; although on re-marriage the applicant changed her status from that of a widow to that of a married woman, she remained the person who, as a widow, was entitled to recover under the Fatal Accidents Acts, 1846 to 1908; and, therefore, she was not entitled to payment of the money out of court.

Johnston v. Liston (H.) & Co. ([1920] 1 K.B. 99) and *Re Embleton* ([1946] 2 All E.R. 542), distinguished.

Hamer v. Cunard White Star, Ltd. The Queen Mary ([1952] 1 All E.R. 787), not approved.

FOR R.S.C., ORD. 22, r. 14 (3) and (9), see ANNUAL PRACTICE, 1951, Vol. 1, pp. 402 and 406.

Cases referred to:

- (1) *Johnston v. Liston (H.) & Co.*, [1920] 1 K.B. 99; 88 L.J.K.B. 1152; 121 L.T. 626; 12 B.W.C.C. 224; 34 Digest 448, 3676.
- (2) *Re Embleton*, [1946] 2 All E.R. 542; [1947] K.B. 142; [1947] L.J.R. 423; 175 L.T. 451; 2nd Digest Supp.
- (3) *Hamer v. Cunard White Star, Ltd. The Queen Mary*, [1952] 1 All E.R. 787.

APPEAL by the applicant from an order of DONOVAN, J., made on Feb. 28, 1952, affirming an order of Master BURNAND on an application for payment out of money held by the court pursuant to R.S.C., Ord. 22, r. 14 (3),

On Nov. 2, 1950, the applicant, Winifred May Taylor, brought an action in the High Court on behalf of herself and her two children under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her then husband, Douglas Ryan. On Mar. 15, 1951, the action was stayed by an order of the master, made by consent, under which the defendants agreed to pay to the applicant £650 in settlement of her claim under the Act of 1934, and the sum of £2,850 was to be paid into court in respect of the claim under the Fatal Accidents Act to be invested as to £350 for the benefit of the infant daughter, as to £500 for the benefit of the infant son, and as to £2,000 for the benefit of the applicant. On Sept. 29, 1951, the applicant married Albert James Taylor. Thereupon, she applied to the master for payment out of the £2,000 on the ground that, on re-marriage, the court no longer had any discretion with regard to the fund. The master held that although by re-marriage the applicant changed her status from widow to married woman, she remained the "widow of the person killed" within the meaning of R.S.C., Ord. 22, r. 14 (9), and that re-marriage alone was not grounds for making an order for payment out.

Castle-Miller for the applicant.

J. P. Ashworth for the Attorney-General, as *amicus curiae*.

SOMERVELL, L.J.: This is an appeal from a decision of **DONOVAN, J.** who confirmed a ruling given by **Master BURNAND**. The applicant is now **Mrs. Taylor**. She was formerly **Mrs. Ryan**. Her husband, **Mr. Ryan**, lost his life in an accident while employed by the **Cheltenham & Hereford Breweries, Ltd.** The circumstances were such that she brought an action claiming damages under the **Fatal Accidents Act, 1846**, and the **Law Reform (Miscellaneous Provisions) Act, 1934**. That action was begun on **Nov. 2, 1950**, and on **Mar. 15, 1951**, it was settled on terms. The relevant term regarding the claim under the **Fatal Accidents Act** is:

"That the defendants do within fourteen days pay into court the sum of £2,850 such sum to be invested in $3\frac{1}{2}$ per cent. War Stock for the benefit of **Joan Ryan** the infant daughter of the plaintiff as to £350 and of **Graham Ryan** the infant son of the plaintiff as to £500 and of the plaintiff as to £2,000 the dividends of all three funds to accumulate."

A sum of £650 in settlement of her claim under the Act of 1934 was paid out to **Mrs. Ryan**. The £2,000 was paid into the High Court. The apportionment was made in accordance with s. 2 of the Act of 1846 which provides:

"... Every ... action [in respect of death caused by negligence] shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

On **Sept. 29, 1951**, **Mrs. Ryan** re-married, and she then made an application to **Master BURNAND** for payment out of the £2,000. The secretary to the master replied in these terms to her solicitors.

"Your application on behalf of **Mrs. Taylor** (formerly **Ryan**) is that an order shall be made for payment out of court to her of the whole of her fund on the sole ground that she has re-married since the order was made on **Mar. 15, 1951**, and that the court has no longer any discretion with regard to the fund. **Master BURNAND** has directed me to state that he is unable to accept your view that the court no longer has a discretion in the matter. He cannot make an order for the payment out on the grounds only of the re-marriage. **Order 22, r. 14 (3) and (9)**, of the Rules of the Supreme Court make it necessary for the court to control the dealings with the fund of 'the widow of the person killed'. If 'the widow of the person killed' recovers money under the **Fatal Accidents Acts, 1846 to 1908**, she does not cease to have been 'the widow of the person killed' by reason of her having become the wife of another man. By re-marriage she changes her status from widow to married woman, but she remains 'the widow of the person killed' who recovered money under the **Fatal Accidents Acts**. If **Mrs. Taylor** desires on good ground to have an order made for payment out of the whole or part of her fund, the master will consider the grounds on which such an application is made and so exercise the discretion given to the court by **Ord. 22, r. 14 (3)**."

DONOVAN, J., confirmed the view expressed by the master in this letter. **R.S.C., Ord. 22, r. 14** provides:

"(1) In any cause or matter ... in which money ... is ... claimed ... on behalf of an infant or a person of unsound mind suing either alone or in conjunction with other parties, no settlement or compromise or payment

or acceptance of money paid into court, whether before or at or after the trial, shall as regards the claims of any such infant or person of unsound mind be valid without the approval of the court or a judge. (2) No money (which expression for the purposes of this rule includes damages) in any way recovered or adjudged or ordered or awarded or agreed to be paid in any such cause or matter in respect of the claims of any such infant or person of unsound mind, whether by verdict or by settlement, compromise payment, payment into court or otherwise, before or at or after the trial, shall be paid to the plaintiff or to the next friend of the plaintiff or to the plaintiff's solicitor unless the court or a judge shall so direct."

Paragraph (3) provides:

"All money so recovered or adjudged or ordered or awarded or agreed to be paid shall be dealt with as the court or a judge shall direct and the said money or any part thereof may be so directed—(i) to be paid into the High Court and to be invested or otherwise dealt with there; (ii) to be paid into the High Court and transferred to or where the money has been paid into the High Court to be transferred to, the county court of the district in which the infant or person of unsound mind resides . . ."

Paragraph (4) provides that the court or judge may give any general or special direction as to how the money is to be applied or dealt with and as to any payment to be made either directly or out of the amount paid into court. Paragraph (9) provides:

"The provisions of this rule shall also apply to all actions in which damages are claimed or recovered by or on behalf of or adjudged or ordered or awarded or agreed to be paid to an infant or person of unsound mind under the Fatal Accidents Acts, 1846 to 1908, and also to money which under those Acts is recovered by or adjudged to be paid to the widow of the person killed as they apply to money recovered by or adjudged or ordered to be paid to an infant. Where such proceedings are taken by or for the benefit of more than one person and the amount recovered is to be divided amongst such persons, the judge or jury as the case may be shall divide and apportion the share to be paid to each of the said persons and the amount so apportioned shall be specified in the order or judgment made or directed in the High Court."

The first case in which this type of question was dealt with was *Johnston v. H. Liston & Co.* (1), which was concerned with r. 53 of the Workman's Compensation Rules, 1913, which provided as follows:

"Where an agreement is made for the payment of a lump sum in lieu of a weekly payment to a person under any legal disability, or for the redemption by a lump sum of a weekly payment payable to a person under any legal disability, and a memorandum thereof has been recorded in accordance with the Act and these rules, such sum shall be paid into court, and shall be invested, applied, or otherwise dealt with by the court in such manner as the court in its discretion thinks fit for the benefit of the person entitled thereto . . ."

In accordance with that rule a sum of money had been paid into court in respect of an accident within the Act to an infant workman. On attaining twenty-one, the workman applied for the money to be paid out to him and this court held that he was entitled to have it paid to him. WARRINGTON, L.J., said ([1920] 1 K.B. 103):

"The Act could, of course, impose any restriction the legislature thought fit on the right of a person of full age and not otherwise under any disability to dispose as he pleases of his own property, and some people may think it

desirable to maintain the condition of pupillage notwithstanding the termination of the legal period of infancy, but in my opinion the court ought not to be astute to discover such a restriction of the rights of property, and ought not to hold it to be imposed except by express words or by necessary implication."

Then he said he could find nothing of the kind in that rule, and he analysed the particular words of the rule. DUKE, L.J., and ATKIN, L.J., agreed.

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A similar, though not the present, problem, came before this court in *Re Embleton* (2). That case was concerned, not with the rules of court which we have to construe, but with provisions in the County Courts Act, 1934, s. 164, which deal with the same subject-matter—infants and persons of unsound mind, on the one hand, and widows, on the other, in respect of whom sums recovered under the Fatal Accidents Acts are paid into court. Though the wording is somewhat different, I have come to the conclusion that the effect of the provisions there dealt with is the same as the effect of the rule which we have to construe. B
The County Courts Act, 1934, s. 164, provides:

"(1) Where in any cause or matter in the King's Bench Division of the High Court, or in an Admiralty action in the Probate, Divorce and Admiralty Division of that court, money is in any manner recovered by or on behalf of, or adjudged or ordered to be paid to or for the benefit of, a person who is an infant or of unsound mind, the High Court or a judge thereof may order the money or any part thereof to be paid into or transferred to the county court of the district in which that person resides or such other county court as the High Court or judge may order. (2) On the making of any such order, the money or the part thereof to which the order relates shall be paid or transferred according to the order, and shall, subject to any special order or direction of the High Court or a judge thereof, and to county court rules and to the County Court Funds Rules, or the Mayor's and City of London Court Funds Rules, as the case may be, be invested, applied or otherwise dealt with for the benefit of the person to whom the order relates in such manner as the county court in its discretion thinks fit. (3) The provisions of this section shall apply to money which in proceedings under the Fatal Accidents Acts, 1846 to 1908, is recovered by or adjudged or ordered to be paid to the widow of the person killed as they apply to money recovered by or adjudged or ordered to be paid to an infant." C
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In that case, again, the court was concerned with an infant in respect of whom money recovered had been paid into the county court under the Act and who had become twenty-one. This court held that the discretionary control of the fund terminated on the infant's coming of age and the whole fund must be paid out on his application. They applied *Johnston v. H. Liston & Co.* (1), and MORTON, L.J., set out in his judgment the passage which I have cited from the judgment of WARRINGTON, L.J. I agree with that decision to which, indeed, G
I was a party, because it seems to me clear that, with regard to people who are under a legal disability, the principles laid down in *Johnston's* case (1) apply to the provisions which had to be construed in *Embleton's* case (2). MORTON, L.J., in what is admittedly a dictum, went on to say ([1946] 2 All E.R. 544):

"There is one possible distinction between the present case and *Johnston v. H. Liston & Co.* (1). In s. 164 (3) the provisions of the section are applied to money 'adjudged or ordered to be paid to the widow of the person killed'. Now, the widow of a person killed would not be a person under any legal disability and, therefore, the passage from WARRINGTON, L.J.'s judgment which I have read would not apply verbatim to the case of a widow. I think, however, it would be drawing far too fine a distinction to say that the present case can be distinguished from *Johnston v. H. Liston & Co.* (1) on that ground. In my view, the application of the reasoning of H

WARRINGTON, L.J., to the case of a widow would be that the words 'for the benefit of the person to whom the order relates' mean for the benefit of a person already described, namely, a person who is the widow of the person killed, and when the person in question ceases to answer that description the discretion ceases also. Thus, if the widow re-married, she would be entitled to have the money paid out to her. That case is not before us, but it seems to me that that result must logically follow."

A similar problem came before LORD MERRIMAN, P., in *Hamer v. Cunard White Star, Ltd. The Queen Mary* (3). It arose over a question of taxation of costs, the details of which do not matter. There was there, as here, a widow who had re-married. The learned President referred to the observations of MORTON, L.J., namely, that the discretion would cease on her re-marriage, and though, as he points out, they are obiter, he says ([1952] 1 All E.R. 789):

"... they form so integral a part of the reasoning on which that case was decided, that I would hesitate long before dissenting, even if I disagreed with them. As I entirely agree with them, I accept them gladly."

Counsel for the Attorney-General, as amicus curiae, submitted that the decision by the learned President, based as it was on a dictum of MORTON, L.J., was wrong. I think that MORTON, L.J., proceeded on the basis, to some extent, that, unless a widow was treated as ceasing to be subject to control if she re-married, there was difficulty in applying the reasoning of WARRINGTON, L.J., in *Johnston's* case (1) to s. 164 (1) of the Act of 1934 where the cases of infants or persons of unsound mind were dealt with. I do not find that difficulty. I think that WARRINGTON, L.J.'s reasoning does apply where the basis of the control is legal disability. If the legal disability ceases, there seems no reason why the control should not cease too unless there are express words saying that it is to continue. Just as both in the County Courts Act, 1934, s. 164 (3), and in Ord. 22, r. 14 (9), the widow is separately dealt with, so the construction of the words dealing with her have to be considered by themselves in their context. The basis of WARRINGTON, L.J.'s reasoning does not seem to me to apply to a widow. She is not under any legal disability. In my view, in their context the words of r. 14 (9)—"and also to money which under those Acts is recovered by or adjudged to be paid to the widow of the person killed as they apply to money recovered"—are words of identification of a person rather than words based on a legal disability because of the person's status. On re-marriage the widow does not free herself from a legal disability under which she was before, and, if the words are words of identification, she remains and will always remain the person who, at the time of the death, was the widow entitled to benefit under the Fatal Accidents Act, 1846.

The learned judge referred to an example, which is to be found in the Act of 1846, of a word plainly used as a word of identification which is immediately inapplicable if it is regarded as a word defining status. In s. 2 of the Act it is said that the action is to be brought for the benefit of the "wife". Ex hypothesi, by the time the action is brought she will be contemplating something having happened under which she has ceased to be a wife and become a widow. Though I do not say that that assists the construction of Ord. 22, r. 14 (9), it is a good example of the mode of construction of those words in their context, which the learned judge applied and with which I agree. The learned judge went on to consider the purpose of the statute, referring to the similar provisions of s. 164 of the County Courts Act, 1934. There, with respect, I think he went too wide. He referred to the fact that in many cases the widow will be someone of, perhaps, modest means who has not often had a large sum at her disposal. She might waste the money, or, for other reasons which he gives, it might be undesirable that it should not be controlled in her interests. I do not derive much help from that because the same could be said of any lump sum recovered

by any man or woman, young or old. There may be many cases in which there are children—and this is one—who, no doubt, themselves will get some apportionment, but where the apportionment to the widow will be on the basis that she will be expected to provide a home with the normal amenities of a home for the family. In such a case as that it might, I think, well-be desirable that the control should continue after a re-marriage. The children may still be there, and what may be described as their interests in the money apportioned to the mother should be subject to control. But neither the rules nor the Act of Parliament restricts the control to cases of women who have children. I do not find any sufficiently clear purpose for the reason for this restriction in this particular class of case to aid me in construing the rule.

Therefore, for the reasons which I have given, I think that these words are words of identification and that the discretion remains in the court notwithstanding that the widow has re-married and in that sense is not aptly described as the widow of the deceased man. It was, however, as the widow that she obtained the money to which, I think, the control continues to attach. In my view, the appeal should be dismissed.

DENNING, L.J.: I agree. In *Re Embleton* (2) this court, in effect, wrote into the County Courts Act, 1934, the words "during infancy". We are now asked to follow that decision to its logical conclusion and to write in the words "during widowhood". I do not think we should do this because I am sure that Parliament never intended it. This situation often arises when we are asked to proceed from one decision to another. It is rather like a journey when you come to a fork in the road. You take the one you believe to be right, but before very long you discover that you are going in the wrong direction altogether. The wise traveller then takes the quickest way back to the right road. He does not go blindly on in the wrong direction. In the present case it only needs one illustration to show that we are asked to take the wrong direction. Take a widow who has been awarded £3,000 for the keep of herself and her children. She has been only awarded it because it represents the weekly amount which her husband would have allowed her. She becomes engaged to marry a man who is crippled with debts. If she applies to a master for £2,000 to pay his debts, the master would certainly refuse it. The next day she marries him. Is it to be said that she can forthwith take out the whole £3,000 and use £2,000 of it to pay his debts? Suppose he afterwards deserts her, or dies, and she is left a widow again? She will have lost the maintenance that the £3,000 was intended to provide. This illustration shows that the widow of the deceased needs as much protection during re-marriage as she needed during widowhood. An interpretation of the rules which deprived her of that protection would defeat the intention of Parliament. It is not that she is being kept out of the money. The master, if he thinks fit, will allow her money to help furnish the new home. But it is very salutary for him to continue to have control over it. I find myself in full agreement with Master BURNAND and DONOVAN, J., and all that my Lord has said. I agree that this appeal should be dismissed.

ROMER, L.J.: I also agree. The argument for the applicant, in effect, is that under Ord. 22, r. 14 (3) and (9), three classes of persons are affected, namely, infants, persons of unsound mind, and widows of persons killed. This court, in *Johnston's* case (1), said that an infant would be entitled to money paid in on his behalf on attaining twenty-one on the ground that at that age he became relieved of the disability, namely, infancy, which had debarred him from receiving the money earlier. The same process of reasoning would, presumably, result in a person of unsound mind being held entitled on becoming of sound mind because he then becomes relieved of his disability, and should, therefore, be treated in the same way as an infant on his attaining twenty-one. One thus finds, it is argued, two categories which are affected by the order, each under a

disability and each entitled to payment when their disabilities are removed. To those categories is added by Ord. 22, r. 14 (9), a third category, widows, and the suggestion is that, to preserve the pattern or symmetry of the matter, an element of removable disability should be introduced in relation to this category similar to that which characterises the other two, and the element of disability suggested is widowhood so that, on re-marriage, the widow rids herself of her disability in the same way as infants do on attaining twenty-one and lunatics do on recovering their sanity.

This argument is not without attraction, but I do not think that it should prevail. While infancy and mental deficiency constitute recognised disabilities in law, widowhood does not, and, so far as I know, never has done, though the status of a married woman did for very many purposes until recently. The characteristic which is common to the first two categories is, accordingly, found wholly wanting in the third, and affords no ground for any presumption of similar treatment. Therefore, one should approach the position of a widow with a mind unaffected by the implications which have been drawn with regard to infants, and the fact that those implications would appear to be equally applicable to persons of unsound mind. Approaching the matter with that independence of view, I can see no grounds for suggesting that a widow becomes freed from the court's discretion when she re-marries. I could not formulate my opinion on that better than it has been expressed by Master BURNAND where he said:

“By re-marriage she changes her status from widow to married woman, but she remains ‘the widow of the person killed’ who recovered money under the Fatal Accidents Act.”

In other words, as my Lord has pointed out, the question is one, not of status, but of personality. One has only to find the person who is affected, and, having found that person, viz., the widow, then the money which has been recovered by or adjudged to be paid to her has to be dealt with in accordance with Ord. 22, r. 14 (3) and (9), and those sub-rules furnish the discretion which remains exercisable in relation to that money.

It is well settled that, if the capital and income of a legacy is given to an infant and the gift is followed by a direction that the capital is not to be paid to the infant until he attains the age of, say, thirty, and there is no gift over in the event of his dying under that age, he can claim payment of the legacy when he attains his majority, the principle being that a man is entitled to possession of property in which no one but he has an interest. The application of that principle is in conformity with the judgment of WARRINGTON, L.J., in *Johnston's case* (1), but the principle itself is quite irrelevant to the case of a widow where, notwithstanding the absence of any initial disability, the legislature has authorised the retention of what, *prima facie*, is her own property. I, accordingly, for the reasons which I have tried to express, agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Darracotts* (for the applicant); *Treasury Solicitor* (for the Attorney-General).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

TIDEWAY INVESTMENT AND PROPERTY HOLDINGS, LTD.

v. WELLWOOD. SAME v. ORTON. SAME v. JONES. SAME v.

FRIEDENTAG. SAME v. THORN *Affirmed.* C.A. [1952] 2 All E.R. 514

[CHANCERY DIVISION (Harman, J.), March 4, 5, 6, 7, 10, 11, April 4, 1952.]

Landlord and Tenant—"Improvement"—*Installation of individual hot water system*—*Trespass to landlord's property*—*Landlord and Tenant Act, 1927* (c. 36), s. 19 (2). A

Rent Restriction—*Tenancy within the Acts*—*Breach of covenant*—*Failure by landlord to serve notice requiring tenant to remedy breach before expiration of contractual tenancy*—*Tenant continuing in possession.*

Rent Restriction—*Possession*—*Reasonableness*—*Breach of covenant*—*Installation of gas water heater*—*Rent and Mortgage Interest Restrictions (Amendment) Act, 1933* (c. 32), s. 3 (1), sched. I, para. (a). B

Rent Restriction—*Costs*—*Action in High Court*—*Claim for possession for breach of covenant imported into statutory tenancy*—*Increase of Rent and Mortgage Interest (Restrictions) Act, 1920* (c. 17), s. 17 (2).

During the war part of a block of flats, including the boiler house which provided heating for the whole block, was destroyed by enemy action. Thirty-three flats which remained intact were requisitioned by the local authority, who provided in each flat a gas geyser for heating water. After the war the part of the block which had been demolished was re-built and now consisted of twenty-two flats and a boiler house. These flats were let on tenancies which expired on Dec. 25, 1950. The rateable value of each flat brought it within the protection of the Rent Restrictions Acts. Although the landlords intended to provide hot water and other services for these flats and the rent was such as to include the cost of services, the tenancy agreement in respect of each of them contained (a) a clause that the landlords undertook no obligations for any services, and, if they furnished any, it would be merely an act of grace on their part, and (b) a covenant by the tenant that he would not make any alteration whatever in the premises or erect any stove or pipe without the written consent of the landlords. In 1948 the present landlords acquired the freehold of the block. On Mar. 23, 1950, on applications by the tenants under the Landlord and Tenant (Rent Control) Act, 1949, the rent tribunal reduced the rents of the flats on the basis that the landlords were under no contractual obligation to provide any services. The landlords thereupon withdrew all services, but offered to provide them at an increased rent. They also informed each tenant that alterations necessary to instal individual water heating would be authorised subject to the tenant complying with certain conditions in regard to reinstatement and payment towards the landlords' costs. On Aug. 25, 1950, five of the tenants wrote to the landlords requiring licences for individual installations of gas heaters on the footing that they were "improvements", within the meaning of the Landlord and Tenant Act, 1927, s. 19 (2). The landlords insisted that the application forms should first be signed, but by Oct. 21, 1950, each of the five tenants had installed a gas heater. The fumes of the heater were, in each case, carried out of the flat by flue pipes fixed to the under side of the balcony of the storey above and ending in a baffle protruding beyond the balcony. Each of the thirty-three requisitioned flats had a similar installation. It was held by the court that the balconies, which ran along the outside of the building, and from which access to the flats was obtained, were not demised to the tenants, but remained the landlords' property. On learning at the end of October, 1950, that heaters were already installed by the five tenants, the landlords were willing to waive the breach of covenant which they alleged if the tenants would sign a supplemental agreement, but the tenants refused to do so. On the expiry C
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of the tenancy agreements on Dec. 25, 1950, the tenants retained possession of the flats. In January, 1951, the landlords started actions for possession.

HELD: (i) the installation of a gas water heater constituted an "alteration" within the meaning of the tenant's covenant in each of the tenancy agreements; the installation would have been an "improvement", within the meaning of s. 19 (2) of the Landlord and Tenant Act, 1927, but for the existence of the flue pipe, which, being fastened to the balcony, was a trespass on the landlord's property, and, therefore, s. 19 (2) did not apply; the landlords had an absolute right to withhold their consent; and the installation was a breach of covenant which remained unremedied when the tenancy agreement expired.

(ii) assuming that the installation was an "improvement" within the meaning of s. 19 (2), the landlords had not unreasonably withheld their consent, and the tenant was not justified in installing the gas heater without licence or consent, and had, before the end of the contractual tenancy, committed a breach of a covenant in the tenancy agreement which would have justified a claim for forfeiture after service of notice under the Law of Property Act, 1925, s. 146 (1).

(iii) as the landlords had, in each case, failed to serve a notice requiring the tenant to remedy the breach before the expiration of the contractual tenancy, they were not in a position to forfeit the tenancy before it expired, and, therefore, on Dec. 26, 1950, the tenant acquired a statutory tenancy.

(iv) on the facts, it would not be reasonable to make orders for possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), and sched. I, para. (a), or to insist on the removal of the heaters as a condition of withholding the orders, and each of the tenants would be allowed to remain in possession and to maintain his installation subject to his signing an agreement (i) to pay a proper sum towards the landlords' costs and (ii) to deposit a proper sum for the reinstatement of the flat after removing the heater.

(v) the actions being claims for possession against statutory tenants for a breach by each of them of a contractual term imported into his statutory tenancy by s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the court was precluded, by s. 17 (2) of the Act, from awarding any costs to the landlords.

AS TO DISCRETION OF COURT AS TO ORDERS FOR POSSESSION, see HALSBURY, *Hailsham Edn.*, Vol. 20, p. 329, para. 392; and FOR CASES, see DIGEST, *Replacement*, Vol. 31, pp. 696, 697, Nos. 7875-7884.

Cases referred to:

- (1) *Lambert v. Woolworth (F. W.) & Co., Ltd.*, [1938] 2 All E.R. 664; [1938] Ch. 883; 107 L.J.K.B. 554; 159 L.T. 317; Digest Supp.
- (2) *Balls Bros., Ltd. v. Sinclair*, [1931] 2 Ch. 325; 100 L.J.Ch. 377; 146 L.T. 300; Digest Supp.
- (3) *Woolworth (F. W.) & Co., Ltd. v. Lambert*, [1936] 2 All E.R. 1523; [1937] Ch. 37; 106 L.J.Ch. 15; 155 L.T. 236; Digest Supp.
- (4) *Court v. Robinson*, [1951] 1 All E.R. 209; [1951] 2 K.B. 60.
- (5) *Bell London & Provincial Properties, Ltd. v. Reuben*, [1946] 2 All E.R. 547; [1947] K.B. 157; [1947] L.J.R. 251; 176 L.T. 92; 2nd Digest Supp.
- (6) *House Property & Investment Co., Ltd. v. James Walker (Goldsmith & Silversmith), Ltd.*, [1947] 2 All E.R. 789; [1948] 1 K.B. 257; [1948] L.J.R. 343; 2nd Digest Supp.
- (7) *Russoff v. Lipovitch*, [1925] 1 K.B. 628; 94 L.J.K.B. 355; 132 L.T. 789; 31 Digest, *Replacement*, 722, 8054.
- (8) *Lee v. Carter (K.), Ltd.*, [1948] 2 All E.R. 690; [1949] 1 K.B. 85; [1949] L.J.R. 7; 2nd Digest Supp.

CONSOLIDATED ACTIONS by the landlords of a block of flats for possession of five of the flats.

In each case the tenancy agreement, which expired on Dec. 25, 1950, contained a covenant by the tenant not to make any alteration in the premises, nor to erect any stove or pipe without the consent of the landlords. In October, 1950, the tenant installed a gas water heater without the landlords' permission. On learning this, the landlords were willing to waive the alleged breach of covenant on certain conditions, but the tenant refused to comply with the conditions. After the contractual tenancy expired, the tenant remained in possession of the flat, and in January, 1951, the landlords started an action for possession on the ground of breach of covenant.

A. R. Campbell for the landlords.

L. A. Blundell for the tenants.

Cur. adv. vult.

April 4. **HARMAN, J.**, read the following judgment. These five actions, by consent heard together, are brought by the freeholders of a block of flats in the borough of Hammersmith situate in Hartington Road, Chiswick, and known as Hartington Court. The five defendants are the occupiers, respectively, of five of the flats, and the plaintiffs' claim in each case is for possession of one of them.

The block was built before the outbreak of the war in 1939. It consisted of a building round three sides of a courtyard divided into fifty-six flats, all provided with hot water and some degree of central heating by a single system operated by the then landlords, who also furnished various other services, such as porters, the lighting and cleaning of the passages, the clearing of dustbins and the maintenance of a garden in the courtyard. About the rents before the war I know nothing and they are not relevant for the present purpose. During the war heavy damage was done to the property, the transverse portion being demolished together with the boiler house providing the heating, and at or before the end of the war the Hammersmith borough council requisitioned the thirty-three flats which remained more or less intact. There being no central heating system, the council provided the occupiers with individual means of heating water by gas geysers in each flat. These requisitions are still in force. After the war the demolished portion of the building was re-built, under a cost of works payment, in 1946 or 1947. The property was then in the hands of a receiver and manager appointed by a building society as debenture holders and to him fell the duty of letting the new flats. At that time there had recently been passed the Furnished Houses (Rent Control) Act, 1946, which set up rent tribunals having the right, in any case where a contract existed between lessor and lessee in which the rent included payment for services, to review that rent. These tribunals were regarded with extreme disfavour by landlords, and, accordingly, when the receiver was minded to let the flats, he sought about for a device whereby, notwithstanding that the landlords were intending to provide various services including hot water (the boiler house having been re-built at a considerable expense), the contracts should be kept out of the clutches of the rent tribunals. Accordingly, in the agreement into which the receiver entered in respect of each and every of the twenty-two newly built flats, there is an extraordinary clause providing that the landlords undertake no obligations for any services and stating that, if the landlords find it convenient to furnish any services, that shall merely be an act of grace on their part. The agreements were for a term of three years ending Christmas, 1950, and contain the following covenants:

"4. The tenant agrees that he . . . will not without written consent of the landlord make any alteration in or addition to the said premises whatsoever nor erect any stove or pipe or do anything to increase the rate of premium of insurance."

It may be thought that no sensible tenant would enter into such an agreement, but the persons with whom the receiver contracted were speculators who had

no intention of living in the flats, and, in fact, the agreements were made before the flats were habitable. These speculators, however, succeeded in every case in assigning the agreements to persons badly in want of a roof over their heads and who apparently did not much mind what terms they accepted if they could get one. The five defendants are in this class. In 1948 the plaintiffs acquired the freehold from the receiver.

In 1949 there was passed the Landlord and Tenant (Rent Control) Act, 1949, which brought these flats under the jurisdiction of the rent tribunals, and in autumn, 1949, seventeen of the twenty-two tenants promptly applied to the tribunal to have their rents reduced. Confronted with these applications, the landlords did not withdraw the services which they were voluntarily providing, but went before the tribunal, which on Mar. 23, 1950, reduced all the rents on the basis that the landlords were under no contractual obligation to provide any services. The obvious retort by the landlords to the tenants' action, and one which they should have foreseen, was to withdraw all services. Immediately after the tribunal's decision there was a meeting between the landlords and their solicitors and certain of the tenants who called themselves a tenants' committee, and there was a long discussion about the future. The landlords put forward proposals for the continuance of the various services, notably the hot water and the radiator heating, and produced figures which purported to show that the cost of doing so amounted to £80 or more for each of the twenty-two flats. I do not think these figures were justified, but that is immaterial. The fact remains that this building was designed as one unit comprising fifty-six flats, all provided with services at a reasonable cost to each tenant, but, as thirty-three of the flats are requisitioned and the tenants neither accept nor pay for services, the whole economy of the block is thrown out of gear and the cost to the landlords of supplying even hot water and radiator heating alone to twenty-two tenants is out of all proportion to what it is reasonable to ask a tenant to pay. The result is that all the elements of a stalemate exist, for the landlords cannot be called harsh or unreasonable for not providing services for which they are under no obligation at less than cost, while it is natural that the tenants will not accept services more costly to them than in reason they should be.

At the meeting above mentioned the landlords offered to provide the services for £60 a flat, and this offer was indignantly rejected by the so-called committee. As a result, on Mar. 30, 1950, the boilers were put out and provision of hot water ceased. There arose at once the question whether the tenants should provide their own hot water. This matter had, in fact, been mooted at the meeting, when it was pointed out that under the terms of the lease, according to the landlords' view of it, the installation of hot water systems would constitute alterations which could not be made without their leave. They said that they would not unreasonably withhold permission, but must have from each tenant full details of any proposed alterations before work was started. On Mar. 27 a letter containing words to this effect was sent to every tenant. Thereafter the matter pursued a course which differed slightly in the case of each defendant though much of the ground is common to them all. I will take as typical the case of the defendant Jones. This tenant, on Apr. 12, 1950, applied for permission to instal a gas geyser similar to those in the requisitioned flats. He also promised to restore the property when the installation was removed. Similar applications were made by other tenants, and by Apr. 14 twelve of them had asked leave to instal some kind of water heater. On that date a further circular was sent to every tenant offering to supply the services for £50 a flat and stating that alterations necessary to instal individual water heating would be authorised subject to a condition of reinstatement and to a sufficient deposit to ensure the cost of it. The landlords also asked for a specification of the work proposed and an undertaking to pay their costs. There was obviously nothing unreasonable in these terms.

On May 18 the landlords withdrew their offer and sent out another circular in which the relevant covenant in the lease is set out. This circular was a wordy document and was accompanied by a form of application, on the signature of which the landlords insisted before alterations could be allowed. They also stipulated that a sufficient majority of the tenants should apply. The document accompanying this letter was severely criticised at the hearing, and, no doubt, it is capable of improvement and simplification, but, in my judgment, it contains substantially nothing which a landlord might not reasonably require in the circumstances. In June, 1950, Mr. Jones consulted Messrs. Bird & Bird, the solicitors now representing the defendants, on his own behalf and on behalf of ten other tenants, including his co-defendants, and on June 9, that firm wrote the following letter:

"Dear Sirs, Hartington Court. We are acting for Mr. G. W. Jones and for ten other tenants of Hartington Court in connection with negotiations which have taken place arising out of the provision of services to the flats and particularly over the supply of hot water. Our clients now desire to instal gas or electric water heaters of approved design, full details of which we are prepared to furnish together with proper specifications covering the work involved. We are also prepared to pay your legal expenses properly incurred in respect of the necessary licences or consents, plus reasonable damages (if any) for the diminution in the value of the premises and to give an undertaking to reinstate on departure. If this proposal is unacceptable to you, our clients intend to pursue the matter further, and to take advantage of such legal remedies as may be open to them. In the circumstances we would appreciate a statement of your clients' present attitude on this question."

To this the landlords' solicitors replied that the landlords were willing to give their consent in the terms of the circular letter of May 18, and the application form accompanying it. At this point there is a delay of two months on the tenants' side and then, on Aug. 25, a letter is written on Mr. Jones' behalf treating the proposed installation as possibly an alteration but as being an improvement and asking for a licence on that footing. An answer to this letter was required within fourteen days (and this after two months' delay and in the holiday season), and it was intimated that at the end of the fourteen days Mr. Jones would treat consent as unreasonably withheld and proceed with his alterations. In fact, he did not wait even for fourteen days, but on Sept. 7 placed an order for a gas heater, the work on which was started on Sept. 12. The other four defendants wrote letters somewhat similar to that written by Messrs. Bird & Bird for Mr. Jones on Aug. 25 and obviously adapted from that letter, and in each case they followed it up at a less or a greater interval by ordering similar installations to be made. All the installations were complete by Oct. 21. The landlords on Oct. 3, unaware that most of the installations had been ordered by then, modified to some extent the form sent out by them on May 18 and still asked every defendant to sign it as modified. Each of them refused. Towards the end of October the landlords caused an inspection to be made of the property which disclosed the facts, and on Nov. 16 they wrote to Messrs. Bird & Bird complaining that no permission had been given. Even at this point the landlords were willing to waive the breach which they alleged on the signature by the tenants of a supplemental agreement in a form which they enclosed, but none of the defendants would agree, and these actions were started in January, 1951. At the time when the heaters were installed in September or October, 1950, these tenancy agreements had no longer to run than the end of the quarter, and although this was ignored on both sides, because nowadays tenants hold over under statutory protection and, therefore, forget the length of their tenancies, it remains important when considering a question between landlord and tenant. The rateable value of each flat brought it within the Rent and Mortgage Interest

Restrictions Act, 1939. The installation of gas water heaters did, in my opinion, clearly constitute an alteration and also constituted the erection of pipes within the mischief of cl. 4 of the leases. Thus the landlords had, subject to what is next stated, an absolute right to withhold consent, and a breach of covenant was in each case committed.

By the Landlord and Tenant Act, 1927, s. 19 (2), a covenant against the making of improvements without licence must be read subject to a proviso that a licence is not to be unreasonably withheld. It is settled law that this sub-section covers a covenant against doing something which is an alteration if it be, in fact, an improvement (see *Lambert v. F. W. Woolworth & Co., Ltd.* (1)) and that the question whether it is so must be looked at from the point of view of the tenant: see pre *LUXMOORE, J.* ([1931] 2 Ch. 331) in *Balls Bros., Ltd. v. Sinclair* (2), which was approved by LORD WRIGHT, M.R. ([1936] 2 All E.R. 1533) in *F. W. Woolworth & Co., Ltd. v. Lambert* (3). Access to the flats is obtained by passages in the form of balconies running along the outside of the building. In my judgment, these balconies are not included in the demise to a tenant in the tenancy agreements but remain the property of the landlords. The fumes from the gas heaters are carried out of the flats by flue pipes fixed in each case to the underside of the balcony of the storey above and ending in an unsightly baffle protruding beyond the balcony. This appears to be an essential feature. Were, then, these gas heaters "improvements" within the meaning of s. 19 (2) of the Act of 1927? On the one hand, it was submitted (a) that the flats were not intended to have their water heated in this way, but contained a built-in system of pipes for supplying hot water from a central boiler and that anything else was a mere makeshift, and (b) that the baffles which I have described ruined the appearance of the building. This objection would have great force if the baffles stuck out in the front of the building, but they stick out at the back where each of the thirty-three requisitioned flats has a similar installation, and in those circumstances the addition of a score more seems to me not to deteriorate considerably the amenities of the place. It was argued, on the other side, that these installations must be improvements from the tenants' point of view because a flat with hot water must be an improvement on a flat without it. If the landlords had been in a position to offer a supply of hot water at a reasonable cost, I should have been prepared to hold that these could not have been improvements, but the position is different where the landlords, for the reasons before stated, were not in a position to supply this service except at an excessive cost. Apart from this, the present landlords have inherited these tenancy agreements which are in such a form as to give them no right to supply or charge for any water heating. In the circumstances, I should be prepared to hold that these were improvements but for one fact, and that is that each of them is not confined to the demised premises but depends on the existence of a flue pipe which is fastened to, and is, therefore, a trespass on, the landlords' property. I do not see how that can be an improvement to demised premises which necessarily extends beyond them and trespasses on the property of the landlords who are not obliged to afford support for these flues from their property. Without them, I understand, the installations are not practicable. On this footing, s. 19 (2) does not apply. The landlords had an absolute right to withhold their consent and each installation was a breach of covenant which remained unremedied when the tenancy agreements expired.

I must, however, further consider the matter on the footing that I am wrong in the view last taken, that these alterations do constitute improvements within the meaning of s. 19 (2) of the Act of 1927, and that, therefore, consent to them must not be unreasonably withheld. I take it that the landlords have withheld their consent by the mere act of issuing the writs in these actions. Have they, then, been unreasonable? In the first place, it seems to me again important to emphasise that these were short tenancies. The landlords had no

assurance that any tenant would stay beyond Christmas, 1950, and this fact, in my judgment, entitled them, if they were to assent to alterations of the property to this degree, to take every step to protect themselves against expense if and when the tenant should vacate. The landlords, though conceiving themselves entitled to refuse their assent unconditionally, never did so, and the question which I have to decide is whether the conditions which they imposed on the giving of licences were such as they might reasonably impose in the circumstances. In my judgment, on the facts, even if the installations were improvements, the landlords have not unreasonably withheld their consent to their installation, with the result that the tenants were not justified in doing what they did and had before the end of the contractual tenancy in each case committed a breach of a covenant in the lease which would justify a claim for forfeiture after service of the proper notice under the Law of Property Act, 1925, s. 146 (1). No such notices, however, were sent out and all the tenancies expired at Christmas, 1950, and it is, perhaps, the fundamental question in the action whether after that date the tenants held over as statutory tenants or whether they became mere trespassers, in which case there is no answer to the landlords' claim.

In my judgment, each tenant on Dec. 26, by holding over, acquired what is popularly known as a statutory tenancy. This, of course, is not a tenancy though conveniently so called. It is a mere status of irremovability. The landlords argue that this status is not acquired by a tenant who during his contractual tenancy has committed such a breach as would entitle his landlord to forfeit the lease, but I can find no basis for this proposition, reasonable though it may sound. The landlords served no notice to remedy the breach before the expiration of the tenancies and were, therefore, not in a position to forfeit the leases before they expired, and I can see no reason why in those circumstances statutory tenancies did not arise at Christmas, 1950, in favour of each tenant who held over. Whether the same would be true if notices had been served I need not decide, though I think it would. If writs for possession had been issued before Christmas, 1950, thus conditionally avoiding the leases, the position might have been different, though, even so, it would have been arguable that statutory tenancies arose: see the observation of ASQUITH, L.J. ([1951] 2 K.B. 73), in *Court v. Robinson* (4). No doubt, a tenant in such a position might expect to get short shrift when the court was asked to say that it was reasonable that the landlord should not have possession, at any rate in a case where the breach was such that relief against forfeiture would not have been granted under the Law of Property Act, 1925, but the question would still, in my judgment, be whether it was reasonable to give possession, within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1), and sched. I, para. (a).

There remains, therefore, the question whether it would be reasonable to make orders for possession, or, at least, to make it a term of withholding that order that the offending installations should be removed. It has been said that cases where possession should be refused, if the breach complained of is not remedied, are rare: see per MORTON, L.J. ([1946] 2 All E.R. 550) in *Bell London & Provincial Properties, Ltd. v. Reuben* (5). This, of course, I accept. None the less, I am of opinion that it would not be reasonable in the circumstances to make orders for possession, here, nor to insist on the removal of the heaters as a condition of withholding the orders. I am far from condoning the actions of the defendants, who, in my view, were quite unjustified in attempting to flout the landlords and dictate their own terms for occupying what is, after all, the landlords' property. It remains the fact that the thirty-three requisitioned flats all have heating systems of this sort and that the landlords themselves have granted certain licences to other tenants for similar installations and were always, before writ issued, willing, even after the breaches were known to them, to do

A the same for the defendants. The question, therefore, seems to me to be on what terms I ought to allow the defendants to remain in possession and maintain their installations. In my judgment, it should be on the terms that each of them signs a document substantially in the form of cl. (a) to cl. (g) of the draft agreement accompanying the landlords' letter to Messrs. Bird & Bird of Nov. 16, 1950. It may be that some alterations are desirable or necessary and I propose to give the parties an opportunity of agreeing the terms. If they cannot do that, the document will be settled by conveyancing counsel to the court. It should give to the landlords all the protection for which s. 19 (2) of the Act of 1927 provides and, in particular, (a) the payment of a proper sum towards the landlords' costs (this seems to have been agreed at four guineas) and (b) the deposit of a proper sum to pay for the reinstatement of each flat after removing the heaters (the evidence on this seems to have arrived at a sum of about five guineas). It seems also to be now agreed that this type of installation does not interfere with the functioning of the central system so that it should be made clear that no tenant is obliged to revert to that if the landlords agree with the other tenants or a majority of them to restore it. If any of the defendants fails to sign the agreement within twenty-one days of the date when its terms are agreed or settled, an order for possession will go against him. I am conscious that the terms which I impose involve the continuance of the trespass committed by each defendant in causing the flue to be affixed to the landlords' property, but, as I can give or withhold possession at my discretion, I conceive it to be within my jurisdiction to impose this condition on the landlords as part of the terms on which I refuse possession.

D There remains the important question of costs. The actions are analogous to actions for possession by lessors against lessees where the breach is proved but the lessee obtains by counterclaim relief against forfeiture which he may have (though this is unusual) without remedying the breach: see, for example, *House Property & Investment Co., Ltd. v. James Walker (Goldsmith & Silversmith), Ltd.* (6). In such cases the ordinary course is to direct the tenant as one of the terms of obtaining relief to pay the costs of action and counterclaim, and this is the course I should be disposed to take if free to do so. The present actions, until the statements of claim were amended at the hearing, were framed as though contractual tenancies existed and had been forfeited by notice under the Law of Property Act, 1925, s. 146 (1). This, of course, was a misconception, for the tenancies had expired before writ and the defendants were either mere trespassers or statutory tenants. I have held them to be the latter. The actions were, therefore, claims for possession against statutory tenants on the ground that a breach had been committed of the contractual terms imported into each statutory tenancy by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1), and that it was reasonable that the court should make orders for possession, and it is on that footing that I have decided the cases. The claims in trespass I ignore, for they are technical. Have I, then, jurisdiction to impose on the tenants, as a term of allowing them to retain possession, the obligation to pay the landlords' costs? In my judgment, I am precluded from doing so by s. 17 (2) of the Act of 1920, which forbids the granting to a plaintiff of High Court costs in a case "arising out of this Act." These words have been much debated, but it seems to me that the point is decided in favour of the tenants by the decisions of the Court of Appeal in *Russoff v. Lipovitch* (7) and *Lee v. K. Carter, Ltd.* (8). It is true that here the landlords claimed throughout that the tenants were not protected by the Rent Restrictions Acts, but that claim I have rejected, holding that the only justification of the claims to possession lies in satisfying the conditions laid down in s. 3 (1) and sched. I of the Act of 1933. Accordingly, I find myself precluded from awarding the landlords any costs. As to the tenants, they deserve none, in my judgment, for they could have had

the terms which I have accorded to them without any action and the proceedings stem from their unreasonable attitude.

Order accordingly.

Solicitors: *Forsythe, Kerman & Phillips* (for the landlords); *Bird & Bird* (for the tenants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A

Re 42-48 PADDINGTON STREET AND 62-72 CHILTERN STREET, ST. MARYLEBONE. MARKS & SPENCER, LTD. v. LONDON COUNTY COUNCIL AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.), B
March 27, 31, April 1, 1952.]

Town and Country Planning—"Works for the erection of a building"—Clearance of site—Erection of new building not begun—Separate contracts for clearance and building—*Town and Country Planning Act, 1947 (c. 51), s. 78 (1).*

Town and Country Planning—Interim development—Conditional permission—Limitation of time for commencement and completion of work—No reason given for imposing condition—Validity of condition—*Town and Country Planning Act, 1932 (c. 48), s. 10 (3).* C

In August, 1937, the plaintiffs entered into a building agreement with P.E., under which, on the completion of agreed buildings on a certain site, the plaintiffs would become entitled to a lease of the premises for ninety years at an agreed rent. It was provided that the demolition of the existing buildings on the site must be started by mid-summer, 1938, and that the erection of the new buildings be completed by Christmas, 1939. The time limits were, however, in fact extended beyond the date of these proceedings. By August, 1938, all consents to the building scheme under the London Building Act, 1930, the Restriction of Ribbon Development Act, 1935, and the Town and Country Planning (General Interim Development) Order, 1933, had been obtained. The permission granted to the plaintiffs under the interim development order was dated Aug. 9, 1938, and was subject to a number of conditions of which the first was that the work should be commenced within six months and completed within eighteen months of Aug. 1, 1938, "failing which the consent shall become null and void". Plans for the new buildings were approved, and on June 9, 1939, the plaintiffs entered into a written contract with contractors for the demolition of the existing buildings, which was completed by Aug. 2, 1939. At that time war with Germany was regarded as imminent and no contract for the new buildings was entered into, and during the war the building project remained in abeyance. Execution of the scheme was resumed in November, 1948, when the plaintiffs gave notice to the London County Council of their intention to proceed. The council refused to sanction the development of the site, and the Central Land Board refused the plaintiffs' claim to exemption from development charge. The plaintiffs claimed that planning permission must be deemed to be granted to them by virtue of the Town and Country Planning Act, 1947, s. 78 (1). D E F G

HELD: (i) (SIR RAYMOND EVERSHED, M.R., dissentiente) the words "works for the erection or alteration of a building" in s. 78 (1) included operations which were not in themselves building operations; it was sufficient for the sub-section to apply if operations had been carried out which were part of the totality of operations necessary on the relevant site for the purpose of carrying to completion a particular building project; in carrying out the demolition the plaintiffs had begun works for the erection of a building; H

(ii) the condition relating to time was not expressly or by necessary implication outside the purview of the Town and Country Planning Act, 1932, s. 10 (3), and, therefore, was not *ultra vires*, but the London County Council (the specified authority within s. 10 (3)) was bound by that subsection on its true construction to give reasons for the council's decision to grant permission subject to conditions; such reasons not having been given, the council must be deemed to have granted permission unconditionally; and, accordingly, the plaintiffs' works could, immediately before the appointed day (July 1, 1948), "have been completed . . . in accordance with permission granted" by or under an interim development order" within s. 78 (1) of the Act of 1947;

(iii) therefore, the plaintiffs were entitled to the protection of that sub-section.

Decision of *HARMAN, J.* ([1951] 2 All E.R. 1025), reversed.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 78, see *HALSBURY'S STATUTES*, Second Edn., Vol. 25, p. 590.

APPEAL by the plaintiffs, Marks & Spencer, Ltd., from an order of *HARMAN, J.*, dated Dec. 4, 1951, and reported [1951] 2 All E.R. 1025.

The plaintiffs issued an originating summons to determine, *inter alia*, whether, on the true construction of the Town and Country Planning Act, 1947, s. 78, the plaintiffs had not before the appointed day (July 1, 1948) begun, but not completed, works for the erection of a building on a certain site, and (ii) whether, on the true construction of the Town and Country Planning Act, 1932, s. 10 (3), and the Town and Country Planning (General Interim Development) Order, 1933, the plaintiffs immediately before the appointed day had valid permission to complete the said works.

Capewell, Q.C., J. R. Willis and V. M. C. Pennington for the plaintiffs.

Lawrence, Q.C., and H. E. Francis for the first defendants, the London County Council.

Denys B. Buckley for the Central Land Board.

SIR RAYMOND EVERSHERD, M.R.: This is an appeal from a judgment of *HARMAN, J.*, on an originating summons raising, in effect, the question whether the plaintiffs, Messrs. Marks & Spencer, Ltd., are entitled to proceed with certain building operations on land of which they are lessees in St. Marylebone, without the consent of the first defendants, the London County Council, as the planning authority for that area within the meaning of the Town and Country Planning Act, 1947, and without paying any development charge to the second defendants, the Central Land Board, in accordance with the terms of that Act. This the plaintiffs can do if they bring themselves, but only if they bring themselves, within the scope of the Town and Country Planning Act, 1947, s. 78. The learned judge has concluded the matter against the plaintiffs.

The facts are not in dispute. They are fully dealt with in the judgment of *HARMAN, J.*, and I need not, therefore, repeat them at length. The following summary will, I hope, suffice. The freehold of, or the reversion to the plaintiffs' interest in, this land is vested in the Portman estate, and in August, 1937, the plaintiffs entered into an agreement with the Portman estate which involved the plaintiffs in taking down a number of existing buildings and erecting a large edifice which was to be used by the plaintiffs for offices in connection with their business. By this agreement these operations had to be completed by the end of 1939, but the time has been extended, and as between the Portman estate and the plaintiffs the plaintiffs are not now in default on that ground. But the plaintiffs do, of course, remain liable to the Portman estate under their agreement to perform the operations which were agreed between them, and they are paying in respect of the land a substantial rent.

The time when this agreement was made and the other matters which I am about to relate occurred was, nationally speaking, an anxious period. It was shortly before the outbreak of the second world war. In the spring of 1938 the plaintiffs invited tenders for the work which they had agreed with the Portman estate to undertake, and a number of tenders was put in. The plaintiffs were not satisfied that the prices charged in these tenders were such as they ought to pay, and they accepted none of them. They decided in fact, for the purpose of performing their obligations, to sever the work which had to be done into two separate sections. As regards the second—i.e., the erection of the new office structure—they decided that they would engage the services of a well-known firm of building contractors, Bovis, Ltd., with whom they had had previous business transactions and had agreed a form of building contract which was described by the judge as a kind of cost-plus contract and was thought by the plaintiffs to be the most satisfactory. It followed that they would have to employ some other contractors to do the first necessary operation of taking down the existing buildings and preparing the site for the erection of the new.

On June 16, 1938, Mr. Bennett, the agent for the plaintiffs, applied to the London County Council under the then Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236), for the permission of the council, as planning authority, for this building which it was proposed to erect. As I follow it, however, this application related exclusively to the erection, on a site assumed to be cleared, of the new office building illustrated in the plans submitted. The permission which the plaintiffs sought was granted on Aug. 9, 1938, subject to certain conditions. As I have referred to it at this stage, it may be convenient that I should read the first of a number of conditions, because a good deal of the later part of the argument turns on it. The form which this letter of Aug. 9, 1938, took was :

“ With reference to Mr. Bennett’s application dated June 16, 1938, I am directed to inform you that the council, in pursuance of its powers under the above-named order, hereby permits the erection of a building at the premises known as [they are then defined] in accordance with plans . . . submitted subject to (1) The work being commenced within six months and completed within eighteen months from Aug. 1, 1938, failing which the consent shall become null and void . . . ”

There then follow five more conditions, and the writer, the clerk to the council, is also directed to add that the permission is given subject to certain other matters which are specified on the second page. At the date of that document, Aug. 9, 1938, there did not exist any contracts with either Bovis, Ltd. or with any firm of demolition contractors for doing the whole of the operation which the plaintiffs had, by agreement with Portman estate, undertaken to perform. But in the following year, 1939, a contract was made with a firm of the name of Boyer, who were demolition contractors, to do the essential preliminary work of taking down the existing buildings, clearing and preparing the site, including the basement of the existing buildings (or the excavations which formed part of the existing building) which was to be incorporated in the new structure to be erected. Those demolition works, clearing the site, and so forth, had been completed, as I understand, by the end of July, 1939. To all of us, of course, that date brings back the recollection of a time of the utmost anxiety, and it is not, therefore, at all surprising that nothing further was done in the way of starting the work of erection or even of making a contract with Bovis, Ltd., or with any other person for that purpose. Indeed, the site was occupied then and thereafter in connection with the formation, in preparation for the forthcoming conflict, of fire-fighting units. There the matter remained until the war was fought and won, and until the plaintiffs resuscitated the question they had

taken up so long before with the London County Council by inquiring whether they might now be taken as entitled to proceed with the building proposed on the faith of the permission given, notwithstanding that the first condition in the letter of Aug. 9, 1938, on the face of it showed that, the time limit having long since expired, the consent under the Act of 1932 and the order of 1933 had become null and void.

I have said that in the period of the war and the immediately post-war period nothing was in fact done by the plaintiffs, either by way of physical work in making the new building or in making a contract with somebody else so to do, but it is proved quite clearly, and the judge finds as a fact, that the plaintiffs never at any time abandoned their firm intention to build this new structure. Indeed, they could not very well do anything else because they were under contract with their landlords, the Portman estate, so to do. It is, therefore, clear that the demolition work that was done in the summer of 1939 was done with a view, and solely with a view, to the erection of the building that they had promised the Portman estate to erect, which building was illustrated on the plans, and which plans, in turn, had been submitted to the London County Council as the basis for the granting by them of their planning permission.

So far as the duties of planning authorities are concerned, the matter is now governed by the Town and Country Planning Act, 1947. The broad scheme of that Act (which differs in certain material respects from its predecessor in 1932) is to be found in Part III, so far as relevant to this case, and the first material section, s. 12, provides by sub-s. (1):

“Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day.”

I interpolate that the appointed day for the purposes of this Act was July 1, 1948. Then sub-s. (2) gives a wide definition of the word “development” thus:

“In this Act, except where the context otherwise requires, the expression ‘development’ means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.”

It has been a question debated before us whether the three words “or other operations” in the circumstances include demolition. It does not seem to me to matter whether that formula does or does not include demolition. But it is the broad scheme of the Act, that for “any work” (which would plainly include the putting up of the new building proposed by the plaintiffs after July 1, 1948) permission is required under Part III subject to the other provisions of the Act which may operate to exempt any particular case.

The case of the plaintiffs, as I have already indicated, is that they are within the exemption of s. 78 (1) which provides:

“Subject to the provisions of this section, where any works for the erection or alteration of a building have been begun but not completed before the appointed day [July 1, 1948] then if immediately before that day those works could have been completed in conformity . . . with permission granted by or under an interim development order . . . planning permission shall, by virtue of this section, be deemed to be granted under Part III of this Act in respect of the completion of those works.”

The permission which is contained in the letter of Aug. 9, 1938, was indubitably a permission granted under an interim development order. It states on the face of it that it is given under the Town and Country Planning (General Interim Development) Order, 1933. If, therefore, the plaintiffs can satisfy, first, the condition that there were existing “works for the erection of a building begun but not completed before” July 1, 1948, and, further, if it can be shown that those works could have been completed immediately before July 1, 1948, by

virtue of the permission contained in the letter of Aug. 9, 1938, then the plaintiffs are deemed to have permission under Part III in respect of such completion, i.e., the completion (to use the words of the sub-section) of "those works". It is, therefore, a case in which there are two fences which the plaintiffs must surmount, and I may say that it was the view of HARMAN, J., that they failed at each.

I must now turn to the first question, which has seemed to me to be a matter of great difficulty—whether the first condition is satisfied that there were here works for the erection of a building begun but incomplete on July 1, 1948. As regards that matter HARMAN, J., said ([1951] 2 All E.R. 1028):

"In my judgment, it is really a question of fact whether, at the critical date, works for the erection of a building had been begun, but were not finished on the site. It was agreed before me that 'works', by reason of the use of the plural, must connote physical operations on the site. It is clear that the erection of a building need not have been begun, because otherwise no meaning would have been given to the words 'works for'. It seems to me that, if there had been here a building contract which involved the demolition of the old buildings before the erection of the new, it might well have been possible to say that, though the performance of the contract had proceeded no further than the demolition of the old buildings, that was, nevertheless, works for the erection of the new. This is not that case. Here the demolition contract stands alone, the contractors' work was finished and no further contract ever came into existence. In my judgment, it is not possible to say that the site as it was on the appointed day contained works for the erection of a new building. I am, therefore, of opinion that the plaintiffs fail."

The argument of the plaintiffs is that they have satisfied this formula because, say they, they began in 1939 an operation which consisted of works for the erection of a new building. They began by demolishing the old building, but the works, taken as a whole, were not completed because they had not gone on to the erection of the new building for which the demolition was preparatory. Against this, it is said on the other side that demolition works, though, no doubt, preparatory to works of erection, were in this case wholly distinct in themselves and began and ended years before July, 1948, without any start at all having been made on any new building. In that regard, there is no doubt that HARMAN, J., was much influenced by the absence of a building contract; he appears to have placed emphasis on it in the passage I have read. Counsel for the London County Council before us has not so much emphasised that particular aspect. His argument, shortly, is that if one reads the whole of s. 78 (1) the phrase "works for the erection of a building" is the same subject-matter as "those works", which is the phrase found later; that "those works" must have the quality that they are the subject of a permission granted; and that since here the demolition works were not so subject and were only connected with the proposed erection in the minds of the plaintiffs, therefore, the formula is not satisfied and the plaintiffs, as the learned judge held, must fail.

Whatever is the position under the Act of 1947—and counsel for the plaintiffs in his reply has suggested that works of demolition are within the meaning of the word "works" at any rate for many purposes of that Act—it is, as I understand, clear that under the Act of 1932, save in the case of buildings scheduled as being of special interest or of works comprised within s. 44, demolition, as such, is an operation which did not require any permission from the planning authority. A man might demolish buildings without any decision having been made by him at the time how afterwards he would seek to use the land, and in that case he would require no permission and the demolition of itself could not fairly in that case be said to be part of the totality of an operation which necessarily comprehended the erection of a building. The demolition clearly could not in that case, I should have thought, be "works for the erection of a building". I also have no doubt that in ordinary parlance and among those who are engaged

in the trade of contractor, whether a building contractor or a demolition contractor, the word "works" in the plural is one of common currency, and will or may certainly include works of demolition, excavation and the like. Indeed, in opening his case before us counsel for the plaintiffs put it that the word "works" can be and should be construed, where you find it in these Acts, according to the context in which it from time to time appears. But after looking at the relevant sections in both Acts, including definitions, I am bound to say that in their context here the words "works for the erection" do not strike me as *prima facie* intended to include works of demolition. The point is obviously a narrow one, and, although on this matter I regret to find that my own conclusion is not shared by either of my brethren, I am, for my part, of opinion that the argument of counsel for the London County Council is correct, and that on this part of the case the learned judge's conclusion ought to be sustained.

I think there are two ways in which the matter may be tested. The first is the way I ventured to put it to counsel for the plaintiffs during his reply. If (as it is said by him) there were on July 1, 1948, works for the erection of a building begun but not completed, then what were they? I took a note of his answer, and he said they were the demolition, the clearing of the basement so as to be incorporated in the new building, the erection of hoardings and a gate, and the preparation for building a new building—i.e., the approval of the plan, plus the intention to build, and the contract to build. I am bound to say that I cannot for my part bring that concatenation of things all within the phrase "works for the erection of a building", and it seems to me to resile from what has been said and accepted below, that "works" must be physical operations carried out on the land. JENKINS, L.J., suggested that a more prudent answer would be, "the totality of the operations to be carried out on the site as defined in the building agreement". I will assume that it was true to say, on July 1, 1948, and could have been said many years before, that under the agreement with the Portman estate the plaintiffs were bound to carry out certain specified building operations on the site which would terminate in the appearance on the site of the new edifice which is illustrated on the plans, and if it can be said that those operations had been begun and not completed, then it may well be that the answer is as counsel suggested it should be. But I am not satisfied that, for the purpose of construing this section, one is entitled to take into account the fact that the plaintiffs, the building owners, had made some arrangement or contract with a third party to erect a particular building. If that is right, then it would appear to me to follow that if the plaintiffs could establish that they had made up their minds, apart from any obligation by contract, to erect a particular building, it could equally be said that the demolition works were part of those total operations though the total operations were merely, so to speak, in the minds of the plaintiffs. It may or may not be that demolition is something which requires permission under the new Act and did not under the old. I can well understand that plans put forward for approval may on the face of them show and include the demolition to be done as part of the total operation, even though for the demolition taken by itself no planning permission would be required. Thus, to take the alternative in the sub-section of "works for the alteration of a building", there would, I take it, appear on the plans submitted what had first to be taken down in order that the altered thing might be put in its place, and in all those cases I think it would be right to say that the first stages, which consisted of the destructive part of the work, were part of the "works for the erection or alteration of a building". I also agree that the formula "works for the building" must have a wider significance than would be covered by the words "works of building", but that does not, in my judgment, suffice for the facts of the present case.

What I have said is, perhaps, putting in another way (and it may be not put so well) the main argument put by counsel for the London County Council,

which is to the effect that, if one reads the sub-section as a whole, the "works for the erection of a building" are "those works which could have been completed in conformity with the planning permission", and when in this case one asks what those works were and one looks accordingly at the permission given under the Act and order, one finds that the only works for which permission was given were works for the erection of a new building independently of (though, no doubt, based on the assumption of) a previous clearing of the site, and of those works, as distinct from the first clearing operation, there is not any doubt that they had not been begun at the material date. As I have indicated, I think that the question is one, perhaps, in large degree of first impression, and when I come back and ask the question: What in the present case were "works for the erection . . . but not completed before July 1, 1948"? I am not satisfied that an answer can be given by the plaintiffs which is satisfactory and entitles them to say they are within the ambit of the protection.

I should, therefore, on that ground dismiss this appeal, but, as I have said, my brothers take a different view, and in the circumstances I must pass, though I shall deal with it briefly, to the second hurdle with which the plaintiffs are confronted. It is this: Assuming that these are "works", then are the plaintiffs now entitled to complete them by virtue of this planning permission given on Aug. 9, 1938? I have already stated that on the face of the letter the answer would be in the negative because, the work not having been completed within eighteen months from Aug. 1, 1938, the consent is expressed to have become null and void. But the first point taken by counsel for the plaintiffs is that this condition which I have read is wholly void and ineffective, because there is no power in the planning authority to impose a condition as to time. The learned judge rejected that view, and I reject it also, on the simple ground that I find nothing in the relevant terms of the relevant Act to limit the conditions which may be imposed so as to exclude conditions of time. The relevant part of the relevant Act is s. 10 (3) of the Act of 1932:

"Where an application for permission to develop land is made to the specified authority in manner provided by the order, the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application . . ."

I can find nothing in that context, or anywhere else in the Act—for instance, in para. 19 of sched. II, to which we were referred—which would entitle the court to say that the words "subject to such conditions as they think proper to impose" must be read with the qualification "provided that they are not conditions as to time". I, therefore, reject that part of the answer.

The second matter raised by counsel for the plaintiffs has been much more difficult, though it turns again, I think, as did the first point, very much on a first impression of the language used. The argument used is that by the effect of s. 10 (3) of the Act of 1932, which I have partly read, and to which can be joined the terms of the order of 1933, no condition can be validly imposed unless reasons for its imposition are given. The effect, therefore, if that argument is right, is either that under the terms of the rest of the sub-section (which I will read in a moment) the London County Council is to be deemed to have granted an unconditional permission, or one is entitled to treat this permission granted on Aug. 9 as unembarrassed by the conditions which were invalidly added to it. The language of s. 10 (3) refers to the terms of the order, and that order is the one mentioned in s. 10 (1):

"The Minister shall make a general order with respect to the interim development of land . . ."

The Minister did make a general order in 1933, to which I have already alluded. Section 10 (3), after the part which I have already read, continues as follows:

"... and they [the planning authority] shall be deemed to have granted the application unconditionally unless within two months from the receipt thereof, or within such longer period as the applicant may agree in writing to allow, they give notice to him that they have decided to the contrary, stating their reasons for so doing."

If it is permissible to have regard to the order, the matter appears to be made tolerably plain, because art. 10 of the order of 1933 is:

"The grant or refusal of permission by the interim development authority for development to proceed shall be in writing and, where the authority decide to grant permission subject to conditions, or to refuse permission, the reasons for their decision shall be stated in writing."

It is, therefore, beyond doubt that the terms of the order state that a conditional grant of permission shall contain in writing the reasons for the conditions imposed or at least for the imposition of conditions. Counsel for the London County Council said that the order cannot have the effect of increasing the obligations imposed by Parliament on the authority. I am not quite sure that that is right, because s. 10 (1), as I have said, requires the Minister to make a general order with respect to interim development, and s. 10 (3) provides that where an application for development is made "the authority may, subject to the terms of the order, grant the application", etc.

Assuming in counsel's favour that the matter does depend, and depends exclusively, on the terms of s. 10 (3) itself, then the question revolves round the simple question what is meant by the phrase "they have decided to the contrary". To the contrary of what? That is the problem. It is not, I am bound to say, a happy piece of phrasing, and it has led to long arguments and many suggestions as to what might be meant by those words "to the contrary". If it means they have decided not to grant, unconditionally, an application, then, presumably, a decision to grant a conditional permission would be "to the contrary". Counsel for the London County Council suggested that "to the contrary" in its context really means that they have decided to refuse permission altogether. I have on the whole been unable to accept that view. I do so with some regret because I must say that it seems to me extraordinary that the authority is required to give reasons for every condition that they impose, even though the reason for the imposition of the condition is absolutely obvious. Thus, to take the example given by JENKINS, L.J., if permission is granted subject to there being a proper fire escape provided, it seems absurd that the authority must say: "The reason for this condition is so that people should be able to escape from the building in case of fire." However, the question is: What is the true interpretation of the words used? There is no doubt that at the back of it lies this important consideration, that there is given to the applicant an opportunity, if he feels aggrieved, of going by way of appeal to the Minister. I turn, accordingly, to s. 10 (5) of the Act of 1932, which seems to me to contain within it the answer to this problem. Section 10 (5) provides:

"An applicant who is aggrieved by the refusal of the authority to consent to his application, or by any conditions imposed by them, may within twenty-eight days from the date on which he received notice of the decision of the authority, or such longer period as the Minister may allow, appeal to the Minister..."

Three possibilities are envisaged in s. 10 (3), viz., unconditional permission, absolute refusal, or permission subject to conditions. When one turns to s. 10 (5), it is dealing indifferently with the second and the third. It deals with the case of absolute refusal and also with permission subject to conditions. Both those are spoken of as "decisions" of the authority, which refers one back, I think, to the "decision" mentioned at the end of s. 10 (3), where the language is "give notice... that they have decided to the contrary". If that be right,

it must follow, I think, necessarily that a decision "to the contrary" comprehends a decision to grant permission subject to conditions. If that is so, this matter must be, I think, decided in the plaintiffs' favour. I add that, although it is easy to see cases (I have given an example) where it seems supererogatory to have to give reasons in writing, I can also see that it would be difficult for an applicant who is aggrieved to put his case or even to give satisfactory reasons for his dissatisfaction unless he was given reasons by the planning authority why they have imposed a particular condition. If an appellant appeals against the imposition of a condition without knowing why it is imposed, it is obvious that he might be faced on appeal with an explanation by the planning authority which would make it impossible for him to argue, or put him in the difficulty that he had come unprepared to deal with what turned out to be the real point to be argued. For these reasons I take a different view on this point from that which the learned judge took. It turns on a very small point as to the meaning of a few words. Having regard to the view I take on the first point, I think that the appeal should be dismissed, but having regard to the conclusion reached by my brothers the appeal must be allowed.

JENKINS, L.J.: To my regret I find myself unable to agree with my Lord as regards the answer to the first question in this case, i.e., the question whether on the facts the plaintiffs had, with respect to their Paddington Street and Chiltern Street site, begun works for the erection of a building. The facts, if I might briefly recapitulate them, were these. The plaintiffs had entered into a building agreement with respect to the site, under which the plaintiffs were bound, directly or indirectly, to the Portman estate to erect a building in accordance with certain plans and specifications approved by the Portman estate. The plaintiffs had obtained planning permission, subject to the conditions which my Lord has mentioned, and to which I will return, for the erection of that same building. With a view to carrying out the project and in accordance with their contractual obligations under the building agreement, the plaintiffs had cleared the site for the erection of the projected new building, although the supervening difficulties occasioned by rumours of war and ultimately by war itself had prevented them from carrying the project any further than that.

Those being the facts in barest outline, had any works for the erection of a building been begun on this site, but not completed before the appointed day, within the meaning of the Town and Country Planning Act, 1947, s. 78 (1)? The answer to that question turns in the end on the meaning to be attached to the phrase "works for the erection or alteration of a building" contained in the sub-section, but, in approaching the construction of that phrase, it seems to me legitimate to bear in mind that the manifest object of s. 78 (1) was to accord some measure of protection to a building owner, who, on the faith of planning permission given under the law as it stood before the commencement of the Act of 1947, had incurred expenditure and done work with a view to the carrying out of a building project covered by such permission. Therefore, it seems to me that the intention of the section makes it of relatively little importance whether the actual work in question is work of demolition or of construction or of anything else, provided it is clear on the facts that that work did genuinely form part of the operations necessary to carry out a building project which would have been permitted under the old law.

Returning to the phrase against that background, it is "works for the erection or alteration of a building". That phrase seems to me to be a phrase of wide import, and the inference is that it was adopted so as to cover a wide field of work. If the legislature had intended to confine the application of s. 78 (1) to cases where buildings had been begun, but had not been completed, inevitably the section would have run: "Where the erection or alteration of a building has been begun, but not completed". Here we have "works for the erection or alteration of a building", so as to include in terms operations which are not in

themselves building operations. For my part I find irresistible the conclusion reached by HARMAN, J., as to the meaning of these words when he said ([1951] 2 All E.R. 1028):

“It is clear that the erection of a building need not have been begun, because otherwise no meaning would have been given to the words ‘works for’.”

It is, therefore, in my view, not necessary, in order to bring a case within the sub-section, that one should be able to point to some work of construction on the site and say: “That is part of the new building the erection of which has been begun”. It is enough if on the facts one can conclude that on the site in question operations have been carried out which are part of the totality of operations necessary on that site for the purpose of carrying to completion a particular building project. Where it is shown by the evidence that a building owner had in view a particular building project to be carried out on a site already built on and that his intention to carry out that project had never been abandoned, then work such as the demolition of the buildings already on the site, as a necessary preliminary to the carrying out of the building project, would, in my judgment, be “works for the erection or alteration of a building” within the meaning of the sub-section. Of course, where the works are of such a nature that in themselves they might or might not be works which were being carried out for the purpose of executing some particular building project, it may well be that the onus is then on the building owner to show, and to show clearly, that his intention from the outset had been to carry some particular building project through to a finish. Obviously, where a man had started pulling down a house with no more than a general intention of erecting something else in its place, he could not come within the sub-section. Indeed, the very frame of the sub-section and the whole scheme of the Act would exclude such a one from the benefit of the sub-section, for s. 78 (1) in itself contemplates and necessarily refers only to a case where there is a projected building or alteration in respect of which planning permission has been obtained.

In the present case, on the footing that the construction of the phrase “works for the erection or alteration of a building” which I have adopted is the right construction, there is, to my mind, no doubt that, in commencing and carrying out through their contractors the demolition of the existing buildings, the plaintiffs had begun works for the erection of a building. There is no doubt about their intention. There is no doubt about the identity of the projected building. Not only was it the building referred to in the planning permission obtained in 1938, but it was also the building which the plaintiffs were under contract, directly or indirectly, with the Portman estate to erect. HARMAN, J., as appears from his judgment, might well have come to the same conclusion as I have reached but for the fact that the plaintiffs, in the events which happened, entered into a contract for the demolition of the existing buildings with a demolition specialist who did not undertake any of the work of constructing the new building, whereas, so far as the work of constructing the new building was concerned, they had dealt with that separately through a firm named Bovis, Ltd., and had only made provisional arrangements with them for the building work, not amounting to a firm contract. But for my part, provided it is plain that the building owner concerned did genuinely intend to erect a particular, identifiable, projected building on the site of existing buildings, it cannot matter what contractual arrangements he may have made as regards the demolition of the old buildings and the erection of the new one. That is to say, the answer cannot depend on whether he has got one contractor to pull down and re-build or has got two contractors, one of whom is going to do the demolition and the other the construction. Here, I think, the projected building is well identified, if only by reference to the building agreement.

The argument to the contrary, pressed on us by counsel for the London County Council, was to this effect. He said that the test to be applied in seeing whether given work qualified for the benefit of s. 78 (1) was a purely objective test, that one must go to the site and see whether there was any work begun but not completed on the site for which planning permission was required and had been obtained. Nothing short of that, according to him, would come within the sub-section. He put the matter in three points. He said that for s. 78 (1) to apply (a) there must be works which have been begun; (b) those works must be uncompleted; and (c) they must be part of an operation which required planning permission. He pointed out that demolition was not in any relevant respect an operation which required any planning permission at all. The work which had been begun here, he said, was simply the work of demolition, for which no such permission was necessary, and, therefore, it did not fall within the words

"those works could have been completed in conformity with the provisions of a planning scheme or of permission granted thereunder, or in accordance with permission granted by or under an interim development order."

Planning, he said, was quite irrelevant to demolition. In my view, that construction contains the fallacy that it treats "those works" as the particular type of work or type of operation that has been actually embarked on. Of course, if one applied s. 78 (1) to mere work of demolition taken by itself and treated that as "those works", there would be no question of those works having been the subject of permission, and it would be reasonably plain that the section did not apply. Moreover, the demolition as such, if treated as a separate thing, would not only have been begun; it would have been completed. But, in my view, that is wrong. I think "those works" must mean the works for the erection or alteration of the particular building referred to earlier in the sub-section. I think that must be so, for the test of the application of the sub-section where it is satisfied in other respects must, as it seems to me, be whether the permission was granted for the carrying out of the projected building operations to completion and not whether permission was granted for some mere branch or department of the work. If "those works" is construed in that way, I think the argument no longer applies.

Counsel for the London County Council also suggested that "works" in this context should be construed as meaning works which have something in the nature of a physical presence on the land, as opposed to mere demolition which cannot be said to leave anything physically present on the land, but merely produces an empty space where buildings existed before. He referred us to a number of sections (I will not take up time by referring to them again) where there were references to (for instance) the demolition or alteration of any buildings or works or to decisions that any buildings or works should be altered or removed, and there is no doubt that there are through the Act a number of references to works in contexts which show that "works" are regarded as physical objects. But I do not think it follows that in every case "works" is to be given that meaning. For instance, in s. 30 (6) of the Act of 1947, which is one of the sections dealing with ancient buildings, there is the passage to which counsel referred us to the effect that so long as any building is included in any list compiled or approved under this section no person shall execute, or cause or permit to be executed, any works for the demolition of the building. Counsel for the plaintiffs referred us to the Town and Country Planning Act, 1932, s. 44, which provided, as to works below high-water mark, that

"Nothing in this Act shall authorise the execution of any works whether of construction, demolition or alteration on, over or under tidal lands below high-water mark of ordinary spring tides . . ."

Therefore, it seems to me that the word "works" is well capable in this legislation of including works of demolition, and I think that is in accordance with ordinary English usage in the field of building operations, where the expression "works" is current.

The point is a short one and does not admit of any great elaboration. As my Lord has said, it is largely a matter of first impression. We were pressed by counsel for the London County Council with the absurdities that might arise if the plaintiffs' construction of the sub-section were adopted. What, it is said, of a man who, allegedly with a view to the ultimate erection of a new building, sets about demolishing an existing building and has got no further than removing two tiles or a gutter? It is suggested that in a case of that kind it would be absurd to give the individual in question the protection of s. 78 (1), even though the project of which the removal of the two tiles or the gutter was the beginning was a project in respect of which in all relevant matters planning permission had actually been obtained under the old law. But arguments by way of *reductio ad absurdum* cut both ways, and, on the other hand, it might equally be said to be absurd that a building owner who had spent thousands of pounds on the demolition of valuable buildings with a view to erecting another building in their place should not be protected merely because he had not actually started the building work, while another person who had prepared his site at far less cost should be protected because his work had just arrived at the stage of construction and it was possible by diligent search to find somewhere on the site two bricks laid one on top of the other in the positions which they would respectively occupy in the completed building. As I have said, it is a question of first impression, and I will say no more about it except that, after giving the best attention I can to the arguments the other way, and with some diffidence owing to the different opinion of my Lord, I have come to the conclusion that the plaintiffs, within the meaning of s. 78 (1), had begun works for the erection of a building on the site in question before the appointed day, but had not completed them before the appointed day, with the result that the plaintiffs are entitled to succeed in this case provided they can bring themselves within the second branch of the sub-section.

To do that, as my Lord has said, they must show that immediately before the appointed day those works—i.e., as I construe the sub-section, the totality of the building operations—could have been completed in conformity with the provisions of a planning scheme or of permission granted thereunder or in accordance with permission granted under an interim development order. If that was so then in the words of the sub-section

"... if any permission required under the Restriction of Ribbon Development Act, 1935, for the carrying out of those works was granted, planning permission shall, by virtue of this section, be deemed to be granted under Part III of this Act in respect of the completion of those works."

That depends on the effect of the conditional planning permission of Aug. 9, 1938, having regard to the terms of s. 10 of the Act of 1932 and of the Town and Country Planning (General Interim Development) Order, 1933, art. 10. The vital provision is in s. 10 (3), to which my Lord has already referred. I hope I will be excused for reading it again:

"Where an application for permission to develop land is made to the specified authority in manner provided by the order, the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application, and they shall be deemed to have granted the application unconditionally unless within two months from the receipt thereof, or within such longer period as the applicant may agree in writing to allow, they give notice to him that they have decided to the contrary, stating their reasons for so doing."

The whole matter, so far as it depends on s. 10 (3), turns on the meaning of the words "to the contrary". As a matter of language, I think it is reasonably plain that "notice . . . that they have decided to the contrary" must mean notice that they have decided not to grant the application unconditionally, the words being

"they shall be deemed to have granted the application unconditionally unless . . . they give notice . . . that they have decided to the contrary."

In my view, that must mean that they have decided not to grant it unconditionally. It is said on the other side that "to the contrary" connotes an exact opposite, a complete negation of what has gone before, as opposed to a mere variation of what has gone before, and it is suggested, therefore, that "decided to the contrary" means "decided not to grant it". With respect to those who think otherwise, I cannot accept that, as a matter of language. But, if it is accepted, it seems to me that grave difficulties ensue, for then the relevant part of sub-s. (3) reads: "The authority may . . . grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application, and they shall be deemed to have granted the application unconditionally unless . . . they give notice . . . that they have decided not to grant the application, stating their reasons for so doing", and that would, apparently, produce the result that they could never grant an application conditionally, because in all cases they would be deemed to have granted the application unconditionally unless they gave notice that they had decided not to grant the application at all.

Accordingly, I think that s. 10 (3) really admits of only one construction. I appreciate the force of the learned judge's observations to the effect that one can understand that where unqualified refusal was in question it was very desirable that reasons should be given, but that where it was merely a matter of imposing conditions, and, subject to those conditions, allowing the application, it was not apparent why reasons should be considered necessary, for the applicant would receive his permission with the conditions on which it was granted stated for him to see, and would, therefore, for the purposes of any appeal, know exactly what the conditions were. I also agree with my Lord that one can imagine examples where the giving of reasons for the imposition of conditions would be a palpable absurdity. But these considerations, in my judgment, are not enough to override what seems to me to be the reasonably plain language of s. 10 (3). My Lord has referred to the support which this construction derives from s. 10 (5), and I need not take up time by developing that point again. One may add that the Town and Country Planning (Interim Development) Act, 1943, which reversed the former rule and enacted (in effect) that permission should be deemed to be refused unless it was granted, seems to assume the construction of s. 10 (3) which I have placed on it, for one finds in s. 2 (5) of the Act of 1943 that

"Nothing in this section shall be construed as affecting the duty of an interim development authority . . . (b) to give notice to the applicant of their decision upon the consideration of any such application, including, where the application is refused or granted subject to conditions, a statement of the reasons for their decision."

I am, therefore, of opinion that, inasmuch as the authority here failed to state their reasons for granting the permission of Aug. 9, 1938, subject to conditions and not unconditionally, they must be deemed by the terms of s. 10 (3) to have granted the application unconditionally. Other grounds of objection to this form of permission were urged before us which would lead to substantially the same consequences. Counsel for the plaintiffs endeavoured to persuade us that the first condition, which imposed a time limit for the completion of the work after which the consent was expressed to become null and void was wholly ultra vires and, therefore, bad. I cannot take that view, for s. 10 (3) expressly empowers

the authority to grant the application subject to such conditions as they think proper to impose without anything relevant to the question of time to suggest that the generality of that expression is to be in any way cut down. There is nothing expressly to the effect that conditions as to time are not to be imposed, and I can find nothing in the other provisions of the Act which would make the imposition of a time condition so palpably repugnant as to be by necessary implication outside the purview of the Act, and, therefore, *ultra vires*. Accordingly, I cannot accept the argument based on *ultra vires*, though the plaintiffs achieve the same goal by a different road.

It only remains to mention the Town and Country Planning (General Interim Development) Order, 1933, art. 10, which provides:

"The grant or refusal of permission by the interim development authority for development to proceed shall be in writing and, where the authority decide to grant permission subject to conditions, or to refuse permission, the reasons for their decision shall be stated in writing."

That reinforces the view that the authority is placed under a statutory duty to give reasons for its decision where the decision is to grant permission subject to conditions or to refuse permission, and I think the result might well have been that failure by an authority to give reasons would have enabled an aggrieved applicant, by appropriate process, to obtain an order on them to state their reasons. But I am not satisfied that art. 10 of the order would in itself affect the actual validity of a refusal or the actual validity of conditions purporting to be attached to a consent. I prefer, therefore, to base myself simply on the construction of s. 10 (3) and the construction which I have placed on that sub-section leads, as I have said, to the conclusion that permission must be deemed to have been granted. It follows, in the view I take, that the plaintiffs succeed on both the questions on which their claim to the benefit of s. 78 (1) depends, and they are, accordingly, entitled to such benefit. The appeal should, therefore, be allowed.

MORRIS, L.J.: The first question which arises in this appeal is whether the plaintiffs bring themselves within the opening words of the Town and Country Planning Act, 1947, s. 78. The inquiry is raised whether works for the erection of a building had been begun before the appointed day, viz., July 1, 1948. The Act of 1947 contains a number of definitions. There is a definition of the phrase "buildings or works", but no definition is to be found of the word "works". The word "erection" is defined as follows:

"'erection' in relation to buildings includes extension, alteration and re-erection."

"Building operations" is defined to include

"re-building operations, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder."

There is also a definition of the word "clearing", which

"in relation to land, means the removal of buildings or materials from the land, the levelling of the surface of the land, and the carrying out of such other operations in relation thereto as may be prescribed by regulations made for the purposes of this Act."

There is, of course, a definition of "development", which I do not read again.

In the course of his submissions on this part of the case counsel for the London County Council submitted that the word "works" should be interpreted as denoting some positive operations of a constructional nature. Another part of his submissions was that when the word "works" in the second line of s. 78 is compared with the phrase "those works", to be found in the fourth line of s. 78, it is manifest that there is a reference to the same thing, and counsel submits

that the reference is to what he has described as the "controlled operations". So he submits that the word "works" denotes operations of a positive, constructional nature for which permission was needed, and he submits that permission was not needed under the Act of 1932 for demolition. In support of the first of those two submissions to which I have referred, counsel has invited our attention to a number of sections of the Act of 1947 where the word "works" is to be found. He has, for example, referred us to s. 30 (6), to s. 23 (2), to s. 26 (1) (b), and to other sections. In some places the reference is to the words "buildings or works". We were also referred, by counsel for the plaintiffs, to s. 44 of the Act of 1932. The word "works" also appears in the Town and Country Planning Act, 1947, in s. 75, which begins with the words: "Where any works on land existing at the appointed day were carried out".

In the absence of any definition of the word "works" it seems to me that the word is not to be regarded as a term of art, but that it is really quite a wide term. The word may not be used in all places with precisely the same meaning. It has, in my judgment, in s. 78 the meaning of things done or to be done. I do not myself attempt any definition of the word, for the obvious reason that, as Parliament has not defined it, it would be unnecessary, and, perhaps, unfortunate, to attempt a definition. The word has a wide variety of meanings. It is, for example, used in ordinary speech in the phrase "works of charity", presumably to denote no more than things done of a charitable nature. In its context in s. 78, in my judgment, the word refers to the totality of things necessary to be done for the purpose of erecting a building. The phrase has to be regarded in reference to the facts of each particular case. The question whether works for the erection of a building have been begun becomes, in my judgment, a question of fact and of degree, depending on the circumstances of each particular case. What happened in the present case was that after the plaintiffs had, in August, 1938, obtained the consent of the London County Council under the General Interim Development Order, 1933, they then proceeded to get tenders for the erection of a building, including demolition and the clearance of the site. They received a number of tenders, but each one of the tenders received exceeded the amount that they had been led to expect would be the probable amount having regard to figures supplied to them by their quantity surveyor. So, according to the affidavit of Mr. Lees, it was decided to entrust the work to Bovis, Ltd. Because of the international situation there was delay. By the early part of 1939 the Portman estate were pressing the architects to begin building operations. In para. 9 of his affidavit Mr. Lees said:

"By March, 1939, however, the Portman estate, as freeholders, were pressing the company through its architects to commence building operations in accordance with the agreement A.E.L.2 and pointed out that the agreement provided for completion of the entire building by the month of December, 1939. Accordingly, in April, 1939, the company decided to commence building operations and as a first step to proceed with the necessary works of demolition and clearance from the site of all existing buildings."

In his judgment HARMAN, J., says ([1951] 2 All E.R. 1027):

"Mr. Lees, estate manager of the plaintiffs, who was cross-examined before me, stated that when the plaintiffs entered into this contract they intended to proceed, after the demolition was completed, with their re-building scheme. This evidence I accept. Indeed, the conclusion seems obvious, for persons in the plaintiffs' position, who are paying some £800 a year in rent, do not demolish buildings which might reasonably be expected to let for a considerable part at any rate of that sum unless they intend to replace them by other buildings more to their purpose."

It seems to me that the effect of the evidence accepted by the learned judge was that the plaintiffs, after a delay, did decide to begin works for the erection of a building. It does not seem to me to matter at all that one part of the works

was assigned by contract to one contractor and that the rest was to be undertaken by another contractor. It might be, in the circumstances of a different case, that work of demolition could not be described as "works for the erection of a building". But, as I have indicated, in my judgment the matter is one of fact and degree, depending on the circumstances of each case. In this case, in my view, the plaintiffs did decide to begin, and did begin, works for the erection of their new building.

In regard to the second of the two submissions of counsel for the London County Council to which I referred, in my judgment, the works "could have been completed in accordance with permission granted under an interim development order", assuming that that permission was valid. The works must be deemed to be the totality of what had to be done to erect the building. Those works could have been completed in accordance with the permission granted. The words in s. 78 (1) do not involve that permission is needed for each and every part, phase and deed, provided that the work of erection can be completed within the ambit of permission so that when the building is complete nothing is out of conformity with or out of accord with or beyond any permission given where any permission is required. With a diffidence which I naturally feel when I find that my opinion does not coincide with that of my Lord, the Master of the Rolls, I have reached the conclusion on this first question that the plaintiffs had begun works for the erection of a building before the appointed day.

The second question is whether there was permission under an interim development order. The interim development order that was in operation was that of 1933. Section 10 of the Act of 1932 is in different terms from s. 45 of the Housing, Town Planning, etc., Act, 1919; and the Town and Country Planning (General Interim Development) Order, 1933, is in different terms from the Town Planning (General Interim Development) Order, 1922 (S.R. & O., 1922, No. 927). Under that order, by art. 7, it was provided:

"The local authority shall as soon as may be, inform the applicant in writing that his application for permission to proceed is granted or refused, as the case may be, and, if the application is granted, state in writing the terms of any requirements which they may impose."

But the Act of 1932 introduced new language, and the language of s. 10 (3) calls for consideration. I need not refer to s. 2 of the Act of 1943, which has been referred to by JENKINS, L.J. The provision in that Act is not decisive, but it is at least interesting to note the interpretation that then was assumed.

In regard to the question whether it was legitimate to impose a condition in regard to time, I am in full agreement with all that my Lords have said and I do not desire to add anything. Section 10 (3) provides that three courses may be followed, and they are stated in this order: first, the authority may grant unconditionally; or, secondly, they may grant subject to conditions; or, thirdly, they may refuse. The section then provides that they shall be deemed to have granted unconditionally unless within two months they shall give notice "that they have decided to the contrary, stating their reasons". That, in my judgment, means, to the contrary of granting unconditionally, which was the first of the three possibilities. What, then, is the contrary, or the opposite, of granting unconditionally? Perhaps the most obvious opposite is the second, viz., granting conditionally; but also there is the third, viz., refusing. It seems to me, therefore, to follow that the application was to be deemed to have been granted unconditionally unless two things were done—(i) unless there was notice that the authority had decided to the contrary of granting unconditionally, and (ii) unless they had given reasons. There is no dispute that in the present case the authority did not give reasons. It, therefore, follows that they must be deemed to have granted permission unconditionally. It is no answer to say that reasons might have been given which would have been poor in quality or in quantity, or which might have contained glimpses of the obvious. The

result, therefore, is that, in my judgment, following the words of s. 78 (1) of the Act of 1947, planning permission should, by virtue of the section, be deemed to be granted under Part III of the Act of 1947 in respect of the completion of those works. From that conclusion the consequence as to development charge follows. I am, therefore, in agreement that this appeal should be allowed.

Appeal allowed.

Solicitors: *J. C. Parry* (for the plaintiffs); *J. G. Barr* (for the London County Council); *Treasury Solicitor* (for the Central Land Board).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

BUCKINGHAMSHIRE COUNTY COUNCIL v. CALLINGHAM AND ANOTHER.

[COURT OF APPEAL (Singleton and Morris, L.J.J., and Lloyd-Jacob, J.), February 13, 14, April 7, 1952.]

Town and Country Planning—Development—“ Building ”—“ Works on land ”—Construction of model village, railway and racecourse—Town and Country Planning Act, 1947 (c. 51), s. 12 (2), s. 75 (9), s. 119 (1).

Town and Country Planning—Enforcement of planning control—Land subject to resolution to prepare planning scheme—Development carried out, without permission, before interim development order made—Town and Country Planning Act, 1947 (c. 51), s. 75 (9).

The occupier of a piece of land constructed thereon a model village, a toy railway, a miniature racecourse, and other features. The buildings were from two feet to four feet high and were constructed mainly of stone or brick and fixed to concrete bases in the ground. By August, 1929, part of the village was completed. On Sept. 24, 1929, the local authority passed a resolution to prepare a town planning scheme for the district under the Town Planning Act, 1925, the resolution being registered as a local land charge on Sept. 30, 1929. The village was substantially completed between that date and Apr. 1, 1933, when the Town and Country Planning (General Interim Development) Order, 1933, made under s. 10 (1) of the Town and Country Planning Act, 1932, came into force, and after Apr. 1, 1933, the model railway was extended and further buildings added, but no permission for this additional work was obtained under the order of 1933. In October, 1950, the local planning authority served on the occupier an enforcement notice under the Town and Country Planning Act, 1947, s. 23 and s. 75 (9), requiring him to demolish or remove building, engineering and other operations on the land.

HELD: the works completed before Sept. 24, 1929, or begun or contracted for before that date were “ existing buildings ” within the order of 1933; the later works were “ works on land ” within s. 75 (9) of the Act of 1947; the words of para. (a) of that sub-section covered works begun after the date of the resolution and completed before Apr. 1, 1933, when the order of 1933 (which, by s. 119 (1) of the Act of 1947, was the “ interim development order ” for the purpose of para. (a)) came into force, as well as works so begun but not completed until after Apr. 1, 1933; no permission for any of those works had been obtained under the order of 1933; and, therefore, the works had been carried out “ in contravention of previous planning control ” within s. 75 (9), and under s. 75 (1) the enforcement notice served under s. 23 (1) was good.

APPEAL by the occupier of land on which a model village was constructed and by a trustee of the organisation operating the model railway therein against an order of the Divisional Court dated Oct. 12, 1951, and reported [1951] 2 All E.R. 822.

The respondents, the Buckinghamshire County Council, served an enforcement notice on the appellants under s. 23 of the Town and Country Planning Act, 1947, requiring them to demolish or remove building, engineering and other operations known as the Bekonscot Model Village and Railway. The appellants preferred a complaint to the justices that the notice was wrongly served, on the ground that the operations were not "works on land" and that they had not been carried out in contravention of previous planning control within s. 75 (9) of the Act. On Mar. 9, 1951, the complaint was heard by Buckinghamshire justices who found that the works were not within the ambit of the planning Acts, and quashed the enforcement notice. The county council appealed to the Divisional Court, who held that the works were within the Acts, and that the enforcement notice applied to work done since Sept. 24, 1929 (the date of the town planning resolution). The appellants appealed.

H. P. Stirling (H. I. Willis with him) for the appellants.

W. L. Roots for the county council.

Cur. adv. vult.

April 7. The following judgments were read.

SINGLETON, L.J.: This is an appeal from an order of the Divisional Court made on a Case stated by Buckinghamshire justices. I am clearly of opinion that that which has taken place at Bekonscot is "development" within the definition of that term in s. 53 of the Town and Country Planning Act, 1932, and in s. 12 (2) of the Town and Country Planning Act, 1947. To carry the matter a stage further back, that which was done was within the words "the development of estates and building operations" which might be permitted to proceed pending the preparation or adoption and approval of a scheme under s. 45 of the Housing, Town Planning, etc., Act, 1919, and the same words appear in the Town Planning (General Interim Development) Order, 1922, made under the Act. There is no substance in the submission that because this is a model village, or because the buildings are small, neither is, or are, within the planning legislation. The appellants could, had they so desired, have applied to the local authority for permission under the order of 1922, but they did not do so. No material change in this respect was made by the Town Planning Act, 1925.

The more difficult position is that which arises as to buildings, etc., erected after the date (Sept. 24, 1929) of the resolution of the local authority to prepare a town planning scheme and before the coming into force of the Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236). The order of the Divisional Court does not affect buildings or development before the date of the resolution, but under the order development after that date is held to be subject to the powers given by the Town and Country Planning Act, 1947. The earlier Acts envisaged the adoption of a scheme and the payment of compensation to a person whose land was injuriously affected by such a scheme, but compensation was not payable on account of any building erected on land involved in a scheme after the date of the resolution of the local authority to prepare or adopt a scheme: see s. 58 of the Housing, Town Planning, etc., Act, 1909, s. 45 of the Housing, Town Planning, etc., Act, 1919, and sched. II thereto, and s. 10 (2), of the Town Planning Act, 1925. The Town and Country Planning Act, 1932, by s. 10, imposed on the Minister a duty to make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme applied. The order of 1933 followed; it revoked the order of 1922. Article 2 (1) of the order of 1933 takes one back to the date of the resolution of Sept. 24, 1929, for it defines "existing building" as

"a building erected or constructed before the resolution date, and includes a building . . . begun before, but completed after, that date"

and the "resolution date" means the date on which a resolution or an application or authority to prepare or adopt a scheme took effect. Thus, it seems clear that

buildings erected after Sept. 24, 1929, but before the coming into force of the Act of 1932 and order of 1933 were not existing buildings for the purpose of the Act and order.

Section 13 of the Act of 1932 gives the responsible authority power to enforce schemes and carry them into effect by removing, pulling down, or altering buildings. Under s. 18 any person whose property was injuriously affected thereby could obtain compensation, but s. 20 (2) provided that such compensation should not be recoverable unless the building, &c., was an existing building. It follows that, if there had been a scheme under the Act of 1932, any building erected without permission after the 1929 resolution could have been pulled down without payment of compensation. There was no scheme, and all this was washed away by the Town and Country Planning Act, 1947, Part III of which deals with control of development. Permission to develop land is required, and ss. 12 to 19 cover that. Section 23 deals with enforcement of planning control after the appointed day, and it is under this section that notices were served, and that the appellants appealed to the court of summary jurisdiction. Section 75 (1) makes this procedure available where any works on land existing at the appointed day were carried out in contravention of previous planning control.

It is claimed on behalf of the appellants that the buildings were not works on land erected in contravention of previous planning control. True, no permission had been asked for or given, and to that extent the appellants were at risk. The planning authority might have taken steps under s. 13 of the Act of 1932 if a scheme had been adopted and approved, and no compensation would have been payable, but the Act of 1932 was repealed by the Act of 1947 and no steps can now be taken under the Act of 1932, it is said.

It becomes necessary to consider s. 75 (9) of the Act of 1947:

"For the purposes of this section, works on land shall be deemed to have been carried out . . . in contravention of previous planning control—(a) where at the material time the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim . . . order."

The interim development order here is the order of 1933. I should add that under s. 18 (1) of the Act of 1947 (amplified by s. 75 (4)) the power to grant permission to develop land under Part III includes power to grant permission for the retention on land of any buildings or works constructed or carried out thereon before the date of the application, from which it would seem that the appellants could have applied in respect of the buildings erected between 1929 and 1932.

The question for decision is whether it is shown that such buildings were erected otherwise than in accordance with permission granted under the order of 1933. The answer seems to me to be clear. No permission was asked or given, and, consequently, they were not erected in accordance with permission given under that order. And if I am right in my reading of s. 18 (1) and s. 75 (4) of the Act of 1947, it provides no sort of excuse to say that application could not be made under the order of 1933 for something done before the date of the order (assuming that to be right), for application was possible under s. 18 and s. 75 (4) of the Act of 1947, and, if the application had been successful, no question of enforcement under s. 23 would have arisen. It must not be taken that I agree that no application was possible under art. 5 of the order of 1933 to permit a development of this land merely because some part of the work of development had been commenced or carried out after the date of the resolution and before the coming into force of the order of 1933—as to which see the transitional provisions in s. 52 (2) of the Act of 1932 and ss. 53 and 54.

The scheme of the town planning legislation is to control planning and development. Under the Act of 1932 and the order of 1933 existing buildings (as defined) are not affected. The definition of existing buildings in the order does not cover buildings erected after the date of the resolution unless they were begun before

that date. Under s. 52 (2) of the Act of 1932 the resolution of 1929 is to have effect as if it were a resolution passed by the authority and approved by the Ministry under the Act of 1932. Section 54 repeals the Act of 1925, but nothing in the repeal is to affect any approval or consent given under any enactment repealed, from which it would appear to follow that, if any works were carried out for which permission was given, it could not be said that they were otherwise than in accordance with the order made under the Act of 1932. In my opinion, the works begun after the date of the resolution and before the order of 1933 came into force, were carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order, and this appeal should be dismissed. Buildings begun before the date of the resolution and completed afterwards would, however, appear to fall within the definition of "existing building" in the order.

MORRIS, L.J.: On Sept. 24, 1929, the Beaconsfield urban district council passed a resolution to prepare a town planning scheme for the Beaconsfield urban district. No question is raised in regard to anything which was done at Bekonscot on or before such date. There was then in force the Town Planning (General Interim Development) Order, 1922, which was made by the Minister of Health under s. 45 of the Housing, Town Planning, etc., Act, 1919. Though the Town Planning Act, 1925, repealed that part of the Housing, Town Planning, etc., Act, 1919, which contained s. 45, it was provided by s. 21 (1) of the Act of 1925 that the repeal should not affect any order made under the repealed part of the Act of 1919, and that any order should have effect as if made under the corresponding provision of the Act of 1925. Section 4 of the Act of 1925 contained provisions which corresponded with s. 45 of the Act of 1919. In each section is to be found the phrase "development of estates and building operations". The phrase is, therefore, found in the Town Planning (General Interim Development) Order, 1922. After the passing of the resolution to prepare a town planning scheme it was open to the appellants to apply to the local authority for permission to do any work that would come within the phrase "development of estates and building operations." The work in fact done between the end of September, 1929, and Apr. 1, 1933, consisted, as the justices have found, in completing the village in the south-west of the area, together with the model railway on the land. The justices find that during such period the development had become known as "the Bekonscot Model Village and Railways." On the facts as found, I am of the opinion that the work done during that period would properly fall to be described as being within the phrase "development of estates and building operations." No application for permission was in fact made.

The Town Planning Act, 1925, was repealed by the Town and Country Planning Act, 1932, which came into operation on Apr. 1, 1933. Section 10 (1) of the Act of 1932 is in these terms:

"The Minister shall make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme apply and may make special orders with respect to the interim development of such land in any particular area. For the purposes of this section the expression 'interim development' means development between the date on which the resolution takes effect, and the date of the coming into operation of the scheme."

"Development" is defined in relation to any land as including any building operations or re-building operations and any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used. The word "buildings" is defined as including structures and erections, and the phrase "building operations" is defined as including any road works preliminary or incidental to the erection of buildings.

In exercise of the powers conferred on him by s. 10 of the Act of 1932 the Minister of Health made the Town and Country Planning (General Interim Development) Order, 1933, which came into force on Apr. 1, 1933. By art. 4 of that order certain development was permitted pending the coming into operation of a scheme. Included in such permitted development were in the case of an existing building: (i) works necessary for the maintenance of the building; and (ii) works of alteration neither affecting the exterior of the building, nor proposed in connection with a different use of the building. An "existing building" was defined as meaning a building erected or constructed before the date on which a resolution or an application for authority to prepare or adopt a scheme took effect. It also included a building erected or constructed in pursuance of a contract made before or begun before, but completed after, the resolution date.

It was found by the justices that small replacements to the model buildings in the village were carried out from time to time. The justices have not specified, however, or have not found what "buildings" were erected or constructed before the date on which the resolution took effect. It will, in my judgment, be necessary to have findings as to this matter. It is to be pointed out that any "buildings" begun before, but completed after, such date, or any "buildings" erected or constructed in pursuance of a contract made before such date, are likewise to be regarded as "existing buildings." The justices found that after Apr. 1, 1933, the railway was extended and further model buildings were erected outside the area of the original village. In my judgment, the railway is either a "structure" or an "erection", and the model buildings are also either structures or erections. Small or model buildings may only be small structures or small erections, but they are, nevertheless, within the definition of the word "buildings".

No application for planning permission was made after Apr. 1, 1933, and, in my judgment, the work done after such date was work for which within the definitions in the Act of 1932 and the General Interim Development Order of 1933 permission might have been sought. By art. 3 of the Town and Country Planning (General Interim Development) Order, 1933, it was provided that the Town Planning (General Interim Development) Order, 1922, was revoked.

Although I have referred to the permissions which the appellants could have sought under the General Interim Development Orders of 1922 and 1933, the matters arising in the present appeal fall to be determined by reference to the construction of s. 75 of the Town and Country Planning Act, 1947. By one part of that Act it was provided that general permission was required in respect of any development of land which was carried out after July 1, 1948. The expression "development" meant (subject to some exceptions) the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land. Certain provisions for the enforcement of planning control were embodied in s. 23 of the Act. It was then provided by s. 75 (1) as follows:

"Where any works on land existing at the appointed day were carried out, or any use to which land is put on that day was begun, in contravention of previous planning control, then, subject to the provisions of this section, the provisions of Part III of this Act with respect to enforcement notices shall apply in relation thereto as they apply in relation to development carried out after the appointed day without the grant of permission in that behalf under the said Part III: Provided that an enforcement notice shall not be served by virtue of the provisions of this section in respect of any works or use (not being works or a use carried out or begun during the war period as defined by the Building Restrictions (War-Time Contraventions) Act, 1946) at any time after three years from the appointed day."

The notice which was served on Oct. 24, 1950, by the Buckinghamshire County Council (who were then the local planning authority) on the appellants

was served in reliance on the provisions of s. 75 of the Act of 1947. The planning authority must show that any "works on land" or any user, to which they take exception, were carried out or begun in contravention of previous planning control. There is no definition in the Act of the phrase "works on land". The notice served on the appellants shows that the county council adopted the language of the definition of "development" contained in the Act of 1947. The notice began with the words following:

"Take notice that the county council of the administrative county of Buckingham, as the local planning authority, in pursuance of their powers under s. 23 of the Town and Country Planning Act, 1947, hereby declare that the development specified in the first column of the schedule hereto had been carried out in contravention of previous planning control as defined in s. 75 of the said Act."

The notice then required that the steps should be taken which were set out in the second column of the schedule. The schedule was as follows:

"Development. (1) Use of land lying between Warwick Road and Lethborough Lane in the urban district of Beaconsfield in the county of Buckingham for purposes other than the curtilage of a private dwelling-house namely for the purpose of a public exhibition known as Bekonscot Model Village. Steps required to be taken: Discontinuance."

Then:

"Development: (2) Building, engineering and other operations in and on land lying between Warwick Road and Lethborough Lane in the urban district of Beaconsfield in the county of Buckingham comprising Bekonscot Model Village. Steps required to be taken: Demolition and/or removal."

It will be seen that the heading of column 1 was "development", and that under item no. 2 the words employed are words taken from the definition of "development" which is contained in the Act of 1947.

The justices held that by August, 1929, the general lay-out of the model village and railway and of the garden had been fixed, and the user of the area for its present user had been established. Because of the findings of the justices the county council did not contend before the Divisional Court that there should be discontinuance so far as user was concerned. They did not, therefore, rely on item 1 of the schedule. That was for the reason that on the findings of the justices the change of user was begun before the date of the resolution to prepare a scheme. Similarly, in relation to item 2, the county council did not call for any demolition or removal of any building, engineering or other operations which had been carried out before the resolution date. The appeal of the county council before the Divisional Court, which appeal succeeded, proceeded effectively only in relation to any building, engineering or other operations which had been carried out since the end of September, 1929.

It may seem somewhat incongruous that the county council should abandon complaint in regard to user of land for the purpose of a public exhibition known as Bekonscot Model Village, but should still proceed with a demand for the demolition or removal of some of the buildings which have for years been publicly exhibited as and have become known as Bekonscot Model Village. It is found by the justices that since as long ago as August, 1929, members of the public have been admitted to the area, and that by Apr. 1, 1933, the model village was substantially completed. But the task of the court can only be to decide whether the county council has been endowed with "a giant's strength". The court has not got the material before it to decide whether "it is tyrannous to use it like a giant". In my judgment, the work done by the appellants subsequently to the resolution clearly came within the words "works on land". It is not necessary to seek to define the phrase or to relate it to any statutory definitions, for I consider that the work done by the appellants came within the phrase

"development of estates and building operations" as well as within the word "development" either with its meaning under the Act of 1932 or with its meaning under s. 12 (2) of the Act of 1947.

The inquiry next becomes whether the "works on land" were carried out "in contravention of previous planning control". In this connection it becomes necessary to consider s. 75 (9) which is in the following terms:

"For the purposes of this section, works on land shall be deemed to have been carried out, and uses of land to have been begun, in contravention of previous planning control—(a) where at the material time the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order; (b) where at the material time the land was subject to a planning scheme, if carried out or begun otherwise than in conformity with the provisions of the scheme or of permission granted thereunder; and where permission for any works or use was granted as aforesaid subject to conditions (in whatever form) restricting the period during which the works or use could be continued on the land, and that period has expired before the appointed day, the provisions of this section shall apply as if the works or use had been carried out or begun in contravention of previous planning control."

The words "interim development order" are defined in the Act to mean an order made under s. 10 (1) of the Act of 1932. If the definition of "interim development order" had included the General Development Order of 1922, then, once it is held that what the appellants did after Sept. 30, 1929, comes within the words "works on land", the appellants would be without argument. Such works would have been carried out otherwise than in accordance with permission granted under the Interim Development Orders of 1922 and 1933, for the appellants neither sought nor obtained permission. The question arises whether the appellants are better placed because s. 75 (9) refers only to the General Interim Development Order of 1933. In my judgment, they are not. The appellants carried out "works on land". The question must then be posed whether such works were carried out otherwise than in accordance with permission granted under the order of 1933. As there was no permission granted under the order of 1933, then, in my judgment, it follows that the works were otherwise than in accordance with permission granted under that order. It is said that the words should be read as referable only to the period subsequent to the order of 1933, for it is rightly said that permission under that order could only be obtained after the date of the order. But the words of the sub-section are not limited. Certain works on land are "to be deemed" to have been "in contravention of previous planning control". This choice of language was probably employed for the reason that under the Acts of 1919, 1925 and 1932 developers were not under compulsion of applying for interim development permission; they merely ran certain risks for the future if they proceeded to develop without having secured permission. It was, consequently, enacted by s. 75 (9) that certain works on land should be deemed to have been begun "in contravention of previous planning control". The works were so to have been deemed if they were begun otherwise than in accordance with permission granted under the order of 1933. The words, in my judgment, are wide enough and are apt to cover works carried out after the date of a resolution to prepare a planning scheme, but before as well as after the date of the order of 1933. Parliament has in effect enacted that, unless there was permission under the order of 1933, then works, excluding always anything coming within the definition of "existing buildings", subsequent to a resolution to prepare a scheme should be deemed to have been carried out in contravention of previous planning control. If in some case permission had, in fact, been given under the order of 1922, then, in the unlikely event of a suggestion being made that the words of s. 75 (9)

would, nevertheless, apply, the effect of s. 54 of the Act of 1932 and of s. 113 of the Act of 1947 dealing with repeals and of certain other provisions would have to be considered. It may be that a permission given under the order of 1922 would be treated as a permission given under the order of 1933, but this matter does not call for decision, and I express no opinion on it.

I can see no escape from the applicability of s. 75 (9) to the present case, and the "works on land" which were carried out after the resolution took effect were carried out other than in accordance with permission granted in that behalf by or under an order made under s. 10 (1) of the Act of 1932. There is no proviso to, or limitation of, the relevant words of s. 75 (9) of the Act of 1947, and the result follows that, as the appellants' land was subject to a resolution to prepare a planning scheme, and as "works" were carried out on the land after such resolution, and as no permission for the carrying out of such works was granted under the General Interim Development Order of 1933, the works on land, save so far as they might be within the definition of "existing buildings", must be "deemed" to have been carried out in contravention of previous planning control for the purposes of s. 75 (1) of the Act. I, therefore, reach the conclusion that the judgment of the Divisional Court was correct, and that the results must follow which were consequent on this view.

LOYD-JACOB, J.: By this appeal the appellants seek to maintain that part of an order made by the Beaconsfield justices on Mar. 9, 1951, which, by an order of the King's Bench Divisional Court dated Oct. 12, 1951, was directed to be reversed. The part of the order in question concerned an enforcement notice dated Oct. 24, 1950, duly served by the county council on the appellants wherein demolition and/or removal was required in respect of

"building, engineering and other operations in and on land lying between Warwick Road (sic) and Lethborough Lane in the urban district of Beaconsfield in the county of Buckingham comprising Bekonscot Model Village."

After the hearing before the justices, this enforcement notice was directed to be quashed both in respect of the demolition and removal as well as of the requested discontinuance of user of the site, which latter was not the subject of appeal.

The Case stated by the justices sets out their findings of fact, from which the following are extracted: (i) In September, 1929, a resolution to prepare a town planning scheme for the district was duly passed and entered on the register of local land charges. (ii) Prior to this date the following building, engineering and other operations had been commenced: (a) the construction of a pond, banks and rockeries; (b) foundations for a model railway; (c) erection of model buildings including church, school, post office and council offices. (iii) Prior to this date, the following had been completed: (a) The area of development had been delineated as comprising an area within the blue line on the plan and the general lay-out of the model village and railway within the red line and of the garden within the blue line had been fixed; (b) the public had been admitted on payment. (iv) Subsequent to the said date, but prior to Apr. 1, 1933, the following had been completed: (a), (b) and (c) above so far as they were situate within the red line on the plan. (v) Subsequent to Apr. 1, 1933, the railway was extended and model buildings erected outside the red line, but within the blue line on the plan. (vi) The model buildings above referred to are representative of those found in a village or town, constructed in the main of stone or brick on a concrete foundation to a scale of one inch to the foot. The justices concluded that the works complained of were not works to which s. 75 of the Town and Country Planning Act, 1947, applied, and they proceeded under s. 23 (4) (a) and s. 75 (5) of that Act to quash the notice. On appeal the Divisional Court held that s. 75 of the Act of 1947 did apply to all the structures on this site erected after Sept. 30, 1929, and it is from that finding that the present appeal is brought,

The material portions of s. 75 are as follows. Sub-section (1): "... in contravention of previous planning control . . . " This phrase is not a term of art, and its definition follows in sub-s. (9).

" For the purposes of this section, works on land shall be deemed to have been carried out . . . in contravention of previous planning control—
(a) where *at the material time* the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order "

which order, by s. 119 (1), means an order made under s. 10 (1) of the Act of 1932.

At the time when the appellants commenced the development of the Bekonscot Model Village and the building operations which were comprised in that development, the provisions of the Town Planning Act, 1925, had not been made to apply to the area. There was, therefore, no planning control in operation to which they had any occasion to conform. The resolution to prepare a town planning scheme passed in September, 1929, brought into operation the provisions of the Act of 1925, whereby the opportunity to seek and obtain permission for further development under the order of 1922 was provided, an opportunity of which the occupiers did not choose to avail themselves. By s. 10 (2) any works, other than those approved under an interim development order, if carried out after the date of the resolution, were excluded from compensation should the powers in s. 7 to remove or alter them be exercised when the planning scheme was ultimately approved and adopted, but by proviso (a) to sub-s. (2) there is a special saving for work done or buildings finished if begun or contracted for earlier than the relative operative date, which for present purposes is the date of the resolution. Having regard to the findings of the justices, this would preserve to the appellants a right of compensation in respect of items (a), (b) and (c) above so far as the same were carried out before the date of the resolution and make it necessary for them to seek any permission by way of interim development order to carry out such completion. This completion could not, therefore, have been in contravention of previous planning control, for it was impliedly authorised by the then operative statute under which planning was controlled.

The extension of the railway and the erection of model buildings, if, as is plainly the case, these constitute development within the definition contained in s. 53 of the Town and Country Planning Act, 1932, were such as to require permission under an interim development order if they were not to be at risk of demolition or alteration without compensation should a scheme which did not include them be ultimately approved by the Minister. This construction and erection, therefore, contravened planning control in the sense that it did not accord with the plans envisaged for ultimate adoption in respect of the locality, but no effective steps to remedy the contravention could be taken by the local authority until the planning scheme received the Minister's approval. This position continued until the Act of 1947 came into operation, which swept away this barrier and provided by s. 23 for enforcement of planning control from the appointed day. Section 75 (1) made the procedure for enforcement operative in respect of antecedent works if they were carried out in contravention of previous planning control, and s. 75 (9) defines such contravention. Two things require to be established: (a) that the land in question was subject to a resolution to prepare a planning scheme; (b) that the works do not conform with permission granted under the order of 1933. The appellants do not question the facts, and both requirements have been established. The extended buildings and erections must, accordingly, be held to be a contravention of previous planning control, and are, therefore, appropriate for condemnation under the enforcement notice.

The consequence of these conclusions may appear unfortunate, in that the continued user of the area for exhibition purposes is no longer challenged and

the right to continue to use the buildings in question for such purposes cannot be assailed. The mutilation of the present lay-out by destruction of the remainder would appear to serve no useful purposes to anyone. This, however cogent for consideration by the Minister, is not a matter which concerns the court. In my judgment, therefore, in the result the order of the Divisional Court should be varied by excluding from the remitted matter any work done or buildings finished after Oct. 1, 1929, which had been begun or contracted for before that date.

Appeal dismissed.

Solicitors: *Callingham, Griffith & Bate* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *G. R. Crouch*, clerk of Buckinghamshire County Council (for the county council).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

LEE v. SHOWMEN'S GUILD OF GREAT BRITAIN.

[COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), March 20, 21, 24, April 4, 1952.]

Trade Union—Disciplinary action against member—Review of decision—Jurisdiction of court.

Domestic Tribunal—Review of decision—Jurisdiction of court.

In 1949 the plaintiff and one, S., both members of the defendant guild, applied to the local authority for a site on a fair ground. The plaintiff was allotted a position to which S. claimed, in accordance with a previous ruling of the guild, he was entitled. The plaintiff, nevertheless, occupied the site. By r. 14 (a) of the rules of the guild the committee of each section of the guild had power to impose a fine on any of its members who broke the rules, and, if the fine was not paid within one month, the member was deemed to have ceased to be a member of the guild. Rule 15 (c) provided: "No member of the guild shall indulge in unfair competition with regard to the renting, taking or letting of ground or position". On a complaint by S., a committee of the guild decided that the plaintiff was guilty of "unfair competition" within r. 15 (c), fined him, and, the fine not having been paid, resolved that he ceased to be a member. In an action by the plaintiff for declarations that the decisions of the committee were ultra vires and void,

HELD: the court had jurisdiction to examine any decision of the committee which involved a question of law, including one of the interpretation of the rules; on the facts the committee had mis-construed r. 15 (c) in finding that the plaintiff had been guilty of "unfair competition" within the meaning of that rule; and, therefore, the committee had acted ultra vires and their decision to expel the plaintiff was void.

AS TO TRADE UNION AGREEMENTS, see HALSBURY, Hailsham Edn., Vol. 32, pp. 473-483, paras. 764-771; and FOR CASES, see DIGEST, Vol. 43, pp. 96-101, Nos. 1004-1052.

Cases referred to:

- (1) *Dawkins v. Antrobus*, (1881), 17 Ch.D. 615; 44 L.T. 557; 8 Digest 507, 18.
- (2) *Leeson v. General Council of Medical Education & Registration*, (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 34 Digest 544, 30.
- (3) *Allinson v. General Council of Medical Education & Registration*, [1894] 1 Q.B. 750; 63 L.J.Q.B. 534; 70 L.T. 471; 58 J.P. 542; 34 Digest 544, 24.
- (4) *Maclean v. Workers' Union*, [1929] 1 Ch. 602; 43 Digest 101, 1046.
- (5) *Young v. Ladies' Imperial Club*, [1920] 2 K.B. 523; 89 L.J.K.B. 563; 123 L.T. 191; 8 Digest 509, 25.

- (6) *Amalgamated Society of Carpenters, Cabinet Makers & Joiners v. Braithwaite. General Union of Operative Carpenters and Joiners v. Ashley*, [1921] 2 Ch. 399; *affd.* H.L., [1922] 2 A.C. 440; 91 L.J.Ch. 688; 128 L.T. 65; 43 Digest 100, 1043.
- (7) *Rigby v. Connol.* (1880), 14 Ch.D. 482; 49 L.J.Ch. 328; 42 L.T. 139; 8 Digest 512, 38.
- (8) *Cookson v. Harewood*, [1932] 2 K.B. 478, n.; 101 L.J.K.B. 394, n.; 146 L.T. 550, n.; Digest Supp. A
- (9) *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540; 80 L.J.Ch. 315; 104 L.T. 267; 43 Digest 93, 972.
- (10) *Abbott v. Sullivan*, [1952] 1 All E.R. 226.
- (11) *Baird v. Wells*, (1890), 44 Ch.D. 661; 59 L.J.Ch. 673; 63 L.T. 312; 8 Digest 512, 39. B
- (12) *Wood v. Wood*, (1874), L.R. 9 Exch. 190; 43 L.J.Ex. 153; 30 L.T. 815; 8 Digest 510, 29.
- (13) *Weinberger v. Inglis*, [1918] 1 Ch. 517; 87 L.J.Ch. 345; 118 L.T. 769; *affd.* H.L., [1919] A.C. 606; 88 L.J.Ch. 287; 121 L.T. 65; 42 Digest 790, 14.
- (14) *Scott v. Avery*, (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 10 E.R. 1121; 16 Digest 115, 149. C
- (15) *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478; 92 L.J.K.B. 81; 127 L.T. 824; 16 Digest 116, 151.
- (16) *Re Raven*, [1915] 1 Ch. 673; 84 L.J.Ch. 489; 113 L.T. 131; 8 Digest 303, 823.
- (17) *Re Wynn's Will Trusts*, [1952] 1 All E.R. 341. D
- (18) *Labouchere v. Wharnccliffe (Earl)*, (1879), 13 Ch.D. 346; 41 L.T. 638; 8 Digest 509, 24.
- (19) *Osgood v. Nelson*, (1872), L.R. 5 H.L. 636; 10 B. & S. 119; 41 L.J.Q.B. 329; 13 Digest 317, 507.

APPEAL by the defendant guild from an order of ORMEROD, J., made on Dec. 14, 1951. E

The defendant guild was a society of showmen and a registered trade union formed to protect the rights and interests of showmen visiting fairs and show-grounds. The plaintiff was a travelling showman and at all material times a member of the guild. By a bye-law of the Yorkshire section committee of the guild no member of the guild should apply for the use of any position in a fair-ground which another member had occupied for two immediately previous consecutive years if such other member desired again to occupy that position. By r. 6 of the rules of the guild any member guilty of unruly conduct might be called before his section committee who had power to expel him from the guild. By r. 14 (a) the section committee had power to impose fines on any of its members breaking any of the provisions of the rules or bye-laws, and, if such fine was not paid within a month, the member was deemed to have ceased to be a member of the guild. Any member on whom a fine had been imposed by his section committee had the right of appeal to the central council of the guild. Rule 15 (c) provided: "No member of the guild shall indulge in unfair competition with regard to the renting, taking or letting of ground or position." By r. 26 all members of the guild had the option, at the termination of the war or before, of taking up their pre-war positions at all fairs, providing that the section committee was satisfied that the claim was justified. Rule 30 defined "the rules" as meaning and including the rules of the guild for the time being in force. F
G
H

Between 1934 and 1943 one William Shaw occupied a certain position (No. 2 site) at the Bradford summer fair, which was held on ground belonging to the Bradford Corporation. In 1945 and 1946 the position was occupied by

the plaintiff. In 1947 there was no fair. In that year Shaw applied to the committee to have the option of again taking up his pre-war position at the fair, and on Aug. 19, 1947, the committee, acting under r. 26, granted to Shaw the right to take up his pre-war position. In 1948 the plaintiff arranged to occupy No. 2 site, but permitted Shaw to occupy it without prejudice to his (the plaintiff's) claim to be solely entitled to its occupation. On May 25, 1948, on a complaint by Shaw to the committee regarding the plaintiff's assertion of a right to occupy No. 2 site the committee, after hearing the plaintiff, decided that Shaw was entitled to occupy the site, and on June 7, 1948, on appeal to the appeal committee this decision was upheld. In 1949 the plaintiff occupied the position and Shaw again complained to the committee, in the following terms: "(2) I . . . herewith wish to make the following two complaints against Mr. Frank Lee, one under r. 15 (c) he occupied my Noah's Ark position with his Noah's Ark at Bradford fair, July, 1949, knowing the same had been given to me under r. 26 as he lodged an appeal against the section's decision and the section's decision was upheld and I occupied the position in 1948 with my Noah's Ark which had been granted to me. (3) I also wish to make a complaint against Mr. F. Lee under standing order No. 3 re Bradford fair, July, 1949, that he did violate the appeal committee's decision by occupying my Noah's Ark position with his Noah's Ark after I had been granted same by the appeal committee. He occupied the same position after having been asked three times whether he intended occupying same by the Yorkshire section committee and each time he said he was going to occupy same, this was before he started to build up." On Aug. 14, 1949, the committee decided that the case against the plaintiff had been proved, fined him £100, and instructed him to hand back the position to Shaw. On Oct. 12, 1949, the plaintiff having failed to pay the fine, the committee resolved that he was deemed to have ceased to be a member of the guild. The plaintiff claimed declarations, inter alia, (i) that the committee's decision of May 25, 1948, and that of the appeal committee on June 7, 1948, were ultra vires and void, (ii) that the plaintiff was not guilty of unfair competition, and (iii) that the decisions of the committee on Aug. 14, and Oct. 12, 1949, were ultra vires and the plaintiff was still a member of the guild. The plaintiff further claimed injunctions restraining, inter alia, the guild from excluding the plaintiff from the premises of the guild or preventing him from exercising his rights and privileges of membership of the guild. The defendant guild contended that the committee's decision that the plaintiff was guilty of unfair competition within r. 15 (c) was final and one with which the courts had no jurisdiction to interfere. ORMEROD, J., held that the plaintiff's conduct did not amount to unfair competition and that the fine and expulsion were ultra vires and void.

Sir Frank Soskice, Q.C., and Wingate-Saul for the guild.

Percy Lamb, Q.C., and Beaton for the plaintiff.

Cur. adv. vult.

April 4. The following judgments were read.

SOMERVELL, L.J. [after stating the facts]: In this class of case it seems to me plain that the nature of the complaint should be clearly stated, and para. (2) of Mr. Shaw's complaint in 1949 seems to me to satisfy that test. The standing order referred to in para. (3) deals with appeal sub-committees and throws no light on the nature of the charge. It is on the face of it a charge that the plaintiff had violated a decision of the appeal committee. That does not, in my opinion, come within r. 14. Counsel for the defendant guild submitted that it should be regarded as a complaint of violating r. 26. There are two difficulties about this. First, it does not so state. Secondly, by this time r. 26 had ceased to exist as a rule, though it is not suggested that rights acquired under it did not remain in force. We were referred to the definition of "the rules" in r. 30. That does not, in my view, assist the argument. It was suggested that the violation of a committee's decision might be brought under r. 6. I express no opinion about that

because quite plainly there was no charge as to a breach of r. 6. In my opinion, the only charge that falls to be considered is for a breach of r. 15 (c). Before the learned judge the case seems to have proceeded on the basis that that was a question for him on the facts which were really not in dispute. Before us counsel for the defendant guild, relying on a number of statements in reported cases, suggested that the committee's decision on the matter was final if, whatever the view of this court, the facts were such that the words of the rule might be applicable.

I will read the passage in which the learned judge dealt with this point:

"Because the plaintiff in 1948 allowed without prejudice Mr. Shaw to have the use of this site and because he properly thought he was entitled to it in 1949 and insisted on having it, I am asked to say that conduct of that kind amounts to unfair competition to bring him within r. 15 (c) of these rules. Even if that were all the rule said, I think I should have the greatest possible difficulty in finding that the action taken by the plaintiff on the occasion when the complaint arose was action which came within the wording of r. 15 (c), but I doubt very much whether on a reading of the whole of sub-r. (c) of that rule it deals or is intended to deal in any way with conduct of this kind. It appears to me that it is intended to deal almost entirely, if not entirely, with questions arising in the course of either under-cutting, on the one hand, or bribery by offering an increased rent on the other hand, and not unfair competition in the sense of one man saying: 'Whatever the committee's decision, I am entitled to the use of this site.' How I could hold or any other court could hold that the conduct of the plaintiff in these circumstances came within that rule I find it impossible to think, and I am satisfied it did not come within that rule."

Counsel for the defendant guild submitted that this was wrong. He put it in this way. He said quite rightly that the plaintiff and Mr. Shaw were competitors. There was competition for No. 2 site, which was, no doubt, the better site. The plaintiff in insisting on its use, notwithstanding the decision of the committee, was being unfair. Therefore, there was unfair competition. I do not think that, if the words "unfair competition" stood alone, they are apt to describe what happened here. It is often fallacious in considering the meaning of a phrase consisting of two words to find a meaning which each has separately and then infer that the two together cover the combination so arrived at. The two together may, as here, have acquired a special meaning of their own. In any event, the phrase here has to be read in the context of the rule, and I agree with the learned judge that so construed it is incapable of being applied to the plaintiff's conduct.

Counsel referred us to some cases dealing with the circumstances in which the court will interfere or will refrain from interfering with the decisions of a domestic tribunal. Before I refer to them it is right to say that there is no question here of any breach of what are called the principles of natural justice still less of malice or bad faith. The plaintiff was heard and the committee, I think, made praiseworthy efforts to try to get the trouble resolved. In considering statements in cases it is, I think, important to have in mind what was the subject-matter dealt with by the rule which was before the court. In *Dawkins v. Antrobus* (1) the court was concerned with the rule of a club which provided that, if the conduct of a member was "in the opinion of the committee . . . injurious to the character and interests of the club", he could, subject to a right of appeal to a general meeting, be expelled. BRETT, L.J., referred to the danger of the courts acting as courts of appeal from decisions of members of clubs. On the words and subject-matter in question the court considered, first, whether there was anything contrary to natural justice. Being satisfied that there was not, they then, as I read the judgments, proceeded on the basis that, being satisfied the decision was bona fide, the court would not further examine into the matter, although two

of the lords justices indicated that they thought the decision reasonable. Although, of course, any rule or formula in one sense involves construing the words used, the question here was the opinion of a body of men on a question of the standards of propriety and conduct appropriate to members of a particular association. In considering in such a case whether the committee has acted *intra vires*, they will, perhaps, inevitably have done so if they have acted *bona fide*.

In *Leeson v. General Council of Medical Education & Registration* (2) and *Allinson v. General Council of Medical Education & Registration* (3) this court had, *inter alia*, to consider the words of s. 29 of the Medical Act, 1858:

"If any registered medical practitioner . . . shall after due inquiry be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

There are words in the judgment of COTTON, L.J., in *Leeson's* case (2), which suggest that, subject to the principles of natural justice, the court would only interfere if satisfied that the council had not acted honestly. BOWEN, L.J., proceeded on the same lines. Counsel for the guild relied on these judgments. In *Allinson's* case (3) the test is, as I read it, put more objectively. LORD ESHER, M.R., said ([1894] 1 Q.B. 761):

"Was the evidence, taken as a whole, reasonably capable of being treated by the council as bringing the plaintiff within that definition of 'infamous conduct in a professional respect'?"

LOPES, L.J., held (*ibid.* 763) that the court would not interfere if there was any evidence on which the council could reasonably have come to their decision. DAVEY, L.J., puts it in the same way at the conclusion of his judgment. In these cases the question was primarily one, not of construction, but of professional ethics.

In *Maclean v. Workers' Union* (4) MAUGHAM, J., had to consider a case in which the plaintiff had been expelled for committing a breach of the rules. The plaintiff maintained that in the circumstances of the case the committee could not be impartial. The plaintiff had attacked the committee. There was a long history of previous disputes. They were, therefore, it was said, biased in their conclusion to expel him and their decision was void. MAUGHAM, J., reviewed the decisions. He preferred the statements in *Leeson's* case (2) to those in *Allinson's* case (3). With respect, I prefer the latter, though it may be, on the subject-matter being considered in those cases, that the distinction is one without a difference. If a committee have held that "A" is established when there was no evidence on which they could so find, I think the court should interfere although they, the committee, may have honestly misconstrued the provisions under which they were purporting to act. The issue as raised in *Maclean's* case (4) does not, of course, arise in this appeal.

The decision in *Young v. Ladies' Imperial Club* (5) is as such, of no assistance. SCRUTTON, L.J. ([1920] 2 K.B. 535), stated that this court is not a court of appeal from the decisions of club committees,

"... provided the committees are properly constituted and properly summoned, and deal with the matter in a way not contrary to the principles of natural justice."

I am sure the learned lord justice did not intend to exclude the rules, in considering the question whether the committee had acted *ultra vires*. In *Amalgamated Society of Carpenters, Cabinet Makers & Joiners v. Braithwaite* (6) the House of Lords, after disposing of the first defence based on s. 4 of the Trades Union Act, 1871, proceeded to consider a defence based on the construction and

application of the rules. Although it would appear that a committee had regarded a breach of one of the rules as proved to their satisfaction, it would seem, at any rate to me, that they were a committee acting in an executive capacity and not as a domestic tribunal deciding a charge after hearing the party or parties charged. In any case there appears to have been no doubtful issue on the point with which we have to deal.

These cases, in my opinion, show that, even where the subject-matter is as it was in the medical cases, the courts will interfere if there is no evidence. In such a case the committee will have acted *ultra vires*. That, on the conclusion which I have already expressed, is sufficient to enable the plaintiff to hold the judgment which he obtained below.

This is a difficult and important branch of the law. I am alive, I hope, to the important and necessary work done by domestic tribunals normally with care, skill and fairness. I am also alive to the principle reiterated more than once that this court cannot be made a court of appeal from decisions of such tribunals. On the other hand, a power of expelling a member is a drastic power which in many cases, as here, may affect the plaintiff's livelihood, or reputation. There is, in my opinion, a distinction between cases where the decision challenged is under the rules based on the opinion of a committee on a matter which is primarily one of opinion, and those cases, such as the present, where the decision is, or should be, based primarily on the legal construction of words in a rule. The principles laid down in the former class of case are sufficient for the plaintiff here. I wish, however, to make it clear that, in my opinion, the principles laid down in those cases are not necessarily to be regarded as setting the limit to the jurisdiction of this court where the issue is one primarily of construction.

DENNING, L.J.: The jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as Parliament authorises it or the parties agree to it. The jurisdiction of the committee of the Showmen's Guild is contained in a written set of rules to which all the members subscribe. This set of rules contains the contract between the members and is just as much subject to the jurisdiction of these courts as any other contract.

It was once said by SIR G. JESSEL, M.R., that the courts only intervened in these cases to protect rights of property: see *Rigby v. Connol* (7) (14 Ch. 487); and other judges have often said the same thing: see, for instance *Cookson v. Harewood* (8) ([1932] 2 K.B. 481 and 488). But FLETCHER MOULTON, L.J., denied that there was any such limitation on the power of the courts: see *Osborne v. Amalgamated Society of Railway Servants* (9) ([1911] 1 Ch. 562); and it has now become quite clear that he was right: see *Abbott v. Sullivan* (10). *Abbott's* case (10) shows that the power of this court to intervene is founded on its jurisdiction to protect rights of contract. If a member is expelled by a committee in breach of contract, this court will grant a declaration that their action is *ultra vires*. It will also grant an injunction to prevent his expulsion if that is necessary to protect a proprietary right of his, or to protect him in his right to earn his livelihood: see *Amalgamated Society of Carpenters, Cabinet Makers & Joiners v. Braithwaite* (6), but it will not grant an injunction to give a member the right to enter a social club, unless there are proprietary rights attached to it, because it is too personal to be specifically enforced: see *Baird v. Wells* (11) (44 Ch.D. 675, 676). That is, I think, the only relevance of rights of property in this connection. It goes to the form of remedy, not to the right.

Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation

to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard. That appears, I think, from the judgments of BRETT, L.J., in *Dawkins v. Antrobus* (1) (17 Ch.D. 630), of KELLY, C.B., in *Wood v. Woad* (12) (L.R. 9 Exch. 196), and of LORD BIRKENHEAD, L.C., in *Weinberger v. Inglis* (13) ([1919] A.C. 616), which are to be preferred to the dictum of MAUGHAM, J., in *Maclean v. Workers' Union* (4) to the contrary. Another limitation arises out of the well-known principle that parties cannot by contract oust the ordinary courts of their jurisdiction: see *Scott v. Avery* (14) (5 H.L. Cas. 845, 846) per ALDERSON, B., and LORD CRANWORTH, L.C. They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void: see *Czarnikow v. Roth, Schmidt & Co.* (15) ([1922] 2 K.B. 488), *Re Raven* (16) and *Re Wynn's Will Trusts* (17).

The question in the present case is: To what extent will the courts examine the decisions of domestic tribunals on points of law? This is a new question which is not to be solved by turning to the club cases. In the case of social clubs the rules usually empower the committee to expel a member who, in their opinion, has been guilty of conduct detrimental to the club, and this is a matter of opinion and nothing else. The courts have no wish to sit on appeal from their decisions on such a matter any more than from the decisions of a family conference. They have nothing to do with social rights or social duties. On any expulsion they will see that there is fair play. They will see that the man has notice of the charge and a reasonable opportunity of being heard. They will see that the committee observe the procedure laid down by the rules, but will not otherwise interfere: see *Labouchere v. Earl of Wharnccliffe* (18), *Dawkins v. Antrobus* (1). It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield powers as great, if not greater, than any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers, but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee. Is such a tribunal to be treated by these courts on the same footing as a social club? I say: "No." A man's right to work is just as important, if not more important, to him than his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work.

But the question still remains: To what extent will the courts intervene? They will, I think, always be prepared to examine the decision to see that the tribunal have observed the law. This includes the correct interpretation of the rules. Let me give an illustration. If a domestic tribunal is given power by the rules to expel a member for misconduct, such as here for "unfair competition", does that mean that the tribunal is the sole judge of what constitutes unfair competition? Suppose they put an entirely wrong construction on the words "unfair competition" and find a member guilty of it when no reasonable person could so find, has not the man a remedy? I think he has, for the simple reason that he has only agreed to the committee exercising jurisdiction according to the true interpretation of the rules, and not according to a wrong interpretation. Take this very case. If the man is found guilty of unfair competition, the committee can impose a fine on him of a sum up to £250. Then, if he has not the

money to pay, or, at any rate, does not pay, within one month, the man automatically ceases to be a member of the guild: see r. 14. To be deprived of membership in this way is a very severe penalty on a man. It means that he will be excluded from all the fair grounds of the country which are controlled by the guild or its members: see r. 11 (g) (ii) and r. 15 (a). This is a serious encroachment on his right to earn a livelihood, and it is, I think, not to be permitted unless justified by the contract into which he has entered. These courts have never allowed a master to dismiss a servant except in accordance with the terms of the contract between them. So also they cannot permit a domestic tribunal to deprive a member of his livelihood or to injure him in it, unless the contract, on its true construction, gives them power to do so. I repeat "on its true construction" because I desire to emphasize that the true construction of the contract is to be decided by these courts and by no one else. Counsel for the defendant guild argued that it was for the committee of the guild to construe the rules, and, so long as they put an honest construction on them, then their construction was binding on the members, even though it was a wrong construction. I cannot agree with this contention. The rules are the contract between the members. The committee cannot extend their jurisdiction by giving a wrong interpretation to the contract, no matter how honest they may be. They have only such jurisdiction as the contract on its true interpretation confers on them, not what they think it confers. The scope of their jurisdiction is a matter for the courts, and not for the parties, let alone for one of them. This is how the House of Lords approached the problem in the *Carpenters'* case (6), and I think we should follow their example.

In most of the cases that come before such a domestic tribunal the task of the committee can be divided into two parts—(i) they must construe the rules; (ii) they must apply the rules to the facts. The first is a question of law which they must answer correctly if they are to keep within their jurisdiction. The second is a question of fact which is essentially a matter for them. The whole point of giving jurisdiction to a committee is so that they can determine the facts and decide what is to be done about them. The two parts of the task are, however, often inextricably mixed together. The construction of the rules is so bound up with the application of the rules to the facts that no one can tell one from the other. When that happens, the question whether the committee has acted within its jurisdiction depends, in my opinion, on whether the facts adduced before them were reasonably capable of being held to be a breach of the rules. If they were, then the proper inference is that the committee correctly construed the rules and have acted within their jurisdiction. If, however, the facts were not reasonably capable of being held to be a breach and yet the committee held them to be a breach, then the only inference is that the committee have misconstrued the rules and exceeded their jurisdiction. The proposition is sometimes stated in the form that the court can interfere if there was no evidence to support the finding of the committee, but that only means that the facts were not reasonably capable of supporting the finding.

We were referred to a number of cases on statutory tribunals. These are not directly in point, because a statute can, expressly or by implication, exclude the jurisdiction of the courts, whereas parties cannot do so. Nevertheless, in cases where the jurisdiction is not excluded, the courts have intervened on the same principles as I have mentioned. The cases show that, although Parliament has given a tribunal power to deprive a man of his livelihood for a particular cause, nevertheless the courts will intervene if there is a real substantial miscarriage of justice with regard to him, and they will hold there is a miscarriage of justice if the facts adduced before the tribunal are not reasonably capable of supporting the charge made against him. Thus, where an Act stated that a tribunal might remove a registrar for "any cause which may appear reasonable to the tribunal", all the judges of England were of opinion that the courts would take care to see

that the cause was a real and substantial cause. There must, it was held, be sufficient evidence to go to a jury on it: see *Osgood v. Nelson* (19) (10 B. & S., 156, 164, 167, and L.R. 5 H.L. 646-654). So, also, when the General Medical Council were empowered to remove a medical man for "infamous conduct", it was held by this court that the facts before them must be reasonably capable of being so considered: *Allinson's case* (3) ([1894] 1 Q.B. 761, per LORD ESHER, M.R.). It has sometimes been said in these cases that absence of evidence is not itself a ground for the intervention of the court, but only goes to show bad faith in the tribunal: see *Leeson's case* (2) (43 Ch.D. 377, 384) and *Maclean v. Workers' Union* (4) ([1929] 1 Ch. 623); but I do not think those statements can stand in the light of *Osgood v. Nelson* (19) which was not cited to the court in either case. Those cases, it is true, concerned statutory tribunals, but I see no reason why the power of the court to intervene should be any less in the case of domestic tribunals. In each case it is a question of interpretation, in the one of a statute, in the other of the rules, in order to see whether the tribunal have observed the law. In the case of statutory tribunals, the injured party has a remedy by certiorari, and also a remedy by declaration and injunction. The remedy by certiorari does not lie to domestic tribunals, but the remedy by declaration and injunction does lie and it can be equally effective, if not more effective than certiorari. It is, indeed, more effective because it is not subject to the limitation that the error must appear on the face of the record.

My conclusion, therefore, is that the court has power in this case to intervene in the decision of the committee of the Showmen's Guild if no facts were adduced before them which could reasonably be considered to be "unfair competition" within r. 15 (c) which says that

"No member of the guild shall indulge in unfair competition with regard to the renting, taking or letting of ground or position."

The facts are not in dispute. In May, 1949, the plaintiff and Mr. Shaw applied to the Bradford Corporation for a site on the fair ground for the Bradford Moor Fair. No allocations were made by the corporation before the two showmen arrived on the ground, but when they got there, it was found that the best position had been allotted to the plaintiff. Mr. Shaw then claimed that, in accordance with a previous ruling of the guild, he was entitled to the position. The corporation thought that the plaintiff was entitled to it, but they were quite ready to allow the showmen to decide between themselves. But the plaintiff said that, as the corporation had allotted it to him, he was going to stand on it. The learned judge held that there was nothing of "unfair competition" in the plaintiff's conduct and I agree with him. It may have been very reprehensible of him not to abide by the previous ruling of the guild. He should have given way to Mr. Shaw, but he can hardly be said to have been guilty of unfair competition. There was no undercutting or anything of that sort. He only accepted the position allotted to him and stood on it. Inasmuch as the facts are not reasonably capable of being "unfair competition" it follows that the committee had no jurisdiction to find him guilty of it.

There was another charge suggested though not clearly made against the plaintiff, namely, that he failed to observe the previous ruling of the committee which awarded Mr. Shaw the site. That ruling had been given in June, 1948, under r. 26 of the 1948 rules, and if that rule had been in existence in 1949, it may be that the plaintiff could have been found guilty of evading it. But it was not in existence in 1949. It had been repealed, and it is difficult to see how the plaintiff could be guilty of evading a rule which had ceased to exist. That was, no doubt, the reason why he was not charged with evading it. I do not stay to consider whether the plaintiff could have been charged with "unruly conduct" under r. 6. That was not before the committee, and is, therefore, not before us. The only real question before us is whether, on the admitted facts, the plaintiff

could properly be found guilty of "unfair competition" within r. 15 (c). I agree with the judge that he could not. I would, therefore, dismiss the appeal.

ROMER, L.J.: In the case of trade unions such as the defendant guild the rules constitute a contract which are binding on the members and are enforceable against them. The plaintiff, accordingly, on joining the union became bound to observe the rules which were for the time being in force and which regulated matters as between the executive and the members and as between the members themselves. This obligation, however, carried with it the corresponding right of remaining a member unless and until he forfeited that right by conduct which, under the rules, justified his expulsion from the guild. In general this right to continued membership of a trade union is of vital importance to men who join it and expulsion from the union may well result in the loss to a man of his only known means of livelihood. It is a right which the courts recognise and will not hesitate, in proper circumstances, to protect.

The plaintiff in this case, Mr. Lee, having been expelled from the defendant guild, comes to what are, *prima facie*, the proper tribunals in this country for the redress of grievances, namely, Her Majesty's courts, and seeks to establish that his expulsion was wrongful and to have his right to continued membership of the guild recognised and affirmed. He was met before us (though not, apparently, before the learned judge below) with the contention that he has no right to resort to the courts on this matter inasmuch as he is bound under the rules to accept as final and binding the decision of the domestic tribunal which adjudicated on his case, and that that tribunal is the sole and decisive arbiter of his fate. The particular provision on which this contention is based is r. 14 (a), which has already been read and which I will not read again. There can be no question but that the plaintiff, by virtue of this rule, has, on the face of it, agreed to accept the decision of the relevant tribunal on such matters as properly come within the scope of its jurisdiction. On any question, however, that is outside that scope he is free to come to the courts. The first question, therefore, to be considered is whether the decision which resulted in disciplinary action being taken against the plaintiff was or was not one which lay within the exclusive province of the tribunal. I will not re-state the controversy which arose at Bradford or the part which the plaintiff played in it. Suffice it to say that he conceived that he had a right under a bye-law passed in 1941 to a certain pitch at the fair which was claimed by a man named Shaw and carried his assertion of that right to the point of defying a contrary ruling by the properly constituted representatives of the guild. A domestic tribunal (hereinafter referred to as "the committee") was convened to consider the affair and on the facts (which were substantially not in dispute) that tribunal held that the plaintiff's conduct infringed r. 15 (c) which forbids members of the guild from indulging in unfair competition. This finding sufficiently furnished (as the committee thought) the necessary condition precedent to action under r. 14 (a), and that action, which took the form of fining, and subsequently expelling, the plaintiff, was accordingly taken. The plaintiff says that the committee's decision was wrong (in which I agree with him), but the question for the moment is whether it is open to him to come to the courts and say so.

The question whether a member of a community is in breach of a rule which he has agreed shall be binding on him may be purely factual, or may be one partly of fact and partly of law, or may be one purely of construction of the rule, in which case it is wholly a question of law. In my judgment, the inquiry on which the committee embarked in the present case came within the third of these categories for no question of fact was really in dispute. There was no doubt about what had happened at Bradford and it was the aim of the plaintiff, not to deny his actions, but to justify them. All, therefore, that the committee had to do was to determine whether those actions came within the prohibition imposed on

members by r. 15 (c). Its primary and only task, accordingly, was to interpret the meaning and effect of that sub-rule or, as lawyers say, to construe it.

Did, then, the plaintiff, when he joined the guild, agree to accept as final and binding the decision of the committee on questions that might arise as to the construction of the rules? I leave aside for the moment the question whether he would be bound in law by any such agreement, but did he in fact agree? Such an agreement might have unfortunate, and even disastrous, results. There are few questions in the legal sphere which call for a higher degree of skill and experience in those who approach them than questions arising from the construction of documents. Such problems come almost daily before the courts and can in many cases only be solved by the proper application of principles which have been gradually evolved and of which the average layman has never heard. Even with a knowledge of such principles the task is frequently difficult and it is one for which a lay tribunal is singularly unfitted to deal. In these circumstances I should require the use of clear language before I was satisfied that members of any body such as the defendant guild had agreed to leave exclusively to a domestic tribunal powers which it had neither the knowledge nor experience to use and which, if misused (however honestly), might have such serious consequences for the members. I can find no such language in r. 14. The defendants' argument is that any member can be fined and expelled under this rule if he breaks a rule as construed by the committee even though, on its true construction, he has not broken it at all. The short answer to this contention, as it seems to me, is that r. 14 does not say so. If the rule had provided that members who "in the opinion" or "in the judgment" of the committee broke the regulations, then the plaintiff might, on this aspect of the case, have found himself in a difficulty. That qualification does not, however, appear. The condition precedent to the taking of action under r. 14 is that a member should have broken the rules, and that, in my opinion, means according to what they really mean and not according to what the committee think they mean. It is provided in sub-r. (b) of r. 14 that the decision of an appeal committee is to be taken as final as regards any member who appeals to them, and I am willing to assume (although it does not expressly say so) that the decision of the subordinate committee is also to be final if a member does not appeal. Even so, the condition precedent remains, and there is no sufficient indication in the rule that the committee are to be the final interpreters of the rules which constitute the contract into which the members of the guild have entered. If they attribute to a rule a meaning which it does not bear and then punish a man for breach of the rule as so construed, they are assuming a jurisdiction which they do not possess if the man has conformed to the rule on its proper interpretation, and I can find nothing in r. 14 to suggest that such a man has contracted out from applying to the court to determine whether, on the true construction of the rule which he is said to have broken, he has broken it in fact.

So far as I am aware, there is nothing in any of the decided cases which conflicts with the view which I have expressed. It certainly does not conflict with what I may call "the club cases": see, for example, *Dawkins v. Antrobus* (1). Two elements of importance distinguish those cases from this. First, by the rules in the club cases by which the members agreed to be bound, it was expressly provided that the test of expulsion was whether "in the opinion of" the domestic forum the conduct of a member warranted it, and, secondly, the decision on which the intervention of the courts was unsuccessfully sought were questions of ethics and not of law. Such questions are peculiarly within the province of the committee of a social club and it is now well established that the courts will not interfere even with unreasonable decisions provided that the committee has not acted dishonestly or in excess of jurisdiction in arriving at them. We were also referred to cases such as *Leeson's case* (2) and *Allinson's case* (3). In those cases the powers of the medical disciplinary body, the General

Medical Council, were under discussion. Such powers are conferred by statute (and not, as in the club cases, by the members themselves) and under them the name of a medical practitioner can be erased from the register if after due inquiry he is judged by the general council to have been guilty of infamous conduct in any professional respect. Accordingly, as in the club cases, a domestic tribunal, peculiarly qualified for the task, is established whose duty it is to inquire into questions of conduct and arrive at a conclusion on them. Parliament has entrusted the General Medical Council with this duty in substitution for the courts. Appeals to the courts in the medical cases, as in the club cases, have been in relation to decisions on ethical, not legal, questions, and the considerations which, and which alone, will warrant the intervention of the courts have been stated in not dissimilar terms.

In truth, I think that neither the club nor the medical cases, or the grounds on which they were decided, are of much assistance in the case that is now before us. The expulsions complained of in those cases depended on matters which lay within the exclusive competence of the domestic tribunals to decide whereas in the present case the plaintiff's expulsion depended on a matter which, in my view, the committee had no exclusive competence to decide, namely, the interpretation or construction of the rules. Further, in neither the club cases nor the medical cases has the question been raised or decided whether resort to the courts will be entertained where the opinion or judgment of the domestic tribunal has been on a question of law as distinct from a question of personal conduct. Of greater relevance to the present question, as I think, are cases in which the courts have exercised their power to adjudicate on rights contractually acquired notwithstanding the conferment of such power on domestic and untrained bodies. An example of this is the *Amalgamated Society of Carpenters, Cabinet Makers & Joiners v. Braithwaite* (6). In that case the rules of the appellant trade union included a rule (32) which provided that it should be competent for any managing committee, district council, branch committee, or branch at a special quarterly meeting

"to fine . . . or expel any member from the society upon satisfactory proof that such member . . . [was] working on a co-partnership system when such system makes provision for the operatives holding only a minority of the shares in the concern."

The power of expulsion was, accordingly, exercisable under the rule if it had been proved to the satisfaction of the relevant tribunal that a member was so working. The respondents (members of the society) joined a co-partnership scheme inaugurated by Lever Brothers, Ltd. and the appellant society issued instructions to the effect that any member of the society who participated in this scheme must be excluded from the society in accordance with the general rules. The respondents obtained from the Court of Appeal (who reversed the decision of EVE, J.) a perpetual injunction restraining the society from expelling them from the society on the ground that their participation in the scheme justified their expulsion under r. 32. Now, although, presumably, the society, in acting on that rule, found it proved to its satisfaction that the respondents were working on a co-partnership of the nature described in the rule before it issued instructions for the expulsion of the respondents, it did not, apparently, rely on that fact as a bar to the respondents' action either in the Court of Appeal or the House of Lords. The society sought to defeat the respondents' action partly on the ground that it was precluded by s. 4 of the Trade Union Act, 1871, and partly on the ground that r. 32 justified the expulsion. The House of Lords (affirming the Court of Appeal) rejected the contention based on the Act and then proceeded to consider whether participation in the Lever Brothers scheme did or did not transgress the relevant part of r. 32. This (as sufficiently appears from the speech of LORD WRENBURY ([1922] 2 A.C. 471, 472) was a mixed question of fact and construction and the House was in no way deterred from considering it merely because of the jurisdiction which the rule gave to the society. Their Lordships in fact decided

this question in the respondents' favour, and thus, in effect, overruled the society's decision on the matter. Another decision of the House of Lords which may usefully be referred to in this connection is *Osgood v. Nelson* (19).

For the above reasons I am satisfied that the plaintiff is in no way debarred from asking the court to say that the committee mis-construed r. 15 (c) and to contend that on its true construction nothing that he did at Bradford was in breach of its provisions. I have already indicated that, in my opinion, the committee did mis-interpret the rule, and on this point I entirely agree with the view which the learned judge expressed. It was argued for the defendant guild that, in asserting his right to the coveted pitch on the fair ground, the plaintiff unfairly competed with Shaw in the "taking" of that pitch. In my judgment, this is attributing to the sub-rule an effect which goes far beyond its terms. If "A" and "B" claim the right to occupy the same position on a ground it might be said that in a sense they were "competing" for that position. Assuming (though I do not accept the assumption) that that kind of competition was "competition" within the meaning of the rule, when does it become "unfair"? If the appropriate authority decides that "A" is right, it follows that "B" is wrong, but it cannot be said that "B" was unfair in advancing his claim. A plaintiff who unsuccessfully sues to establish his title to land may be ill-advised, obstinate, or even pig-headed, but it is difficult to see how he could legitimately be charged with unfairness. In the present case the plaintiff was setting up a claim under the bye-law of 1941 in answer to Shaw's claim under r. 26. In that endeavour he failed, but I agree with the learned judge that his action did not constitute "unfair competition" even if one takes the first sentence of r. 15 (c) by itself. When, however, one looks at the rest of the sub-rule—and the meaning of a part can only be ascertained by a consideration of the whole—it becomes abundantly plain that the prohibition which the rule imposes is against competition of quite a different kind from that which arises when there are rival claimants to a site. Every provision in r. 15 (c) which follows the first sentence constitutes an exception to, or qualification of, or an express inclusion in, a general rule. If a general rule is couched in equivocal terms light may well be thrown on the meaning which it was intended to bear by provisos that are subsequently engrafted upon it. In r. 15 (c) the general rule is stated in the first sentence and prohibits "unfair competition" in the renting, taking or letting of ground or position. This is followed by provisions to the effect that certain acts shall not be, and that other acts shall be, regarded as breaches of the general rule. Each of these acts is characterised by the feature of undercutting or bribery and each of these features is characteristic of the ordinary conception of unfair competition. From this it is a very legitimate inference that the general rule is one which prohibits competition between members by means of undercutting or bribery or by acts analogous thereto. The plaintiff never broke this rule and, as he was never charged with a breach of any other rule, it cannot be postulated of him that he came within that category of members against whom and against whom alone, the committee, under the provisions of r. 14 (a), had authority to act. I am, therefore, of opinion that the plaintiff has not contractually ousted the jurisdiction of the courts to entertain his action, and that, in the exercise of that jurisdiction, he is entitled to the relief which was granted to him in the court below.

I am, accordingly, of the opinion that the appeal fails. I would, however, like to say a word or two as to what the position would have been, in my view, if the defendant guild had succeeded in establishing that the effect of r. 14 (a) was to vest in the committee the exclusive power of interpreting the rules and that the plaintiff had contractually debarred himself from resorting to the courts even though the committee adopted a palpably erroneous construction of a rule. I hesitate to express a concluded view on this point, partly because it does not arise if I am right in thinking that the powers of the committee under r. 14 (a)

are not such as the defendant guild claim them to be and partly because it was not argued before us. It seems to me, however, as at present advised, that on the hypothesis which I have suggested it is at least possible that the courts would hold that the plaintiff's agreement to accept as final decisions of the committee on the construction of the rules was not binding on him. The proper tribunals for the determination of legal disputes in this country are the courts and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates, are fitted for the task. The courts jealously uphold and safeguard the prima facie privilege of every man to resort to them for the determination and enforcement of his legal rights. As an example of this it has been held that any attempt by a testator to divert from the courts the power of deciding questions of construction that may arise on his will and vesting that power in his executors instead will fail: *Re Raven* (16), *Re Wynn's Will Trusts* (17). Directions of this kind by testators will be disregarded partly on the ground that they are contrary to public policy as being attempts to oust the jurisdiction of the courts, and partly as being repugnant to the benefits conferred by the will on the beneficiaries. If the cases to which I have referred were rightly decided, as I think they were, it may well be that the same considerations of public policy which act as a fetter on testamentary attempts to oust the jurisdiction of the courts on questions of law would defeat contractual attempts to bring about the same result, and more especially, perhaps, where the contract is contained in trade union rules to which members of the union are virtually bound to subscribe. I will only add that passages in the judgments of this court in *Czarnikow v. Roth, Schmidt & Co.* (15) lend support, as I think, to the view that if r. 14 (a) had the force and effect which the defendant guild has suggested should be attributed to it the courts would not recognise as binding the attempted ouster of jurisdiction which would be thereby involved.

Appeal dismissed.

Solicitors: *J. H. Milner & Son* (for the guild); *Stafford Clark & Co.*, agents for *G. E. Hutchinson*, Huddersfield (for the plaintiff).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

Re AGRICULTURAL INDUSTRIES, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), April 1, 2, 1952.]

Court of Appeal—Hearing in camera.

Company—Winding-up—Contributory—Realisation of assets—Desirability of ascertaining views of contributories.

PER SIR RAYMOND EVERSLED, M.R.: Notwithstanding that a matter was heard at first instance in chambers, to justify the Court of Appeal in sitting in camera it must be shown plainly that otherwise the ends of justice would be liable to be defeated within the principle laid down in *Scott v. Scott* ([1913] A.C. 417). The Court of Appeal has no power to sit in chambers.

The only assets of a public limited company, A. Ltd., were forty-nine per cent. of the shares of a private limited company, W. Ltd. An order was made for the winding-up of A. Ltd., and the liquidator entered into an agreement (conditional on the approval of the court) with the holder of the majority of the shares in W. Ltd., for the sale to him of the minority holding. Certain contributories of A. Ltd., desired the liquidator to apply to the court to have W. Ltd., wound-up in order that proceedings might be taken against the directors. The liquidator refused.

PER SIR RAYMOND EVERSLED, M.R.: I have not been impressed by the suggestion that the contributories cannot be expected to form an opinion on such a matter themselves. They are the persons solely concerned, and, however well founded may be the liquidator in his opinion, it is wrong to

deny the contributories an opportunity, if they wish, even of throwing good money after bad.

AS TO HEARING IN CAMERA, see HALSBURY, Hailsham Edn., Vol. 8, p. 526, para. 1167; and FOR CASES, see DIGEST, Vol. 16, pp. 128-131, Nos. 259-289.

Cases referred to:

- (1) *Scott v. Scott*, [1913] A.C. 417; 82 L.J.P. 74; 109 L.T. 1; 16 Digest 31, 301.
- (2) *Mellor v. Thompson*, (1885), 31 Ch.D. 55; 55 L.J.Ch. 942; 54 L.T. 219; 16 Digest 130, 282.
- (3) *Re London & Globe Finance Corp'n., Ltd.*, [1903] 1 Ch. 728; 72 L.J.Ch. 368; 88 L.T. 194; 10 Digest 985, 6819.

APPEALS by leave of VAISEY, J., by certain contributories of Agricultural Industries, Ltd., from orders of VAISEY, J., dated Mar. 10, 1952, made in the winding-up proceedings of the said company.

By the said orders, VAISEY, J., (i) sanctioned a conditional agreement made by the liquidator of the company for the sale of forty-nine per cent. of the shares held by the said company in W. Dennis & Sons, Ltd., to the holder of the majority of the shares in the latter company; and (ii) refused an application by the said contributories for an order on the liquidator to take steps to effect the liquidation of W. Dennis & Sons, Ltd. On appeal counsel for the applicants asked that the case be heard in camera on the ground that otherwise the proposed defendants would obtain advance information of the case and evidence against them.

Only two preliminary matters discussed in the Court of Appeal call for a report. The facts, so far as relevant, appear in the headnote.

Pennyquick, Q.C., and *A. F. M. Berkeley* for the applicants, the contributories objecting to the proposed sale.

Raymond Jennings, Q.C., and *Raymond Walton* for the liquidator.

SIR RAYMOND EVERSLED, M.R.: Before I proceed to state the conclusion at which I have arrived there are two preliminary matters to which I wish to refer. We were asked to hear this case in camera, and, possibly, it appeared to be thought that wherever a case is heard in chambers by the judge below, *prima facie* the case should not be heard in open court in the Court of Appeal. It is, I think, desirable to observe that the Court of Appeal has no power to sit in chambers, but according to the Rules of the Supreme Court certain matters are referred to the judge in chambers, and they are not heard in public, whatever be the nature of the particular case. To justify this court closing its doors and thereby making an exception to what is fundamental in the administration of justice in this country, viz., that it should not be done behind closed doors, it must be shown that, as laid down by the House of Lords in *Scott v. Scott* (1), the ends of justice would otherwise be liable to be defeated. In this case it was necessary to consider whether it would be proper to take certain steps which would or might end in litigation against a certain individual, and during the early part of the argument attention was drawn to a case in this court in which it was said that, if the result might be to render futile, by disclosing what steps were going to be taken, any relief which might be had, then it would be proper for the Court of Appeal to hear the case in camera: *Mellor v. Thompson* (2). Counsel for the applicants did not suggest that he could put the matter so high when he asked us to hear it in camera, but we thought, with our then imperfect knowledge of what was going to be discussed, that in the circumstances we should hear the matter in camera, at any rate to start with. During the discussion which followed MORRIS, L.J., referred to *Re London & Globe Finance Corp'n., Ltd.* (3), in which consideration was given to the question whether criminal proceedings should be taken against the late Mr. Whitaker Wright. BUCKLEY, J., refused the application to hear the case in camera. I have made these statements because I think it is undesirable *prima facie* that matters which

come to the Court of Appeal should be heard in camera, unless it is made plain that the conditions in *Scott v. Scott* (1) are satisfied. Having heard the arguments, we have now thought it proper that the court should be opened for the purpose of delivering the judgments of the court.

The second preliminary matter to which I should like to make a reference is this. The case is one of great complexity. The history covers a period of a generation and concerns the transactions of a number of persons, including the somewhat ominous names of Mr. Gerard Lee Bevan and Mr. Clarence Hatry. The liquidator, who has resisted the application made in this case, is an extremely distinguished chartered accountant, and nobody has suggested, or could for a moment suggest, that he has acted otherwise than to the best of his very considerable professional skill, or that he has not, in negotiating this agreement, done what he has regarded as the best for the estate, and I am far from suggesting that he is not right. Nevertheless, it ought not to be forgotten that the persons solely concerned in this matter are the contributories. They have, either themselves or through their predecessors, been in the unhappy position of having taken shares in Agricultural Industries, Ltd., thirty years ago on the faith of promises of a most rash character put before them in the offer to the public. They have never, save on one occasion right at the beginning, received any return whatsoever in respect of those shares, and they may reasonably take the view that, having had nothing for so long, there would be much to be said, if prospects were at all promising in their opinion, for risking something in an attempt, at long last, to regain what they have lost. I have not been impressed by the suggestion that in a matter of this sort the persons concerned cannot be expected to form an opinion on the matter themselves. I think that, however well founded may be the liquidator in his opinion, it is quite wrong to deny to the persons really concerned an opportunity, if they wish to do it, even of throwing good money after bad. It is for them to decide. I think that in this case it was unfortunate that no step was taken to ascertain the views of the contributories (other than a gentleman who is himself a very large contributory) on the question whether they did desire to try to recover, through a liquidation of W. Dennis & Sons, Ltd., some of the money that had been lost.

[HIS LORDSHIP added that, on the facts, it was now too late for the liquidator to adopt that course. HIS LORDSHIP then stated the history of Agricultural Industries, Ltd., and said that the only assets of that company were forty-nine per cent. of the shares in the private company, W. Dennis & Sons, Ltd. The question which he had to consider was what were the chances of the private company's being put into liquidation on a petition presented by the liquidator as representing the holders of forty-nine per cent. of the shares. Counsel had suggested that the company would be wound-up under the "just and equitable" provision of the Companies Act, 1948, s. 222 (f). HIS LORDSHIP was not satisfied that the assets of the private company, when sold, would afford the contributories of Agricultural Industries, Ltd., substantially more than they would receive by the proposed sale of the shares in the private company. Moreover, there was no evidence that the holders of the minority of the shares in the private company (i.e., the contributories of Agricultural Industries, Ltd.) had been oppressed by the holders of the majority. Counsel for the applicants had based himself on certain turgid transactions which occurred between 1919 and 1925, but those matters were very stale. The chances that would attend an attempt to wind-up the private company must, in HIS LORDSHIP's view, be regarded as speculative and hazardous, and there was no reason to disturb the conclusions to which, in his discretion, VAISEY, J., had come.

JENKINS, L.J., and MORRIS, L.J., agreed.]

Appeal dismissed.

Solicitors: *Ballantynes* (for the applicants); *Slaughter & May* (for the liquidator).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

STEWART v. REAVELL'S GARAGE.

QUEEN'S BENCH DIVISION (Sellers, J.), March 4, 5, 6, 7, April 7, 1952.]

Contract—Implied term—Duty to supply good work and materials—Purpose made known to contractor—Reliance on skill and judgment—Execution by sub-contractor contemplated—Contractor's advice on materials and sub-contractor accepted—Contractor's liability for unsuitable materials and sub-contractor's faulty work.

A motorist with no technical or engineering knowledge, but a good knowledge of his car, a Bentley speed model with powerful brakes, took it to experienced car repairers to have the brake-drums re-lined. Knowing this was specialist's work which they did not undertake, he suggested it should be done by a firm who advertised cast-iron linings which, he said, would be preferable because they would consist of an unwelded circle of metal. The price quoted by that firm being considered high, the car repairers, with the plaintiff's consent, obtained a lower quotation from another firm who advocated fitting alloy steel linings. In recommending the acceptance of this quotation the repairers omitted to inform the motorist that alloy steel linings involved welding. The second firm did the work as sub-contractors of the car repairers, but the alloy steel linings were not suitable for the brake-drums and the car was damaged in consequence.

HELD: the motorist having so made known to the repairers that he required the brake-drum linings for a car designed for speed as to show that he relied on their skill and judgment to ensure that the brakes were repaired in a suitable and efficient manner, notwithstanding that he had approved the employment of specified sub-contractors the repairers were under a duty to provide good workmanship, materials of good quality, and a braking system fit for its purpose, and not merely to employ competent sub-contractors.

Dictum of LORD WRIGHT in *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.* ([1934] A.C. 423), and dictum of DU PARCQ, J., in *G. H. Myers & Co. v. Brent Cross Service Co.* ([1934] 1 K.B. 55), applied.

AS TO DUTY OF PERSON EMPLOYED UNDER CONTRACT OF WORK AND LABOUR, see HALSBURY, Hailsham Edn., Vol. 34, pp. 465-467, paras. 529-534; and FOR CASES, see DIGEST, Vol. 44, pp. 1300, 1301, Nos. 56-62.

Cases referred to:

- (1) *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.*, [1934] A.C. 402; 103 L.J.K.B. 289; 151 L.T. 142; Digest Supp.
- (2) *Myers (G. H.) & Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46; 103 L.J.K.B. 123; 150 L.T. 96; Digest Supp.
- (3) *Edwards v. Newland*, [1950] 1 All E.R. 1072; [1950] 2 K.B. 534; 2nd Digest Supp.

ACTION for damages for breach of contract and for negligence, and counterclaim for charges for work done.

The plaintiff was a motorist with no technical or engineering knowledge. He took his car, a 1929 Bentley speed model with powerful brakes, to the defendants, an experienced firm of car repairers to whom the car was well known, to have the brake-drums and the brake-shoes re-lined. Re-lining of the brake-drums involved placing inside each drum, by shrinking and pressure fitting, a sleeve of metal so as to give a new surface to the braking face on which the shoes applied their force, and the plaintiff knew that this was a specialist's work which the defendants did not undertake. He suggested that it should be done by a firm who advertised cast-iron linings for Bentley brake-drums, and informed the defendants that a cast-iron sleeve, which would be cut from a tube with no weld, so forming an unwelded circle of metal, would be preferable. The price quoted by the firm of brake liners proved too high, and the plaintiff agreed to

a further quotation being obtained from another firm, Re-Lined Brake-Drums, Ltd., who also normally did that kind of work for the defendants. That firm, in submitting their quotation, said they advocated the fitting of an alloy steel lining. The defendants recommended that Re-Lined Brake-Drums, Ltd., should do the work, and the plaintiff accepted their advice without knowing that this method involved welding. Re-Lined Brake-Drums, Ltd., did the work as sub-contractors of the defendants, and the re-lined brake-drums were fitted and tested by the defendants. When the plaintiff was driving the car to London on the day after it was delivered to him, he applied the brakes gently and reasonably when travelling at sixty miles an hour. There was a violent noise and vibration, and the car swung quickly to the right, mounted the off-side of the road, struck a tree and overturned on its near side. The plaintiff contended that the accident was due to a faulty brake-drum lining, that it was an implied term of the contract that the defendants would exercise all proper care and skill in the work and would use materials suitable thereto, and that they would carefully test the operation of the brakes before delivery of the car to the plaintiff so as to ensure that they were working properly and were accurately adjusted so as to be safe for use by the plaintiff. He said that the responsibility of the defendants extended to the work of sub-contractors even though it was contemplated that certain specified sub-contractors should be employed. The defendants submitted that in respect of the work in question they were only under a duty to take reasonable care to employ suitable sub-contractors and were not liable for the default of the latter, but were entitled to assume without detailed examination that their work would be satisfactory.

R. T. Monier-Williams for the plaintiff.

P. M. O'Connor for the defendants.

Cur. adv. vult.

April 7. **SELLERS, J.**, read a judgment in which he stated the facts; found that the accident was due to the lining on the off-side front brake-drum having come away from the drum, that the plaintiff was not negligent in driving the car at the time of the accident, that the defendants were not negligent in fitting the brake-drums as returned from the sub-contractors, or in re-lining the brake-shoes or in the assembling, adjustment, and compensation of the brakes or the testing after assembly, that a strip metal lining was unsatisfactory for the brake-drums, that the fitting of the lining to the off-side brake-drum by the sub-contractors was not done properly, and that the defendants would be able to establish a breach of contract by the sub-contractors, who were not parties to the action; and continued: The somewhat difficult question of the liability of the defendants depends on the terms, expressed or implied, of the contract, and must be determined on their true effect. This was not a contract for the sale of goods to which s. 14 of the Sale of Goods Act, 1893, could be applied. It was a contract for work done and materials supplied. Into that type of contract there may also be implied an absolute warranty of fitness for the intended purpose, if the circumstances show that the particular purpose is made known to the repairer and that the work of repair is of the type which the repairer holds himself out to perform either by himself or others as his sub-contractors, and, no less important, if the circumstances show that the purpose was made known so as to show that the customer relied on the repairer's skill and judgment in the matter.

I would adapt to this kind of contract some words of LORD WRIGHT which state the standard of proof in a case of the sale of goods in *Cammell Laird & Co., Ltd. v. Manganese Bronze & Brass Co., Ltd.* (1) ([1934] A.C. 423). The standard of proof is equally applicable to the present case. Such a reliance must be affirmatively shown. The customer must bring home to the mind of the repairer that he is relying on him in such a way that the repairer can be taken to have contracted on that footing. The reliance is to be the basis of a contractual

obligation. There is a passage in the judgment of DU PARCQ, J., in *G. H. Myers & Co. v. Brent Cross Service Co.* (2), which provides a concise statement of the law applicable ([1934] 1 K.B. 55):

" . . . I think that the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty. There may be circumstances which would clearly exclude it. A man goes to a repairer and says: 'Repair my car; get the parts from the makers of the car and fit them'. In such a case it is made plain that the person ordering the repairs is not relying upon any warranty except that the parts used will be parts ordered and obtained from the makers. On the other hand, if he says 'Do this work, fit any necessary parts', then he is in no way limiting the person doing the repair work, and the person doing the repair work is, in my view, liable if there is any defect in the materials supplied, even if it was one which reasonable care could not have discovered."

The present case does not fall precisely under either of the classes the learned judge enumerated. If the plaintiff's first suggestion had been accepted and those sub-contractors had done the work, I think it would have been very much the same as saying: "Get the parts from the makers of the car" and the facts would have negatived any reliance by the plaintiff on the defendants' skill and judgment in respect of the lining to the brake-drums. The particular purpose of the work which the plaintiff contracted to have done was obvious. It was the very object of the arrangement, namely, to be provided with an efficient braking system for his Bentley car, which was a car specially designed for speed, and, therefore, required a braking system adequate for such speeds as were in contemplation. The size and type of the drums themselves indicated a powerful braking system. The question arises whether this purpose, made known, as it was, to the defendants, was made known to them so as to show that the plaintiff relied on their skill and judgment. I find that the effect of what was said and done when the parties entered into the contract was that the plaintiff did rely on the defendants as experienced repairers to repair the brakes in a suitable and efficient manner, and it was left to them to obtain suitable sub-contractors to do the lining of the drums and to arrange for a suitable type of drum lining to be fitted. The plaintiff's original request for a cast-iron sleeve—that is a sleeve without a weld—was not carried out. The defendants and not the plaintiff substituted for that a strip-metal sleeve with a weld and, although some mention of the Re-Lined Brake-Drums, Ltd.'s quotation was made known to the plaintiff, more particularly as to price, he was not informed that this sleeve involved a weld. Once the defendants departed from the plaintiff's suggestion of a cast-iron sleeve, the type of lining was a matter within their province as repairers. It was their duty, in the circumstances, to provide good workmanship, materials of good quality, and a braking system reasonably fit for its purpose, and they failed to do so by reason of the faulty off-side front brake-drum lining. In fact, though unwittingly, the defendants handed over to the plaintiff a highly dangerous vehicle. The faulty lining caused the accident and the damage to the plaintiff's car, and the plaintiff is, therefore, entitled to recover damages in this action.

Learned counsel for the defendants sought to apply to this case the reasoning of TUCKER, L.J., in *Edwards v. Newland* (3) ([1950] 1 All E.R. 1080), and to allege that this was a complex contract where the defendants would be liable for such work as they did themselves if it were faulty, but with regard to work which it was known, indeed intended, would be sub-contracted, they were only under a duty to take reasonable care to employ suitable sub-contractors and were not to be liable for their default and were entitled to assume without further detailed examination that their work would be satisfactory. *Edwards v. Newland* (3) was a case of the storage of furniture for reward, and the furniture was stored

elsewhere than in the defendant's premises without the knowledge of the plaintiff, the bailor and owner of the furniture. As the defendant had never fulfilled his obligation to be a bailee for storage, he was held to have been in breach of his contract ab initio. I do not find it possible to apply similar considerations to the facts of this case which are so essentially different. I would add that I have considered also the other authorities referred to on behalf of the defendants, but I do not regard them as sufficiently relevant to call for further examination.

Judgment for plaintiff for £283 2s. 4d. damages, less an amount set off in respect of work done. Counterclaim dismissed.

Solicitors: *W. A. Sando, Parrott & Co.* (for the plaintiff); *Joynson-Hicks & Co.*, agents for *W. Davies & Son*, Woking (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. R. (otherwise F.).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Bush-James, Q.C.), April 3, 4, 9, 1952.]

Nullity—Incapacity of husband—"Consummation"—Erectio and intromissio without ejaculation.

The husband was able to effect an erection and a full penetration of the wife, but he was never able to produce the emission of semen into the wife's body. In a suit for nullity on the ground of the husband's incapacity to consummate the marriage,

HELD: the marriage was consummated by the erectio and intromissio, and, therefore, no decree could be granted.

AS TO INABILITY TO CONSUMMATE MARRIAGE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 640-643, paras. 937-941, and 1951 Supplement; and FOR CASES, see DIGEST, Vol. 27, pp. 265-272, Nos. 2328-2407, and Supplements.

Cases referred to:

- (1) *Baxter v. Baxter*, [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479; 2nd Digest Supp.
- (2) *Napier v. Napier*, [1915] P. 184; 84 L.J.P. 177; 113 L.T. 764; 27 Digest 268, 2370.
- (3) *Grimes (otherwise Edwards) v. Grimes*, [1948] 2 All E.R. 147; [1948] P. 323; [1948] L.J.R. 1471; 2nd Digest Supp.
- (4) *White (otherwise Berry) v. White*, [1948] 2 All E.R. 151; [1948] P. 330; [1948] L.J.R. 1476; 2nd Digest Supp.
- (5) *Cackett (otherwise Trice) v. Cackett*, [1950] 1 All E.R. 677; [1950] P. 253; 2nd Digest Supp.
- (6) *W. v. W.*, (1950), 1 Western Weekly Rep. 981, British Columbia.
- (7) *D—e v. A—g (falsely calling herself D—e)*, (1845), 1 Rob. Eccl. 279; 163 E.R. 1039; 27 Digest 267, 2350.
- (8) *L. v. L. (otherwise D.)*, (1922), 38 T.L.R. 697; 27 Digest 267, 2357.
- (9) *J. v. J.*, [1947] 2 All E.R. 43; [1947] P. 158; [1947] L.J.R. 1468; 177 L.T. 157; 2nd Digest Supp.
- (10) *G. v. G.*, [1924] A.C. 349; 131 L.T. 70; 27 Digest 266, 2347.
- (11) *A.B. v. C.B.*, (1906), 8 F. (Ct. of Sess.) 603; 43 Sc. L.R. 411; 13 S.L.T. 923; 27 Digest 269, 2371, i.

PETITION by the husband for nullity of marriage on the ground of his incapacity to consummate the same. By her answer the wife pleaded that the marriage was valid and subsisting, denied that the marriage had not been consummated, and said that the parties had sexual intercourse together about six months after the celebration of the said marriage, that during such intercourse full penetration was achieved by the husband, and that thereafter the husband and wife had

sexual intercourse together on numerous occasions, on each occasion the husband achieving full penetration of the wife.

The marriage was celebrated on June 20, 1938, and there was no issue. At the time of the marriage the wife was twenty-seven years of age, and the husband twenty-five. The husband's character and characteristics, as summed up in a letter dated Feb. 15, 1941, from one of many doctors and psychologists whom the husband and the wife consulted over a period of years, were:

"Prior to the age of seventeen he appears to have had numerous illnesses, including bronchitis, pneumonia, an operation to his ear, removal of glands in the neck, and 'a complicated operation on the right groin' . . . His co-operation is certainly excellent and I only hope we will be able to help him with his difficulties. There seem to be two aspects of his problem—(i) The real and initial one—to obtain emission at the correct time and normal intercourse. (ii) Failing this, attempts to produce pregnancy in his wife."

According to the evidence the husband was brought up in "rather strait-laced circumstances". In his family any discussion of sex was taboo. He was subject to the usual involuntary nocturnal emission of semen of an adolescent, but apart from that he showed very little interest in matters of sex. After the marriage the parties occupied the same bedroom, and for some six months there was little or no attempt to consummate the marriage. At first the wife was afflicted by some small trivial disability, but at the end of some six months the husband, with the co-operation of the wife, was able to get an erection and to penetrate his wife fully. He maintained that state of things for a period of four or five minutes and did his best to secure the emission of semen, but he was unable to do that, and at no time was there any orgasm on the part of the wife. The husband withdrew from the wife with his penis still in a state of erection. Although he was unable to achieve consummation with the wife, he continued to have these nocturnal emissions of semen. From 1938 onwards for a period of eight years the parties consulted a variety of doctors and psychiatrists and a distinguished surgeon. The intention of those visits was the hope that a child might be conceived, and the husband underwent a series of treatments by all these doctors and psychiatrists and received advice from the surgeon. But in spite of their treatment and recommendations, the same conditions persisted, and the husband, although able to effect full penetration, was incapable of producing an emission. Early in 1947 the husband informed his wife that he had fallen in love with another woman. This affection seemed to have been very transitory and of no great depth, but in the following year, 1948, when the parties were residing at a farm in Berkshire there was in their employ a land girl, to whom the husband made overtures, and, after four or six abortive attempts, he achieved intercourse with her in the fullest sense of the word, that is to say, penetration and emission in the body of this girl. It was not until the present case came on for hearing that the wife, although she had heard scandal about her husband and this girl, ascertained that he had had intercourse in the fullest sense with her. After what occurred on the farm he wrote a letter to the wife asking her to acquiesce in a petition for nullity of marriage that they might be set free to marry again.

Simon, Q.C., and *H. J. Phillimore* for the husband.

Vaughan, Q.C., and *J. Stirling* for the wife.

Cur. adv. vult.

April 9. MR. COMMISSIONER BUSH-JAMES, Q.C., stated the facts and read the following judgment. Now I have to deal with the law. The petition is founded on paras. 3 and 4 where it is alleged:

"That the said purported marriage has never been consummated", [and]
 "that the petitioner was at the time of the said ceremony of marriage and has ever since been incapable of consummating the same."

In para. 2 of the answer it is pleaded that "full penetration of the respondent was achieved by the petitioner", and that fact is not disputed. The issue, therefore, turns on the meaning of the word "consummate", and it is necessary from the outset to make three distinctions. The first of these distinctions is set out in clear terms by LORD JOWITT, L.C., in *Baxter v. Baxter* (1). His lordship refers to the new ground for annulment introduced by the Matrimonial Causes Act, 1937, s. 7 (1) (a) (now s. 8 (1) of the Act of 1950), namely, "wilful refusal . . . to consummate", and points out that this ground, being a post-nuptial defect, differs completely from the old ecclesiastical ground of annulment, i.e., impotence, which must exist at the time of the marriage. To quote his own words ([1947] 2 All E.R. 889):

"It is necessary, however, to beware of applying too literally to suits for nullity under the section in question in this case principles and rules relating to suits for nullity on the ground of incapacity under the old jurisdiction. In such a suit it was, and still is, necessary to prove that at the time of the marriage the particular wife or husband was incapable of consummating the marriage with the other spouse, whereas the section has introduced as a ground of nullity a cause necessarily arising after the marriage which, as PICKFORD, L.J., said in *Napier v. Napier* (2) ([1915] P. 189), was 'contrary to the principles of the ecclesiastical law as administered in the ecclesiastical courts' . . . It is clear, therefore, that in relation to the meaning of the word 'consummate', the common area covered by suits for nullity on the grounds respectively of incapacity and of wilful refusal to consummate is very small."

The second preliminary distinction to which I refer relates to the practice of withdrawal before emission, the practice known as coitus interruptus. In *Baxter v. Baxter* (1) LORD JOWITT emphasised (*ibid.*, 888) that he was expressing no view on that practice. But from the point of view of the present case, a case on impotence, the decisions on coitus interruptus are not of direct assistance, since, whatever remedies coitus interruptus may give rise to in practice (as to which learned judges have held different views (*Grimes (otherwise Edwards) v. Grimes* (3), *White (otherwise Berry) v. White* (4), *Cackett (otherwise Trice) v. Cackett* (5), *W. v. W.* (6)), it assumes the very point in issue in the present case, namely, whether emission is necessary to prove a man "potent" according to the old ecclesiastical laws.

The third distinction is one which I must have in mind the whole time, and it concerns the end of marriage. It used to be said, as in AYLIFFE'S *PARERGON JURIS CANONICI*, 2nd ed., p. 360, that

"as the first cause and reason of matrimony ought to be the design of having an offspring; so the second ought to be the avoiding of fornication."

But in *Baxter v. Baxter* (1) LORD JOWITT said (*ibid.*, 890):

"In any view of Christian marriage the essence of the matter . . . is that the children, if there be any, should be born into a family . . . but this is not the same thing as saying that a marriage is not consummated unless children are procreated or that procreation of children is the principal end of marriage."

He went on to emphasise the irrelevance of procreation as an end in marriage.

Bearing these three distinctions in mind, one must look at the medical evidence adduced before the court in the present case. It comes to this. The husband was able to obtain an erection and penetrate his wife, but during the conjunction of their bodies, and I use the expression advisedly, he was unable to ejaculate whether with or without spermatozoa and she was unable to enjoy an orgasm. That is the evidence, and there is no dispute of consequence concerning it. It was suggested that there was a possibility of what was termed a "leakage" by the husband when their bodies were joined as opposed to a proper, full ejaculation

with or without seed. There was no evidence on that point, nor, indeed, could there be, as neither party would have been aware of such a thing, and I must disregard it, both for being hypothetical and for the reasons, taken by way of analogy, given by LORD JOWITT in *Baxter v. Baxter* (1) (*ibid.*, 892) when deploring, in relation to the statutory remedy, the attempt to make "consummation" depend on an unwitting and unintentional hole in a contraceptive sheath. I have, therefore, to decide whether the husband or wife, physically joined together as they were from time to time, in fact consummated their marriage in the manner and to the degree which would have convinced the ecclesiastical lawyers that the marriage had been consummated. It is curious that there is no direct authority on the point that I have to decide, though this is probably due to the fact that such a question would not have arisen before the advances made by medical science in investigating and explaining the intimacies of the marriage bed, and in enabling parties to give evidence thereon in a comparatively scientific way.

What, then, was "consummation" in ecclesiastical law? The ecclesiastical lawyers, in fact, used the term "*vera copula*". "*Copula*", or copulation, means simply, in dictionary terms, "sexual union" (CONCISE OXFORD DICTIONARY), so that the meaning in law of *vera copula* must be sought elsewhere. I have referred already to LORD JOWITT's judgment in *Baxter v. Baxter* (1), and it is to be noted that in that case he cited with approval a statement in LORD STAIR'S INSTITUTIONS, 1681 ed., book I, tit. 4, para. 6, that the relevant factor is the creation of a consent,

"... whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds, as the general end of the institution of marriage, is the solace and satisfaction of man."

Then there is the "true distinction" stated by DR. LUSHINGTON in *D—e v. A—g* (*falsely calling herself D—e*) (7) (approved in *Baxter v. Baxter* (1)), a case in which the wife had no uterus at all when he said (1 Rob. Eccl. 299):

"If there be a reasonable probability that the lady can be made capable of a *vera copula*—of the natural sort of coitus, though without power of conception—I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect, and unnatural coitus, I would pronounce the marriage void."

Of course, in *D—e v. A—g* (7), the husband was capable of ejaculation, so that it may be said that in *D—e v. A—g* (7) there was coitus, i.e., penetration and ejaculation, and so it does not help in the present case. But examination of the passage cited shows that the learned judge was willing to treat coitus in the abstract as being identical with *vera copula*, i.e., as being equivalent to penetration without emission. (I emphasise that coitus in this sense has not the inference which appears in the term coitus interruptus where ejaculation is always implied.) So it may be said that a surgical operation before marriage which makes the wife incapable of bearing children does not make *vera copula* impossible: *L. v. L.* (*otherwise D.*) (8); though, again, I must point out that the husband in that case was, it seems, capable of ejaculation.

In *White v. White* (4), a coitus interruptus case, WILLMER, J., points out that *vera copula* means merely "conjunction of the bodies". I do not wish to refer further to the learned judge's conclusion because he is discussing a case where ejaculation was always possible, but he indicates ([1948] 2 All E.R. 155) that for some cases, and I think the present case is one of them, a "true conjunction" is achieved

"... as soon as full entry and penetration has been achieved. What follows goes merely to the likelihood or otherwise of conception."

I have already pointed out that *Baxter v. Baxter* (1) decided firmly that conception was not a principal end of marriage, indeed, it is well-known that a marriage might not be consummated in either the statutory or ecclesiastical

sense, even though the woman has conceived from her husband with no artificial aid. It is not without interest to note, too, the case of *J. v. J.* (9), where the Court of Appeal held that a man who, by reason of an operation before marriage, rendered himself only capable of penetration and emission, but in such a fashion that the male sperm could not leave his body, was incapable of consummation in the ecclesiastical view. But that decision was virtually overruled in *Baxter v. Baxter* (1), and I do not think it affects the present case. Indeed the comment on it in *Baxter v. Baxter* (1) supports my view. A

Therefore, in my view, vera copula consists of erectio and intromissio. This is the view of the author in JACKSON ON THE FORMATION AND ANNULMENT OF MARRIAGE from which I have derived considerable assistance. At pp. 209 and 210 the learned author says:

“Contraceptive devices do not prevent intercourse—Vera copula consists of erectio and intromissio. Once this has been achieved, the fact that consummation, in the sense of potential conception, has been made impossible by the use by one or both of the parties of contraceptives, is irrelevant. Only intercourse in the sense of vera copula is necessary to ‘consummate’ a marriage. ‘A person is in law impotent who is incapax copulandi, apart from the question of whether he or she is incapax procreandi’.” B

This last remark is a quotation from LORD DUNEDIN in *G. v. G.* (10), and it is to be further observed that in that case LORD DUNEDIN refers ([1924] A.C. 354) to *A.B. v. C.B.* (11) where the marriage “never was actually consummated” and the husband had tried “all ordinary expedients to induce the wife to admit connection”. “Connection” is the operative word in that sentence. In my judgment, therefore, “connection”, or the “conjunction of bodies”, or “erectio and intromissio”, is for the present purpose—the purpose of deciding what is potency in ecclesiastical law—equivalent to consummation in the ecclesiastical view interpreted in the light of modern authorities. I wish to make it clear that the fact that the husband has been able to achieve consummation in the fullest sense with another woman, as that term is probably indicated in the statute of 1937 and now in the statute of 1950, has not affected my view in the slightest, as the medical evidence demonstrates that this case is a perfect example of impotence quoad hunc or hanc. I find, in consequence, that this marriage has been consummated, and the petition fails and must be dismissed. D

Petition dismissed. E

Solicitors: *Corner & Co.* (for the husband); *W. H. Matthews & Co.* (for the wife). F

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

COBB AND ANOTHER v. LANE.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), March 31, April 1, 1952.]

Licence—Licence to occupy premises—Exclusive occupation.

Landlord and Tenant—Tenancy—Tenancy at will—Exclusive occupation of premises—Need to consider intention of parties.

The fact of the exclusive occupation of property for an indefinite period is no longer inconsistent with the occupier being a licensee and not a tenant at will. Whether or not a relationship of landlord and tenant has been created depends on the intention of the parties, and in ascertaining that intention the court must consider the circumstances in which the person claiming to be a tenant at will went into occupation and whether the conduct of the parties shows that the occupier was intended to have an interest in the land or merely a personal privilege without any such interest.

Dictum of LORD GREENE, M.R., in *Booker v. Palmer* ([1942] 2 All E.R. 676), applied.

Lynes v. Snaith ([1899] 1 Q.B. 486), no longer good law.

AS TO TENANCY AT WILL, see HALSBURY, Hailsham Edn., Vol. 20, pp. 117-121, paras. 130-134; and FOR CASES, see DIGEST, Replacement Vol. 31, pp. 32-42, Nos. 1890-2003.

Cases referred to:

- (1) *Booker v. Palmer*, [1942] 2 All E.R. 674; 2nd Digest Supp.
- (2) *Errington v. Errington*, [1952] 1 All E.R. 149.
- (3) *Lynes v. Snaith*, [1899] 1 Q.B. 486; 68 L.J.Q.B. 275; 80 L.T. 122; 31 Digest, Replacement, 34, 1909.
- (4) *Foster v. Robinson*, [1950] 2 All E.R. 342; [1951] 1 K.B. 149; 31 Digest, Replacement, 697, 7888.
- (5) *Marcroft Wagons, Ltd. v. Smith*, [1951] 2 All E.R. 271; [1951] 2 K.B. 496.
- (6) *Gorham (Contractors), Ltd. v. Field*, (1952), unreported.

APPEAL by the defendant from an order of His Honour JUDGE STOVE in the Great Grimsby County Court, made on Jan. 4, 1952, in an action for possession.

The plaintiffs, who were the executors of Agatha Winifred Lane, deceased, the defendant's sister, claimed possession of a leasehold dwelling-house occupied by the defendant. In December, 1935, the defendant, wishing to buy a house, mentioned the fact to his mother in the presence of the deceased. His mother suggested the purchase of a house as a "nest-egg" for the defendant's daughter, then eight years of age. On May 1, 1936, the deceased entered into a contract for the purchase of a long lease of a house, and on May 7 at her request possession was given to the defendant. On June 24 the deceased completed the purchase. The defendant resided in the house, but he never paid anything for its use and occupation, and, although for the first year he paid the rates, they were subsequently paid by the deceased. On Nov. 28, 1950, the deceased died. The plaintiffs alleged that the defendant was in occupation as a licensee. The defendant contended that the deceased had held the house on trust for his daughter and that it was so held by the plaintiffs, and, alternatively, that he (the defendant) was originally in occupation as a tenant at will, and that under the Limitation Act, 1939, s. 9 (1), that tenancy must be deemed to be determined at the end of a year from its commencement so that the plaintiffs' claim was barred by s. 4 (3) and s. 16 of the Act. The learned county court judge held that there was no evidence of a trust, and that the defendant was in occupation as a licensee, and he made an order for possession.

Mrs. E. K. Lane for the defendant.

Stranders and G. A. Draycott for the plaintiffs.

SOMERVELL, L.J.: The plaintiffs claim possession of this house as executors of the estate of Agatha Winifred Lane, deceased. The defence is based on s. 4 (3) of the Limitation Act, 1939. The defendant's case before us is that when he entered into occupation, to use neutral words, he became a tenant at will of the deceased; that, under s. 9 (1) of the Act of 1939, that tenancy at will was deemed to be determined at the expiration of one year; and that after twelve further years' possession by him (the defendant) without any notice in writing, the estate of the landlord is defeated. Before the learned judge it was alleged that the house was held by the deceased in trust for the defendant's daughter. That allegation failed and there is no appeal against that part of the judgment.

[HIS LORDSHIP stated the facts and continued:] The defendant went into occupation before the date for completion. Nothing turns on that except that it makes it more difficult to infer a tenancy at will, but it is not on that point that I rest my conclusion. The defendant said that when he first occupied the house he paid the rates, but that in 1937 he could not afford to do so any longer. He said:

"My sister agreed to pay the outgoings if I would remain and keep the house intact."

It seems to me there was a new agreement arrived at in consideration of his remaining and keeping the house intact.

Counsel for the defendant submitted that, notwithstanding certain modern authorities, where there is exclusive occupation for an indefinite period a tenancy at will must be implied unless there is something in the facts to prevent that conclusion. I do not know that I very much quarrel with that. The real question may be: What facts do prevent that conclusion? Certainly under the old cases (and I doubt if this has been affected by the modern authorities), if all one finds is that somebody has been in occupation for an indefinite period with no special evidence of how he got there or of any arrangement being made when he went into occupation, it may be that the court will find a tenancy at will. I am assuming that there is no document, or clear evidence as to terms. The modern cases establish that, if there is evidence of the circumstances in which the person claiming to be a tenant at will went into occupation, those circumstances must be considered in deciding what the intention of the parties was. In *Booker v. Palmer* (1) LORD GREENE, M.R., said ([1942] 2 All E.R. 676):

"Therefore, what we have to decide is whether there was any evidence upon which a tenancy between the respondent and Mrs. Goldsmith could be inferred. In my opinion, there is no evidence from which any such inference could be drawn. Whether or not parties intend to create as between themselves the relationship of landlord and tenant, under which an estate is created in the tenant and certain mutual obligations arise by implication of law, must in the last resort be a question of intention. Where the parties enter into a formal document the intention to enter into formal legal relationship is obvious; but when all that happens is a quite casual conversation on the telephone, it is very much more difficult to infer that the parties are really contemplating entering into any legal relationship at all and in particular, such a special relationship as that of landlord and tenant . . . There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

The learned county court judge, applying that and other cases to which I will refer to the facts of the present case, put his conclusion in this way:

"I think it is fair to infer that the defendant's occupation of the premises in the present case was a consequence of the family discussion which took

place at Christmas, 1935. It was a method of providing financial assistance to the defendant and his wife and infant daughter by means of a convenient family arrangement. I do not think that there was any intention on the part of any of the parties concerned of creating any legal relationship or of assuming any legal obligations."

Unless the learned judge has misdirected himself that seems to me a finding with which we must not interfere. It depends on the facts. I can find no indication that he has done other than apply the principles as laid down by LORD GREENE, M.R., to the facts of this case.

In *Errington v. Errington* (2) DENNING, L.J., addressed himself to the question whether exclusive possession was, as is suggested in some cases, the test, so that, if you find exclusive possession, you must find a tenancy at will. That test was, undoubtedly, as I read it, applied and acted on by the Divisional Court in *Lynes v. Snaith* (3). In that case LAWRENCE, J., said ([1899] 1 Q.B. 488):

"As to the first question, I think it is clear that [the defendant] was a tenant at will and not a licensee; for the admissions state that she was in exclusive possession—a fact which is wholly inconsistent with her having been a mere licensee."

DENNING, L.J., came to the conclusion that that was no longer a final test and I think it may be that there is a certain ambiguity in the expression. In *Errington v. Errington* (2), *Foster v. Robinson* (4), and *Marcroft Wagons, Ltd. v. Smith* (5), it was clearly intended that the person who occupied the premises should have the possession which normally people have in their homes. Those cases show that exclusive possession is not a test negating the possibility of the occupier's being a licensee. If you use the expression "exclusive possession" as meaning the rights which a tenant has against his landlord, then, of course, it might well be that an admission of that would lead to the conclusion arrived at in *Lynes v. Snaith* (3). The report of that case does not give very full information regarding what was said when the defendant there originally went into possession, but, in so far as, both in the argument and in the judgment, the case proceeded on the basis that exclusive possession was wholly inconsistent with a licence, it seems to me that it is inconsistent with the three authorities in this court to which I have referred.

In his judgment in *Lynes v. Snaith* (3) CHANNELL, J., referred ([1899] 1 Q.B. 490) to an unreported case of a gamekeeper who was assigned a cottage to reside in by his employer and on the gamekeeper's death his widow was permitted to continue residing there rent free, without having any service to perform. It was held that that was a tenancy at will and that the Statute of Limitations would run. No doubt, in former days, except for the question of the statute, the distinction between a tenancy, whether at will or for a period, and a licence was not so important as it has become since the Rent Restrictions Acts came into operation. In many cases under those Acts it has a special importance. That fact has led to an examination of the distinction, and the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties. As I read what LORD GREENE, M.R., said in *Booker v. Palmer* (1), which was cited by DENNING, L.J., in *Errington v. Errington* (2), and what is, at any rate, implicit, if not so stated, in the other cases, that is the guide which we have to apply. There is no inference of law which compels one to say that a man must be regarded as a tenant at will because one finds him, and, in the present case, his wife and daughter, living in a house as if it was their home. In the circumstances, as it seems to me, the learned county court judge applied the proper principles and came to the same conclusion as I would myself have come to. Therefore, I think this appeal should be dismissed.

DENNING, L.J.: This was a family arrangement whereby a house was bought in the name of the elder sister who allowed her brother to live in it.

He lived in it for more than thirteen years. The sister, meanwhile, paid the rates. When she died she left the property to other people, and her executors now claim possession. There is no answer to the claim unless the brother has obtained a title in himself—sometimes it is called a “squatter’s title”—because he has been in possession for more than twelve years. It is said that he was a tenant at will, that under the Limitation Act, 1939, s. 9 (1), his tenancy is deemed to be determined at the end of the first year, that he has been there for twelve years since, and so the property is his absolutely. It seems to me that the answer to that argument is that he was not a tenant at will at all, but only a licensee. Counsel for the defendant has brought all the authorities before us, old and new. Under the old cases there would have been some colour for saying that the brother was a tenant at will, but the old cases can no longer be relied on. Owing to the impact of the Rent Acts, the courts have had to define more precisely the difference between a tenant and a licensee. I endeavoured to collect the cases in *Errington v. Errington* (2) and since that case was decided we have added one more. Only last week we had a case where an employer had bought a house and allowed his servant to live there simply on the servant’s paying interest on the purchase price. It was held that the servant was not a service occupier nor a service tenant, but only a licensee: see *Gorham (Contractors), Ltd. v. Field* (6).

X The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land? It seems to me that the judge has so found. The defendant had only a personal privilege with no interest in the land, which he could assign or sub-let, and he could not part with the possession to another. He was only a licensee, and he cannot pray in aid the provisions of the Limitation Act, 1939. I would only add that I agree with all that my Lord has said about *Lynes v. Snodith* (3). That case can no longer be regarded as authoritative. The appeal should be dismissed.

ROMER, L.J.: I agree. The considerations to which my brethren have drawn attention are so destructive of the defendant’s case that one need hardly trouble to look at the origin of the matter, but, if one does, one sees that the defendant’s case breaks down in limine because he claims that he was granted a tenancy at will by the deceased lady, Mrs. Lane, on May 7, 1936, when she gave instructions to the agents that the keys should be handed over to him. What was her position at that time? The contract for sale into which she entered was dated May 1, 1936, and completion was fixed for June 24. I gather that she paid a deposit, but she did not herself enter into possession. Therefore, her position on May 7 was that she would become entitled, on payment of the balance of the purchase money when it became due, to a decree of specific performance to compel the vendor to carry out his contract and complete the sale, and, further or alternatively, she would be entitled, if he refused to complete the sale, to sue him for damages. The one thing which she had not at that time was an estate in the land herself. She was not a tenant at will, and, unless she was, she could not create the tenancy on which the defendant relies. In the absence of a sufficient title or interest in her to carve out or to create a similar tenancy in the defendant, his claim, as I say, fails in limine. It was a novelty to me to hear counsel for the defendant describe her as a tenant at will, six days after the contract, when she had not entered into possession. I am well assured she was nothing of the sort and that her rights were merely as I have described them. I agree, therefore, that the appeal fails.

Appeal dismissed.

Solicitors: *Hancock & Scott*, agents for *Wilkin & Chapman*, Grimsby (for the defendant); *Bartlett & Gregory*, agents for *Beloe, Staveley & Baron*, Hunstanton (for the plaintiffs).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

JOHN LEWIS & CO., LTD. v. TIMS.

[HOUSE OF LORDS (Lord Porter, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen), March 3, 4, April 24, 1952.]

False Imprisonment—Arrest without warrant—Person arrested to be taken before justice or police officer as soon as reasonably possible—Right of detention for purpose of investigation.

The respondent and her daughter entered the appellants' shop where the daughter stole certain articles. They then left the shop and the daughter placed the stolen articles in a bag carried by the respondent. Two detectives employed by the appellants followed the two women outside the shop and saw them go into another shop where the daughter again stole an article and placed it in the respondent's bag. As they came out into the street one of the two detectives accosted them, said they had stolen the articles, and asked them to come with her. It was a regulation of the appellants that only a managing director or a general manager of the appellants was authorised to institute any prosecution. The respondent and her daughter were taken back to the appellants' shop and detained until the chief store detective and the managing director heard the account of the two detectives, after which the police were sent for and the respondent and her daughter were taken to the police station, charged, and released on bail. Next morning the daughter was tried and convicted, but the charge against the respondent was withdrawn by consent of the court as the appellants were advised that there was insufficient evidence to justify a prosecution. On a claim by the respondent for damages for false imprisonment,

HELD: where a person in exercise of his common law right arrested a person without warrant, he should take the arrested person before a justice of the peace or a police officer, not necessarily forthwith, but as soon as was reasonably possible; in the circumstances, the taking of the respondent to the appellants' office to obtain authority to prosecute was not an unreasonable delay before handing her over to the police; and, therefore, the appellants were not liable for false imprisonment.

Wright v. Court (1825) (4 B. & C. 596), *Hall v. Booth* (1834) (3 Nev. & M.K.B. 316) and *Morris v. Wise* (1860) (2 F. & F. 51), considered.

Decision of COURT OF APPEAL ([1951] 1 All E.R. 814), reversed.

AS TO THE HANDING OVER OF A PERSON ARRESTED TO A JUSTICE OR CONSTABLE, see HALSBURY, Hailsham Edn., Vol. 9, p. 96, para. 122; and FOR CASES, see DIGEST, Vol. 14, pp. 172-176, Nos. 1488-1538 and Digest Supps.

Cases referred to:

- (1) *Christie v. Leachinsky*, [1947] 1 All E.R. 567; [1947] A.C. 573; [1947] L.J.R. 757; 176 L.T. 443; 111 J.P. 224; 2nd Digest Supp.
- (2) *Wright v. Court*, (1825), 4 B. & C. 596; 4 L.J.O.S.K.B. 17; 107 E.R. 1182; 14 Digest 173, 1508.
- (3) *Hall v. Booth*, (1834), 3 Nev. & M.K.B. 316; 14 Digest 175, 1531.
- (4) *Morris v. Wise*, (1860), 2 F. & F. 51; 175 E.R. 955; 14 Digest 175, 1533.
- (5) *Cokayne v. Manyngam*, (1470) 47 Selden Society 156.
- (6) *Cave v. Mountain*, (1840), 1 Man. & G. 257; 9 L.J.M.C. 90; 4 J.P. 572; 133 E.R. 330; 38 Digest 93, 693.

APPEAL by the appellants from an order of the Court of Appeal (LORD GODDARD, C.J., ASQUITH and BIRKETT, L.J.J.), dated Mar. 14, 1951, and reported, [1951] 1 All E.R. 814, affirming in part an order of DONOVAN, J., dated Nov. 24, 1950, and made in an action for malicious prosecution and false imprisonment in which the jury awarded the respondent, the plaintiff in the action, £176 5s. damages.

The Court of Appeal allowed the appellants' appeal on the issue of malicious prosecution, but decided against them on the issue of false imprisonment, holding

that, in taking the respondent into their office and detaining her there while inquiries as to the circumstances of her arrest were being made, they had not fulfilled the requirements of the law that a person arrested without warrant should be taken forthwith before a justice of the peace or a police officer. From the latter decision the appellants appealed, contending that their duty was to act reasonably for the purpose of bringing the respondent to justice within a reasonable time.

Melford Stevenson, Q.C., Wilson, Q.C., Blomefield and A. W. Hamilton for the appellants.

The respondent did not appear.

The House took time for consideration.

April 24. The following opinions were read.

LORD PORTER: My Lords, the problem raised in this matter requires a determination by your Lordships' House of the principles on which, and the circumstances in which, the arrest of those suspected of felony can be justified in a case where no warrant has been issued, and it affects, I think, both the obligations of the police and those of private persons. The solution must, therefore, lead to a careful inquiry which is not rendered the less anxious by the fact that the appellants alone were represented in the argument before your Lordships or the fact that the sum at stake is a small one. When the liberty of the subject is at stake questions as to the damage sustained become of little importance.

The appeal is from an order of the Court of Appeal of Mar. 14, 1951, in so far as it affirms the judgment of *DONOVAN, J.* on an issue as to false imprisonment. The circumstances in which the claim arises are undisputed.

The respondent, Mrs. Tims, and her daughter visited the calendar department of the appellants' store in Oxford Street in the afternoon of Dec. 16, 1948, and while they were there Miss Tims was seen by a Miss Wheeler, one of the appellants' private detectives, to steal four calendars. As the respondent and Miss Tims were leaving the premises another private detective joined Miss Wheeler and the two together followed the mother and daughter along Oxford Street to Messrs. Littlewoods' store about three or four hundred yards distant. On the way Miss Tims transferred the four calendars to a paper bag which her mother was carrying. At Littlewoods Miss Tims stole a table cloth, and this too she placed in her mother's bag before leaving the store. When the respondent and Miss Tims had come out into the street again one of the two detectives accosted them, said they had stolen the calendars, and asked them to come with her.

The evidence established that the accusation of theft was made in the presence of both the accused and, though the mother is deaf, sufficiently loudly to give her some idea of the charge which was being made. This was the conclusion reached by the Court of Appeal. The respondent, on the other hand, maintained that she had not been informed at first why she was being taken back to the appellants' premises, and the jury accepted her evidence. Her contention, accordingly, was that she had been arrested without being told what her alleged crime was and that, therefore, under the decision in *Christie v. Leachinsky* (1), the arrest was wrongful. It is plain, however, that she knew exactly what the charge was by the time the party had returned to the appellants' store. Indeed, the jury have found that one of the detectives then said: "Where is the stolen stuff?" The learned judge, however, as a result of the jury's answers to two questions put by him, held the appellants liable on the issue of false imprisonment on the ground that the respondent was not informed at the first opportunity that she was accused of stealing. On the other hand, it is clear from the daughter's evidence that the accusation of stealing was made in her presence and that of her mother. I quote from her cross-examination:

"Q.—Whatever was said, this is quite clear, is it not, that it was said in the presence and hearing of both you and your mother? A.—Yes. Q.—And whatever was said it was made quite clear that you were being accused of stealing? A.—As I have already said."

That testimony makes it apparent that the crime for which the arrest was made was plainly referred to. The respondent, it is true, denied all knowledge of the accusation until later, but she was deaf and there is nothing to indicate that the detectives had any reason to suspect that she could not hear what was said. They cannot, therefore, be at fault if the respondent did not hear. In my opinion, the decision in *Christie v. Leachinsky* (1) has no bearing on such a case. I make these observations lest it should be thought that full consideration had not been given in your Lordships' House to the argument which prevailed before DONOVAN, J., but, indeed, this aspect of the case is only a matter for consideration inasmuch as, if the respondent had taken part in the argument before your Lordships, she might have defended DONOVAN, J.'s decision in her favour on that ground.

After making the charge the two detectives took the respondent and her daughter back to the office of the chief store detective in the appellants' store and they were detained there against their will until the chief detective, a Miss Pearce, and a managing director had been summoned to the office and an account had been given to them of what the detectives had observed. Miss Tims, undoubtedly, protested that her mother was some ten to fifteen feet distant from her when the calendars were taken, and the jury have so found, but equally it is clear that the calendars were at a later time placed in the mother's bag, were present in it when the arrest was made, and were found in it at the chief detective's office.

Some difference appears to exist as to the length of time during which the two women were detained at the chief detective's office. Miss Tims said it was not less than an hour, and the jury, in answer to a question put to them in the form: "Was the plaintiff detained in John Lewis's against her will for an hour or so before the police were summoned?", replied "Yes". The exact length of the detention is, in my view, immaterial in the circumstances of this case, but the estimate of an hour or so is, in my view, not established by the evidence. No doubt, it seemed a long time to Miss Tims, but her own evidence is that she and her mother were arrested some time between 3.30 p.m. and 4 p.m., the police evidence called for the respondent is that they were summoned at 4.10 p.m. and after going to the office and hearing the story and accompanying the accused to the station, they reached the station at 4.30 p.m. The length of detention would only be material if it had been alleged that the two women were detained beyond such time as was reasonable to acquaint a director or manager of the circumstances and obtain his instructions whether to prosecute or not. No such suggestion was made, no evidence was called to deal with the point, and the respondent is, therefore, precluded from relying on it now. I only mention it because there may be cases in which it could be contended that, though a reasonable amount of detention would be justified, the actual detention was unduly long. In such a case it would be the duty of the judge to determine whether there was or was not evidence from which it could be deduced that the detention was unduly long, and, if he held that there was, to leave the question to the jury whether, in fact, it was longer than was justified. As I have said, however, no such inquiry is called for in the present case.

The evidence establishes that Miss Tims protested that her mother was in no way concerned with the theft, but the respondent herself seems to have offered no explanation of the presence of the stolen articles in her bag either to the detectives or at the office or before the court though it is in evidence that she did say in the presence of a police constable: "I did not have anything to do with it". Her

failure to do so is, of course, not material as in any way establishing her participation in the crime, but it is a reason for accepting the view that the appellants' representatives genuinely thought her guilty.

The sequence of events after the return to the chief detective's office is that first she and afterwards a managing director were sent for and informed of what had occurred, and that the police were then sent for and arrived shortly after 4.10 p.m. though they were not immediately available on the first summons. The two accused were then taken to the police station, charged and released on bail. Next morning they were brought before the magistrate. At that hearing the appellants were represented by a solicitor, and the respondent was unrepresented. Inasmuch as Mrs. Tims was not beside her daughter at the moment when the calendars were taken, the solicitor appears to have thought that a jury might acquit the mother and, therefore, the charge against her should not be persisted in. He accordingly asked for a remand. It was suggested that, as he thought a jury might not convict and then asked for a remand instead of withdrawing the charge at once, his action supported an allegation of malice with which the appellants would be infected and would, therefore, be liable as having instituted or at any rate persisted in a malicious prosecution. I see no reason for supposing that the solicitor thought that the respondent was not guilty though he may have thought that a jury might not convict. But in any case John Lewis & Co. are the persons sued, not their solicitor, and as LORD GODDARD, C.J., has pointed out, they never instigated him to continue the prosecution after he thought it might not succeed. His caution is no evidence of malice and no allegation of malice is made against the two detectives or any of the other representatives of the appellants.

There remains only the question, therefore, whether the appellants were rightly mulcted in damages for false imprisonment because their servants did not take the respondent immediately before a magistrate, but brought her back to a part of the appellants' premises. It was maintained on her behalf that, though an arrest might originally be justified, yet it became wrongful if the person accused was not taken forthwith before a justice of the peace. The appellants admitted that they could not retain her for an unreasonable time before handing her over to a constable or a jailor, or bringing her before a justice, but contended that their obligation was only to act within a reasonable time and that an immediate and direct journey to the magistrate's court was not required. Of the three courses which the respondents asserted were open to them commitment to prison may today be neglected. The accused would not be received nor would the prison be available. The choice lies between an immediate bringing before a magistrate or, possibly, handing over to a police officer, and the like course taken within a reasonable time. As I have said, if the latter is the true obligation and if the appellants' representatives were justified in bringing back the respondent to the appellants' premises to get the advice of a manager and to obtain, if he thought fit, his authority to prosecute, there is no ground for saying that the time taken was unreasonable. But it is said on behalf of the respondent that it is not enough for the arrester to bring the person whom he has arrested before a justice or the police within a reasonable time: he must be brought before them "immediately" or "forthwith". If not, the arrest is wrongful.

The Court of Appeal has found the appellants liable on this short ground and on this short ground only. Their view has been expressed by LORD GODDARD, C.J., in a passage of his judgment, which I venture to quote ([1951] 1 All E.R. 817):

"The law is that if a person, be he a constable or a private person, arrests without warrant, although the arrest may be perfectly justified on the ground that a felony has been committed, or, in the case of a police officer, that there is reasonable and probable cause for believing that the person arrested has committed the offence, it is the duty of the person arresting

forthwith to take the person arrested before a justice. That was the original law, but now I think—and this is the only respect in which I should be at all inclined to depart from the law which has been laid down for very many years—it is the duty to take the arrested person before a justice or to a police station, and before a police officer. I say that because, since the Summary Jurisdiction Act, 1879, as amended and extended by other Acts, a superintendent or inspector of police, or other officer of equal or superior rank, has power to grant bail where a person is brought to the police station having been arrested without a warrant. Obviously, the reason why the common law required that a person should forthwith be taken before a justice was because he was being imprisoned, in the sense that his liberty was being curtailed, and it was, therefore, for a justice at once to consider whether or not the case should be investigated there and then, as might have been done in the old days when he sat in his own justice room, or whether he should grant bail. Now that a police officer has statutory powers to grant bail, he will do so, except in cases of gravity or where for good reason he may think it would be unsafe. In an ordinary case of a crime of this sort a police officer is as equally efficacious for the protection of the subject as a justice, and for that reason the arrested person should be taken forthwith before a police officer."

The learned Chief Justice supported this view by the citation of three cases and added (*ibid.*, 818):

"... I am of the opinion that the taking of these two women to the defendants' store instead of direct to a police station or to a magistrate's court could not be justified, and, that, therefore, technically there was a false imprisonment of the plaintiff."

Before I analyse the cases and consider the history and principles which lie behind the problem presented to your Lordships, it is, I think, expedient to set out the grounds on which the appellants justify their action. It is undesirable, they say, that their detectives, who must of necessity be subordinate officials, should be entrusted with the final decision whether a prosecution should take place or not. Such a decision should only rest with a senior and responsible officer, and after he has heard any explanation which the accused person has to offer. Indeed, it is in the interest of the person arrested that, however conclusive the evidence should appear against him, he should have the opportunity of stating what he has to say and that, in a proper case, he should avoid the publicity of a public trial. The complaint here is not that the appellants acted unreasonably or harshly or detained the respondent for an unnecessarily long time, but only that it is the law and expedient in the interests of the public generally that the supposed criminal should be brought before the court as speedily as possible and afforded the opportunity of applying for, and being granted, bail. Bearing these considerations in mind I deal first with the three cases on which the Court of Appeal primarily relied.

The first is *Wright v. Court* (2), decided in 1825, where it was held that a constable arresting a man must take him before a justice to be examined as soon as he reasonably can and that detention for three days to enable a person whose goods had been stolen to collect and bring his witnesses was not justified. The judgment says (4 B. & C. 598):

"... it is the duty of a person arresting anyone on suspicion of felony to take him before a justice as soon as he reasonably can, and the law gives no authority even to a justice to detain a person suspected, but for a reasonable time till he may be examined."

A report of the same case in 4 L.J.O.S.K.B. 18 says the arrested man must be brought before the justice "within a reasonable time". For these propositions

COMYNS DIGEST, 5th ed., vol. 4, pp. 471-2 is referred to. The first passage (H.4.) says:

" . . . a man may be imprisoned by warrant of law, for that is a lawful process: as, by a constable ex officio, who upon complaint of a felony may commit the offender to an house, gaol or stocks, till he can be brought before a justice of peace . . . So, if a felony be committed, the offender may be apprehended by any private person."

A later passage (H.5) says:

" . . . the law gives no authority to a justice of peace to detain a person suspected, but for a reasonable time till he may be examined."

It will be observed that none of these passages uses the words "immediately" or "forthwith", though they leave open the question what is a reasonable time. Moreover, the three days' delay in that case was not for the purpose of bringing the man arrested before the justices, but of collecting evidence.

The second case was *Hall v. Booth* (3), decided in 1834. The headnote says:

"A person cannot apprehend another upon a suspicion of felony for the purpose of taking him to the place where the felony was committed in order to ascertain whether he was the thief."

But in those circumstances, the plaintiff was not arrested as a felon, but was taken to the place where the felony was committed to find out whether he had committed the crime or not. Accordingly, DENMAN, C.J., very naturally said (3 Nev. & M.K.B. 319):

"You may go to inquire, but you cannot take him."

In fact, however, the complaint appears to have been that no adequate grounds for suspicion had been set out in the plea, and leave to amend was given, a circumstance which seems only to be consistent with a complaint that the pleadings were not in order. No question as to the time allowable for taking an arrested man before a justice was raised. He was taken to a shop for the purpose of ascertaining if he was the thief and was not arrested as a felon.

The third case is *Morris v. Wise* (4), decided in 1860. The action was for false imprisonment and the plea not guilty by statute. The statute in question was (after amendment by the defendant of his plea) 7 & 8 Geo. IV, c. 29, and the charge was for stealing grass, a crime dealt with by s. 43 but not made a felony in case of the first offence. Apart from the Act, therefore, there would be no power of arrest. By s. 63, however, of the same Act a special power of arrest is given to any peace officer or to the owner of the property in question in respect of any person found committing any offence punishable either on indictment or on summary conviction "by virtue of this Act". This right, however, was subject in express words to the obligation that the offender should be immediately apprehended and forthwith taken before some neighbouring justice of the peace, and it will be observed that the power of arrest is only given to a limited type of individual and even then only if the offender is taken in the act. BYLES, J., who tried the case, pointed out that the plaintiff had not been taken straight to the magistrate, but had been taken to the defendant's house, and he left the question to the jury to say what damages should be given for the taking of the plaintiff by an indirect route. Under this direction the jury awarded 40s. The decision, therefore, has no direct bearing on the obligations imposed by the common law and clearly does not limit the general power of arrest. It would be an odd result of the Act if in all cases of felony no one but a constable or the owner of stolen property could arrest and only then if the person arrested was taken in flagrante delicto. The fact is that the Act does not lessen the common law power of arrest, but, on the one hand, widens it so as to include non-felonious offences, and, on the other, limits the persons who are entitled to arrest, and subjects them to the obligation to arrest immediately and bring the person concerned

before a magistrate forthwith. In my view, therefore, the cases do not of themselves bear out the proposition that an arrested man must be taken before a justice of the peace immediately.

My Lords, similar additional powers of arrest are given by the Larceny Acts, 1861, s. 103, and 1916, s. 41, and by many other Acts and are subject to similar restrictions. I do not need to discuss them further, since the same considerations apply to them as to 7 & 8 Geo. IV, c. 29. If, then, the three cases which have been cited are not authorities that an arrested person must be taken immediately before a magistrate, it is necessary to examine the practice which has obtained in this country both before and after the Acts and cases cited.

Where the right of arrest is given to a private person, it is obviously desirable that the arrested man should be entrusted to some official care as soon as possible, and statements to that effect are to be found in, I think, all the text-books old or new. But it does not appear that in earlier days it was essential that the accused man should be brought before a magistrate in order that he might be bailed. The practice is set out in *HAWKINS' PLEAS OF THE CROWN*, 8th ed. (1824), vol. 2, p. 174, s. 3:

"It seems to be agreed by all the old books, that wheresoever a constable, or private person, may justify the arresting another for a felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person has as much authority in cases of this kind as the sheriff or any other officer, and may justify such imprisonment by his own authority, but not by the command of another. But inasmuch as it is certain, that a person lawfully making such an arrest may justify bringing the party to the constable, in order to be carried by him before a justice of peace, inasmuch as the statutes of 1 & 2 Phil. & Mar, c. 13, and 2 & 3 Phil. & Mar, c. 10, which direct in what manner persons brought before a justice of peace for felony shall be examined by him in order to their being committed or bailed, seem clearly to suppose, that all such persons are to be brought before such justice for such purpose; and inasmuch as the statute of 31 Car. 2 [c. 2] commonly called the Habeas Corpus Act, seems to suppose, that all persons who are committed to prison are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice, and opinions, are agreeable hereto: it is certainly most advisable at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of peace, that he may be committed or bailed by him."

To the like effect is *HALE'S PLEAS OF THE CROWN* (1800), vol. 2, p. 81, in which it is said of private persons using their powers of arrest:

"Now what is to be done by a private person, that thus arrests a party upon suspicion of felony; if after such an arrest the party arresting discharges him without bringing him to a justice or constable, he shall be punished for the escape at the king's suit, but it makes not the imprisonment unlawful as to the party. 10 E. 4. 17. b. Or he may carry him to the gaol, and if the gaoler receives him, he that made the arrest is discharged, 10 E. 4. 18. a. but he must not carry him to a gaol of any other county than where he is taken, unless either there be no gaol in the county, or that he cannot for the danger of rebels bring him to that gaol. 11 E. 4. 4. Or he may deliver him to the constable of the vill, and that is a sufficient discharge. 10 E. 4. 17. b. But the proper way is to bring him to a justice of peace, who may commit, or discharge, or bail him, as the case requires."

HAWKINS in his turn quotes from *DALTON'S COUNTY JUSTICE* (1742) p. 408, where it is said:

"But in all these cases before, where a private man shall arrest another, he ought thereupon to commit the prisoner to the gaol or to carry and deliver him to some constable, or to some other officer, etc."

DALTON himself refers to FINCH'S COMMON LAWS OF ENGLAND. The first English edition (1759) says, at p. 368:

"Every one who suspects another of a felony . . . may arrest him; so that thereupon he commit him to gaol."

To the same effect is SHEPPARD'S ABRIDGEMENT (1675), vol. 2, p. 302, where, dealing with the right of a private person to arrest, he ends:

"he may of his own head, without any warrant from a justice of the peace, or officer, apprehend the felon, and carry him to a justice of the peace, or other officer, or to prison."

Finally, in BURNS' JUSTICE OF THE PEACE, the authority of which has been recognised in your Lordships' House in *Christie v. Leachinsky* (1), it is stated—I quote from the 30th ed. (1869), vol. 1, p. 305:

"When a private person has apprehended another for treason or felony, he should deliver him over to a constable, or carry him before a magistrate or to any gaol in the county. It is rarely the case that a private person carries the party to gaol. He cannot apprehend or discharge the party at his own pleasure . . . Neither can he, it seems, apprehend and deliver the party over to a constable only, but he must follow up the charge by attending before the magistrate, and then only he ceases to be an actor."

One may, perhaps, add the authority of *Cokayne v. Manyngham* (5), reported in vol. 47 of the Selden Society publications at p. 157, in which the court held that

"if a man arrest another for felony and deliver him to the constable that then he is loyally discharged even if the constable has let the prisoner go at large and has not led him to the gaol."

My Lords, I quote these authorities not for the purpose of suggesting that the obligation to bring an arrested person before a magistrate within a reasonable time has been lessened or abolished or of putting forward a contention that the duty may be laxly discharged, but in order to establish that the obligation is not in terms to proceed before the magistrate forthwith or immediately as certain special Acts require. The object of bringing a man arrested before a magistrate is not, as I view it, to ensure that the accused man may be bailed at once. The right to give bail in the case of anyone other than a justice of the peace did not exist before the Summary Jurisdiction Act, 1879, and even then the provisions of s. 38 only gave the right to grant bail to police officers if it was not practicable to bring the alleged offender before a court of summary jurisdiction as soon as practicable after he is taken into custody. Nor has the enlargement of those powers by later Acts effected any alteration in the length of the time given to bring the arrested man before a magistrate. Indeed, under the earlier procedure the individual who arrested was given the choice of three alternatives—gaol, the constable, or the justice. Today the gaol would not receive the prisoner, and I think that BURNS' requirement is right—a handing over to a constable is not enough; the arrester is not free of his obligation until he has proceeded before a magistrate. Nevertheless, the mere fact that the handing over to a constable is one of the methods prescribed for ridding oneself of the prisoner indicates a less stringent obligation than to proceed before the justice forthwith.

The two methods of approach are, perhaps, best seen by comparing the statement contained in the article on CRIMINAL LAW in HALSBURY'S LAWS OF ENGLAND (Hailsham ed.), vol. 9—a subject which was entrusted to the late AVORY, J. At p. 96, para. 122, it is said:

"A private person who arrests another under a common law power can only detain him for a reasonable time, and must then either set him free or

hand him over to a constable or take him before a justice of the peace. If the suspected offender is not liberated and is not taken before a justice with reasonable expedition and by a direct road, the person who arrests is liable to an action of trespass."

For the latter statement *Wright v. Court* (2) is referred to, but that case merely speaks of "a reasonable time". Whether the time taken falls within that requirement is a matter of fact. No doubt, the route taken is one matter for consideration, but in the present case the learned judge who tried the case did not consider the time too long or the route adopted and the delay in proceeding to the appellants' office unreasonable. As against this statement of the law may be contrasted that contained in *CLERK & LINDSELL ON THE LAW OF TORTS*, 10th ed., p. 308, where it is said:

"The statutes authorising arrests without warrant generally provide that the arrested party shall be taken immediately or forthwith before a justice of the peace, but these provisions are only declaratory of the common law. So jealous is the law on this point that if the prisoner be conducted by a circuitous instead of the ordinary direct road he may recover for a false imprisonment."

For this statement *Morris v. Wise* (4) is quoted. That case, however, as is pointed out above, was not one of arrest under the common law, and I see no reason for assuming that statutes which enlarge the power of arrest so as to include misdemeanours, but limit the persons to whom the power of arrest is granted, are merely declaratory of the common law right or that the same principles apply to both classes.

What the common law requires is that, if a man be arrested on suspicion of felony, he should be taken before a tribunal which can deal with his case expeditiously. The question throughout should be: Has the arrester brought the arrested person to a place where his alleged offence can be dealt with as speedily as is reasonably possible? But all the circumstances in the case must be taken into consideration in deciding whether this requirement is complied with. A direct route and a rapid progress are, no doubt, matters for consideration, but they are not the only matters. Those who arrest must be persuaded of the guilt of the accused; they cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man arrested meanwhile or taking him to some spot where they can or may find further evidence. But there are advantages in refusing to give private detectives a free hand and leaving the determination of whether to prosecute or not to a superior official. Whether there is evidence that the steps taken were unreasonable or the delay too great is a matter for the judge. Whether, if there be such evidence, the delay was in fact too great is for the jury: see *Cave v. Mountain* (1840) (1 Man. & G. 257). In the present case the complaint was, as I have said, not that the detention was too long, but that a direct route from the place of arrest to the magistrate's court had not been taken. In my opinion, that is not the vital question. Rather it is whether, in all the circumstances, the accused person has been brought before a justice of the peace within a reasonable time, it being always remembered that that time should be as short as is reasonably practicable. I would allow the appeal.

LORD OAKSEY: My Lords, I have had the advantage of reading the opinion of the noble and learned Lord on the Woolsack, and I agree with it.

LORD MORTON OF HENRYTON: My Lords, the question of law which arises on this appeal may be stated as follows:—When one person arrests another without a warrant in exercise of the common law power of arrest, is it the duty of the person making the arrest to take the arrested person before a justice or to a police station "forthwith", or is it the duty of the person making the

arrest to take the arrested person before a justice or to a police station "as soon as he reasonably can"? The latter phrase is quoted from the judgment of the court in *Wright v. Court* (2) (4 B. & C. 598).

The authorities on this subject have been fully discussed by my noble and learned friend on the Woolsack. I agree with his reasoning and with his conclusion, and I desire only to add a few words on the further question whether the two detectives took the respondent to the Marylebone Lane police station as soon as they reasonably could. In my opinion, they did. It was a regulation of the appellants that only a managing director or a general manager of the appellants was authorised to institute any prosecution against any person. This being so, it was, I think, reasonable for the detectives to take the respondent to the office at the appellants' premises for the purpose of getting authority for a prosecution. I cannot find any evidence that they went there for any other purpose. The case would have been a different one if they had gone there for the purpose of filling in gaps in the evidence: see *Hall v. Booth* (3) and *Morris v. Wise* (4). On reaching the office, the detectives explained what they had seen to the appellants' chief store detective and subsequently to Commander Newdegate, the managing director of the appellants' store in Oxford Street. As soon as Commander Newdegate had authorised the prosecution of the respondent and her daughter on a charge of theft, the police were sent for and they arrived a few minutes later from the Marylebone Lane police station. The substance of the facts was told to the police officers, and the respondent and her daughter were taken to the said police station.

My Lords, it does not appear that any point was taken either before DONOVAN, J., or in the Court of Appeal as to the length of time for which the respondent was detained at the office. The complaint was that she was taken there at all, instead of being taken direct to the police station. It is, I think, clear that DONOVAN, J., attached no importance to the length of the detention, for the first question which he put to the jury in regard to the alleged false imprisonment was:

"Was the plaintiff detained against her will in John Lewis's for an hour or so before the police were summoned?"

If the learned judge had attached any importance to the length of the detention, he would surely have divided this question into two parts—(i) Was the plaintiff detained against her will in John Lewis's? (ii) If so, for how long was she detained? Further, I think, it appears from the judgment of LORD GODDARD, C.J., that he regarded the respondent's case as being based on the fact that she was taken to the office, and not on the length of time during which she was detained there.

If the detectives acted reasonably, having regard to the regulation to which I have already referred, the further question must be considered whether the regulation was a reasonable one to impose on detectives whose duty it might be to arrest a suspected person. For if the regulation was such as to result in an unlawful infringement of the liberty of the subject, such infringement could not be excused on the ground that the detectives were merely carrying out the regulation. In my opinion, the regulation was a reasonable one. On this point I agree with the submissions of counsel for the appellants, which they summarised as follows:

"(A) It is undesirable that the power or duty to institute proceedings on behalf of corporations or other persons should be delegated to subordinate employees thereof or should be exercised by any but senior and responsible officers or representatives thereof. Since, in the case of suspected shop-lifting, it is not practicable to arrest a suspected person until he has left the premises without paying for goods which he has taken, it will not be practicable for a senior and responsible officer or representative to decide whether a charge should be made unless subordinate employees such as store detectives

are entitled to take an arrested person back to the premises before he is handed over to the police.

"(B) It is in the interests of an arrested person himself that he should not be charged without being given an opportunity of offering any explanation or making any representation to a responsible officer or representative of the prospective prosecutors. It is to his own advantage that this opportunity should be given in the privacy of an office with the minimum possible number of persons present. This safeguard is especially important when the arrested person is very young or old or appears to be mentally unstable. In such cases it is in the public interest that a lenient and responsible discretion should be exercised before any charge is made."

I would allow the appeal.

LORD REID: My Lords, I concur.

LORD PORTER: My Lords, my noble and learned friend **LORD COHEN** asks me to say that he has had an opportunity of reading my opinion and he agrees with it.

Appeal allowed.

Solicitors: *Underwood & Co.* (for the appellants).

[Reported by J. D. PENNINGTON, *Barrister-at-Law.*]

DONALDSON v. McNIVEN.

[LIVERPOOL ASSIZES (Pearson, J.), February 21, 22, 25, 1952.]

Negligence—Air rifle—Liability of parent.

The defendant, who lived in a populous district of Liverpool, allowed his son, aged thirteen years, to have an air rifle on condition that it was never used outside the house. There was a large cellar to the defendant's house where the son was allowed to use the air rifle. Behind the house and providing access to it and other houses was an alley-way where children came to play. Without the defendant's knowledge, the son fired the air rifle in the alley-way and injured the plaintiff, a child aged five, who was standing at the entrance to the alley-way.

HELD: an air rifle was not a dangerous thing per se in the sense that a savage animal or poison or fire was a dangerous thing per se, but it was potentially dangerous in the sense that it might cause injury if negligently used, and a parent was negligent if he allowed a child aged thirteen to have an air rifle and did not take any precautions which were reasonably necessary to preclude the dangerous use of it, but in the circumstances the precautions taken by the defendant to restrict the use of the air rifle to a place of safety were suitable and would have been adequate but for the son's disobedience which could not reasonably have been foreseen or contemplated by the defendant, and, therefore, the defendant was not guilty of negligence.

AS TO DANGEROUS ARTICLES, see HALSBURY, Hailsham Edn., Vol. 23, p. 629, para. 883; and FOR CASES, see DIGEST, Vol. 36, pp. 56-58, Nos. 353-364.

Cases referred to:

- (1) *Bebee v. Sales*, (1916), 32 T.L.R. 413; 36 Digest 57, 361.
- (2) *Burfitt v. Kille (A. & E.)*, [1939] 2 All E.R. 372; [1939] 2 K.B. 743; 108 L.J.K.B. 669; 160 L.T. 481; Digest Supp.
- (3) *Ricketts v. Erith Borough Council*, [1943] 2 All E.R. 629; 113 L.J.K.B. 269; 169 L.T. 396; 108 J.P. 22; 2nd Digest Supp.

ACTION for damages for negligence.

The plaintiff, a young child suing by his father as next friend, was injured by a pellet from an air rifle fired by the defendant's son, who was thirteen years

old at the time. The rifle was fired in an alley-way where children came to play. It was contended, *inter alia*, on behalf of the plaintiff, that the defendant did not exercise proper care in allowing the son to have the air rifle in a populous district. The defendant contended that he had discharged the duties of a reasonably prudent parent by ordering the son not to use the air rifle outside the house.

Nance for the plaintiff.

Youds for the defendant.

PEARSON, J.: The infant plaintiff, who was five years old at the time of the accident, sues by his father as next friend for damages in respect of personal injury causing total loss of sight in his right eye. The injury was caused by a pellet fired from an air rifle by another boy, Donald McNiven, who was thirteen years old at the time of the accident. The action is brought, not against the boy who fired the pellet, but against his father, William McNiven, for damages for negligence. Authority for bringing the action against the father in such cases is afforded by *Bebee v. Sales* (1). Other cases which I have considered include *Burfit v. A. E. Kille* (2), and *Ricketts v. Erith Borough Council* (3).

At the material time the defendant and his family occupied a house and shop, known as No. 285 Scotland Road, Liverpool. Behind the shop, on the ground floor, is a store room, from which there are steps leading down to a cellar. The cellar is forty-five feet long and fairly well lit. Above the ground floor there are the living-room and some bedrooms. Behind No. 285 Scotland Road there is a small back yard and then a wall, and behind the wall there is an alley-way which provides access to the backs of the properties in Scotland Road and also to the back of the property on the other side of the alley-way. The alley-way is about fifty-one feet long and is four feet, four inches, wide. At one end, near the back entrance of No. 285 Scotland Road, the alley-way is enclosed by a wall. The other end of the alley-way opens on to Silvester Street, where the infant plaintiff and his parents live. At the end of the alley-way there is a gate, but at the material times it was never locked. Children came to play in the alley-way or at its entrance and used to swing on the gate and climb.

Early in July, 1950, the defendant and his wife and children went for a holiday in London. The defendant knew that his son wished to buy an air rifle, and they both went to a shop in Oxford Street and inquired the price of air rifles, but they found that they were too expensive. On July 4 the son saw an air rifle priced at 25s. in a shop in the Strand, and then either the defendant bought it for his son at the son's request or the son bought it with his own money, but with the consent of the defendant. The defendant's wife, however, did not wish her son to have an air rifle, and, as soon as she heard of the purchase, she strongly objected to it. Eventually she gave way and let the boy keep the rifle, but only on condition that he promised on his word of honour never to use it outside the house in Liverpool. He gave that promise to his mother in the presence and hearing of the defendant. The defendant agreed with or was persuaded by his wife, and later he ordered his son not to use the rifle outside the house in Liverpool. According to the defendant's own evidence, he gave an order or warning to this effect in emphatic and minatory terms on two occasions, once in London and again on their return to Liverpool. I think this evidence may be exaggerated, but I find that such an order was given by the defendant to his son on at least one occasion before or at the time of the return to Liverpool.

After the return to Liverpool the air rifle was kept in the store room beside the top of the steps leading to the cellar, and until the day of the accident, July 14, 1950, it was used only in the cellar, and no complaint was made with regard to it. Originally the defendant's son did not have any proper ammunition, and he used only match sticks for firing in the cellar, but afterwards another boy procured some pellets for him and he fired the pellets in the cellar. The defendant's son was a boy of normal intelligence and disposition, and not specially obedient or disobedient. The defendant said that, so far as he knew,

his son had never disobeyed a direct order. The defendant's wife admitted that "boys will be boys" and that the son had been smacked or thrashed for various things, and he had sometimes been disobedient. On the whole, I do not think that they had any reason to anticipate that, when the son had a place to use the air rifle inside the house, had been ordered by the defendant not to use it outside the house, and had given his word of honour to his mother that he would not do so, he would be so disobedient and dishonourable as to do so. It is a debatable question, but that is the conclusion to which I have come, having seen the boy and his parents in the witness box and having carefully considered the facts.

On July 14, 1950, the defendant's son called on a friend, Harold Hurley, and brought him back to see the air rifle. They came into the alley-way where Harold remained both because he was not invited to enter the house and also because he was afraid of a dog kept by the defendant in the back yard. The defendant's son went by the back door through the yard into the store room, and, in breach of his instructions from his parents and the promise which he had given to his mother, brought the air rifle into the alley-way and he and Harold proceeded to fire it. They were firing it from the inclosed end of the alley-way at a drain pipe which was about the middle of the alley-way, and, therefore, on the way to the open end of the alley-way opening on to Silvester Street. This was a foolish and negligent thing for them to do, involving risk of injury to persons passing in Silvester Street and especially to any child who might turn into the alley-way. Some small children entered the alley-way and were chased away by the two boys. The infant plaintiff himself had been in the alley-way earlier in the morning. At the time of the accident the defendant's wife was out and the defendant, who was in the upper part of the house, did not hear the boys firing the air rifle in the alley-way. The infant plaintiff came along Silvester Street and stopped at the entrance to the alley-way and looked into it just when the defendant's son was aiming a shot at the drain pipe and was pressing the trigger. A pellet was fired, and, apparently, it hit the drain pipe and ricocheted off it. At any rate, the pellet hit the infant plaintiff in the right eye. An operation was unsuccessful and the infant plaintiff's right eye is permanently blind. If there were liability, I should assess the damages at £1,750. The air rifle was, at my request, tested by a police sergeant to ascertain how far it would fire a pellet. He fired a pellet at a distance of about twenty-five yards at an iron gate and he found that the pellet struck the iron gate at a true trajectory at a height of about six feet and ricocheted back off the gate, and that there was still force in the pellet when it struck the ground. The air rifle was described as a Millbrow scout gun, and there was a figure of a boy scout on it. At the trial no reference was made to any rules or regulations, and no evidence was given of this type of air rifle being classified or considered as more dangerous than others.

I thought it right to consider the provisions of the Firearms Act, 1937, to see whether they would give any guidance as to the status of an air rifle in relation to the requirements of public safety. Section 2 (2) and s. 2 (7) show that the Act is concerned, inter alia, with the public safety and the fitness of persons to be entrusted with firearms. Although an ordinary air rifle might not naturally be regarded as a "lethal barrelled weapon", within the definition of "firearm" in s. 32 (1) of the Act, I think it appears from a comparison of the definition with the provisions of s. 16 (1) that, for the purposes of the Act, an ordinary air rifle is sufficiently "lethal" to be a "firearm" within the meaning of the Act. Section 19, read in conjunction with s. 16 (1), shows that a person under the age of seventeen is prohibited from purchasing or hiring any air rifle, but is not prohibited from accepting as a gift or borrowing, and having in his possession without a licence, an air rifle not being of a type declared by rules to be specially dangerous. The Act is concerned with criminal liability and is not concerned with civil liability for negligence. Nevertheless, I think its provisions ought to be taken into account in considering the legal requirements of air rifles and

the standard of care in relation to them. The legislature in 1937, when dealing comprehensively with the subject of the acquisition and possession of firearms, did not consider it necessary to put ordinary firearms out of the reach of boys under seventeen.

An air rifle is not, in my opinion, a dangerous thing per se, in the sense that a savage animal or poison or fire is a dangerous thing per se. It is, however, potentially dangerous in the sense that it may cause injury if negligently used, and a parent is negligent if he allows his son aged thirteen to have an air rifle and does not take any precautions which are reasonably necessary in the circumstances to preclude the dangerous use of it. It was argued on behalf of the plaintiff that the defendant did not exercise proper care in letting his son have the air rifle in that particular locality, the defendant's house being in a populous working-class district and backed by the alley-way; that a mere warning was not sufficient discharge of his duty in view of the air rifle being a dangerous thing; that his duty was to ensure that the rifle was used only in the cellar; and that the defendant's son, who had been guilty of disobedience in the past, was left largely without supervision during the daylight hours. It was argued on behalf of the defendant that he had discharged the duties of a reasonably prudent parent; that it was not negligence for a parent to place an air rifle in the hands of a boy thirteen years old, for use only in a confined place such as a cellar; that the defendant was not responsible for his son's torts; and that, while he would be responsible for his own personal negligence in affording or allowing his son an opportunity of doing mischief, there was, on the evidence, no such negligence in this case.

This is not an easy case, but I have come to the conclusion that, on a fair balance of the requirements of public safety with the requirements of individual freedom, it should not be regarded as negligence on the part of a father to allow his son to have an air rifle in a populous district if suitable precautions are taken to restrict the use of it to a place of safety, and that in the circumstances the precautions taken in this case were suitable and would have been adequate, but for the act of extreme disobedience and unfaithfulness and folly on the part of the son which could not reasonably have been foreseen or contemplated by his parents and was the cause of the accident. I, therefore, decide the issue of liability in favour of the defendant and I give judgment for him.

Judgment for defendant.

Solicitors: *J. Trevor Booth & Banfi*, Liverpool (for the plaintiff); *John A. Behn, Twyford & Reece*, Liverpool (for the defendant).

[Reported by MISS M. D. CHORLTON, Barrister-at-Law.]

Re ROSE (deceased). ROSE AND OTHERS *v.* INLAND
REVENUE COMMISSIONERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.J.J.),
April 3, 4, 1952.]

Estate Duty—Gift inter vivos—Date when made—Shares—Transfer before April 10, 1943—Transfer registered after that date.

By a transfer dated Mar. 30, 1943, the deceased, in consideration of his love and affection for his wife, transferred to her ten thousand shares of £1 each in an unlimited company to hold subject to the several conditions on which he held the same at the time of the execution thereof. By another transfer of the same date, the deceased, in consideration of the payment of 10s., transferred a similar number of the said shares to his wife and R. to hold subject to the same conditions. By a settlement of the same date, made between the deceased, of the first part, the wife, of the second part, and the wife and R. (as trustees), of the third part, trusts were declared of the second block of shares in favour of the wife and the son of the deceased. Under the articles of association of the company the directors were empowered, in their absolute and uncontrolled discretion and without assigning any reason, to decline to register any proposed transfer of shares. The deceased was governing director of the company and as such had full and uncontrolled authority to determine who should be admitted from time to time to be a shareholder of the company. The other directors were the deceased's wife and R. The two transfers (which were in the form prescribed by the articles of the company) and the settlement were executed by all parties between Mar. 30, 1943, and Apr. 5, 1943, and the share certificates of both blocks of shares were thereafter held by R. The transfers were not registered until June 30, 1943, and it was agreed that (having regard to the transitional provisions contained in the Finance Act, 1946, sched. XI, Part II) all the shares would be liable to estate duty under the Finance Act, 1894, s. 2 (1) (c), unless before Apr. 10, 1943, there had been bona fide dispositions of the shares purporting to operate as immediate gifts inter vivos.

HELD: the deceased had done all in his power to divest himself of the shares and to vest them in the transferees, and the transfers were effective as between the deceased and the transferees to divest the deceased of beneficial ownership and to constitute the transferees the beneficial owners of the shares; the circumstance that the transferees must, to perfect their legal title, apply for and obtain registration, did not prevent the transfers from so operating, and pending registration the deceased was the trustee for the transferees of the legal estate in the shares which still remained in him; and, therefore, the gift of the beneficial interest in the shares had been made and completed prior to Apr. 10, 1943, and no estate duty was exigible.

Milroy v. Lord (1862) (4 De G.F. & J. 264), distinguished.

Re Rose ([1948] 2 All E.R. 971), approved.

Decision of ROXBURGH, J. ([1951] 2 All E.R. 959), affirmed.

AS TO LIABILITY OF GIFTS INTER VIVOS TO ESTATE DUTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 237-240, paras. 227-229; and FOR CASES, see DIGEST, Vol. 21, pp. 10-14, Nos. 45-67.

Cases referred to:

- (1) *Milroy v. Lord*, (1862), 4 De G.F. & J. 264; 31 L.J.Ch. 798; 7 L.T. 178; 45 E.R. 1185; 40 Digest 533, 770.
- (2) *Re Rose*, [1948] 2 All E.R. 971; [1949] Ch. 78; [1949] L.J.R. 208; 2nd Digest Supp.
- (3) *Re Fry*, [1946] 2 All E.R. 106; [1946] Ch. 312; 115 L.J.Ch. 225; 175 L.T. 392; 2nd Digest Supp.

APPEALS by the Crown from orders of ROXBURGH, J., dated Nov. 2, 1951, reported [1951] 2 All E.R. 959.

The taxpayers issued two originating summonses to determine the liability to estate duty of two blocks of shares in a private unlimited company gratuitously or for nominal consideration assigned by the deceased to or for the benefit of his wife and child before Apr. 10, 1943, the relevant date, having regard to the Finance Act, 1946, sched. XI, prior to which the gifts must have been made if duty were not to be levied thereon under the Finance Act, 1894, s. 2 (1) (c). The transfers were not registered until after Apr. 10, 1943, and the Inland Revenue Commissioners claimed estate duty on the footing that the gift was not complete until the transfers were registered. ROXBURGH, J., held that the gifts were complete prior to Apr. 10, 1943, and that, therefore, no estate duty was chargeable.

Pennycuik, Q.C., and *J. H. Stamp* for the Crown.

Grant, Q.C., and *F. N. Bucher* for the taxpayers.

SIR RAYMOND EVERSHED, M.R.: On Mar. 30, 1943, one Eric Hamilton Rose (since deceased) executed two transfers of shares in a company known as the Leweston Estates Co. That company, as its name implies, was an unlimited corporation. The first transfer was expressed to be in favour of his wife, Rosamond Mary Rose, and to be in consideration of his love and affection for her. The second transfer was in favour of Mrs. Rose and another individual, and in that case the intention was that the transferees should thereupon hold the shares on certain trusts which it is not material to consider. These two transfers were presented for stamping on Apr. 12, 1943. In due course, the duty was adjudicated by the commissioners and the requisite ad valorem stamp impressed on the transfers. The transfers, with the relative certificates, were then presented to the Leweston Estates Co. for registration and were, in fact, registered on June 30, 1943. Unfortunately, the transferor, Mr. Rose, died some few years afterwards, and the question which has arisen in the two appeals is whether there elapsed, prior to Mr. Rose's death, a sufficient length of time, in accordance with the provisions of a number of finance statutes, so that these shares need not be taken into account for the purpose of assessing death duty on his death and aggregated with the rest of his estate. I do not find it necessary to expand the matter of time at all because it is not in dispute that the vital date, for the purpose of determining whether duty was or was not payable on the transferor's death, was Apr. 10, 1943. In other words, unless the transfers were effected within the meaning of certain provisions of the Customs and Inland Revenue Acts, 1881 and 1889 (to which I shall allude in a moment), before Apr. 10, 1943, there is no doubt that the Crown's claim for duty is well founded.

Before I turn to the sections, I should state one other fact about the Leweston Estates Co. It was a private company, and, therefore, its regulations comprehended articles of a very familiar character restrictive of the right of members to transfer their shares. In brief, the directors of the company had an absolute right to refuse registration. There was also an article in common form, art. 9, which provided:

"The company shall be entitled to treat the person whose name appears upon the register in respect of any share as the absolute owner thereof, and shall not be under any obligation to recognise any trust or equity or equitable claim to or interest in such share, whether or not it shall have express or other notice thereof."

The first provision of the statutes to which I wish to allude is the Customs and Inland Revenue Act, 1881, s. 38 (2), which is in these terms:

"The personal or movable property to be included in an account shall be property of the following descriptions, viz.:—(a) Any property taken as a donatio mortis causa made by any person dying on or after the first day of

June, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made three months before the death of the deceased."

To that sub-section an amendment was made by the Customs and Inland Revenue Act, 1889, s. 11 (1), for it was there provided that

" . . . The description of property marked (a) [in s. 38 (2)] shall be read as if the word ' twelve ' were substituted for the word ' three ' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

Those provisions, as is well known, were picked up and re-enacted in the Finance Act, 1894, s. 2 (1) (c). It was the claim of the Crown in both the present cases that the property, viz., the shares which were the subject of the two transfers I have mentioned, was not comprehended within the language of the two sub-sections I have read so as to be freed from liability thereunder, and, anticipating what I shall say later on, it is plain that the Crown's argument may be put on alternative grounds: (i) that the shares were not taken under a voluntary disposition made by a person purporting to operate as an immediate gift, or, alternatively, if they were, (ii) that bona fide possession and enjoyment was not assumed on the date of the transfers by the donee immediately on the gift and thenceforward retained to the entire exclusion of the donor. It is said by the Crown that until the transfers were registered in the books of the Leweston Estates Co. on June 30, 1943, either there was no effective transfer of the shares to the donee, or, alternatively, there was not until that date an entire exclusion of the donor from all benefit in respect of the shares. By way of illustration, the matter has been put thus for the purposes of the argument. The result of these transfers was such that if, between their date, Mar. 30, and the date of registration, June 30, the company had declared and paid a dividend in respect of its shares, that dividend must have been paid to the donor, Mr. Rose, and could have been retained by him for his own benefit, and the donees could have had against him no claim whatever to have the amount of the dividend handed over to her or to them respectively.

ROXBURGH, J., decided the question which arose in both cases adversely to the Crown. From those decisions the Crown has appealed. It will be sufficient and convenient for me now to confine myself to one of the transactions, the subject of one of the appeals, and I take that of the first transfer which I mentioned, from Mr. Rose to his wife. It is not in question that a decision on that matter will necessarily involve a similar decision in the case of the other. I will first read the transfer. It was in this form:

" I Eric Hamilton Rose of Leweston Manor Sherborne in the county of Dorset, Esquire, in consideration of the love and affection I have for my wife Rosamond Mary Rose of Leweston Manor Sherborne aforesaid (hereinafter called ' the said transferee ') do hereby transfer to the said transferee 10,000 (ten thousand) shares of £1 each Nos. 3 to 10,002 inclusive in the undertaking called the Leweston Estates Company to hold unto the said transferee subject to the several conditions on which I held the same at the time of the execution hereof; and I, the said transferee, do hereby agree to accept and take the said shares subject to the conditions aforesaid."

That document was executed under seal by both transferor and transferee, and there are certain observations which may be made on it. The first is that it was in form in exact correspondence with the requirements of the company's regulations, for in art. 29, dealing with the transfer of shares, it is provided that

"Shares in the company shall be transferred in the following form or as near thereto as circumstances will permit . . ."

The form which follows is that which Mr. Rose adopted. On the execution of the transfer the deed was beyond question delivered to the transferee, and there was also delivered to her the certificate relative to those shares. It follows, therefore, that so far as lay in his power the transferor, Mr. Rose, did all that he could—he followed carefully and precisely the obligations imposed on a proposing transferor by the article—to divest himself then and there in favour of his wife of all his interest, legal and equitable, in the shares.

The next thing to notice (and it is, I think, not without significance) is this. The company was unlimited, and this form of transfer differed, therefore, in one respect from the forms of transfer commonly found in the case of limited companies, in that it contained what was, in effect (because it was under seal) a covenant by Mrs. Rose to accept and take the shares subject to the conditions, i.e., the conditions imposed on shareholders by the regulations of the company, and it was executed not only by the transferor but also by the transferee. There is a third matter to which I think some relevance also attaches in considering the validity of the Crown's claim. I have said that on Apr. 12, 1943, the transfer was presented for adjudication to the stamping authority, and it bears an ad valorem stamp. The impressing of that stamp is justified by the Finance (1909-10) Act, 1910, s. 74, on the ground that

"Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale . . ."

subject as thereinafter provided.

Approaching the matter, then, as one of common sense, or from which the application of common sense is not excluded, and having regard to the terms of the transfer, I should have thought it was exceedingly difficult to contend successfully that on the date of the transfer, Mar. 30, 1943, Mr. Rose did not, within the terms of s. 38 (2) (a) of the Act of 1881, make, and Mrs. Rose did not take under, a voluntary disposition purporting to operate as an immediate gift, but that, of course, is not conclusive, for there still remains on any view the question whether, during the period up to June 30, 1943, the transferor did not, by virtue of the peculiar characteristics attaching to shares in companies, and particularly in this company, retain an interest which did not cease until June 30, a date too late for the purposes of the taxpayers.

The burden, I think, of the case presented by the Crown may be briefly put as it was formulated in reply by counsel. This document, says he, on the face of it, was intended to operate and operated, if it operated at all, as a transfer. If for any reason it was at its date incapable of so operating it is not legitimate, either by reference to the expressed intention in the document or on principles of law well-established, to extract from it a wholly different transaction, i.e., so as to make it take effect, not as a transfer, but as a declaration of trust. I agree that on the face of the document it was obviously intended (if you take the words used) to operate, and operate immediately, as a transfer of rights. To some extent at least, it is said, it could not possibly so operate. To revert to the illustration which has throughout been taken, if the company had declared a dividend during this interregnum then it is not open to question that the company must have paid that dividend to the donor. So that vis-à-vis the company this document did not and could not operate to transfer to the donee the right against the company to claim and receive that dividend. Shares, it is said by counsel for the Crown, are property of a peculiar character consisting, as it is sometimes put, of a bundle of rights, i.e., rights against or in the company. It has followed from counsel's argument that, if such a dividend had been paid, Mr. Rose could, consistently with the document to which he has set his hand and seal, have retained that dividend, and if he had handed it over to his wife it

would have been an independent gift. I think myself that such a conclusion is startling. Indeed, I venture to doubt whether to anybody but a lawyer such a conclusion would even be comprehensible, at least without a considerable amount of explanation. That again is not conclusive, but I confess that I approach a matter of this kind with a preconceived notion that a conclusion that offends common sense as much as this would *prima facie* ought not to be the right conclusion. JENKINS, L.J., carried the matter a stage further by illustration. He said: Suppose, on the Crown's view, the donor, retaining, pending registration, full rights over these shares (for counsel for the Crown argued that this document, not only did not transfer the legal estate, but that it transferred no interest or estate whatever), repented of his generosity and had then told the company not to permit his wife to get the transfer registered. And suppose that the wife went to the company and the directors of the company had nevertheless expressed themselves willing to register the transfer. Let it be then further supposed that the donor proceeded to take action to restrain the company by injunction from registering the transfer. If the donor, in truth, retained at that time a proprietary interest, it may seem to flow from the Crown's argument that the court would be bound to protect it by granting an injunction. That, indeed, was perhaps too startling for counsel, for he said that he thought the court would not grant an injunction and that, the document having at least operated as a gift of a piece of paper, viz., the share certificate, the donor could not be heard then to claim the court's assistance so as to restrain the company from doing that which possession, as on a gift, of the certificate and of this transfer, enabled the donee to require the company to do. I do not pursue these examples, but it seems to follow from testing this matter by such extreme cases, that the assertion that nothing whatever passed under this deed except the right to possess, as physical things, two pieces of paper is not right.

Milroy v. Lord (1) is, in truth, the foundation of the Crown's argument since it is on that case that depends the proposition that I have already tried to state, that, if this document was intended to operate as a transfer, effect cannot be given to what may be thought to have been the intention behind it by treating it as operating as a declaration of trust. It is necessary to examine the case with care because, being a decision of this court, it is, of course, binding on us. It was a case in which a Mr. Medley was the proprietor of a number of shares in a company known as the Bank of Louisiana. It was provided by the regulations of that bank that shares could be transferred in a particular way: they could be transferred in the books of the bank by following particular formalities which the regulations specified. Mr. Medley, out of the love and affection which he expressed to have for his niece, proceeded to execute a deed-poll, and by that deed-poll he said that he conveyed, transferred, set over and delivered, and by those presents conveyed, transferred, set over and delivered to Samuel Lord fifty shares, which were specified, such shares thereupon to be held by Lord as trustee on the trusts set out in the deed-poll. The deed-poll was executed under the hand and seal of Medley and of Lord. Now that deed-poll was not a form of transfer which was apt to procure a transfer of shares in the books of the bank according to the bank's regulations. That difficulty, in actual fact, was not necessarily of any significance, because Lord, at the same time, had a power of attorney from Medley whereby Medley gave power to Lord to do what was necessary by following the regulations of the company—among other things, to transfer to himself these shares. Lord did not avail himself of the power of attorney and nothing was done until Medley died, and then the question arose, to whom did these shares properly belong? The plaintiff, Mrs. Milroy, was the niece in whose favour the deed-poll had been made, and she claimed to be entitled, as beneficiary under the deed, to the benefit of the shares and to be beneficially entitled to them to the exclusion of Medley's estate. The Court of Appeal rejected that view, but I think it is quite plain that the basis on which they so

decided was that this purported gift was incomplete or imperfect in the sense that the donor had not done all that lay in his power to do in accordance with the terms on which the shares were held by him to make his gift effective and to divest himself of his beneficial and other interests in the shares. It is pointed out, for example, by KNIGHT BRUCE, L.J., that (4 De G.F. & J. 272):

"He might, however, have affected the legal title. It was in his power to make a transfer of the shares so as to confer the legal proprietorship on another person or other persons. But, as I have said, no such thing was done."

TURNER, L.J., to the same effect, emphasises the point when he says (*ibid.*, 276) that the shares were never vested in Lord:

"... and the only ground on which he can be held to have become a trustee of them is, that he held a power of attorney under which he might have transferred them into his own name; but he held that power of attorney as the agent of the settlor . . ."

Then he observes that, the settlor having died, the power ceased with him.

It is, however, on certain other passages in the judgment of TURNER, L.J., that counsel for the Crown has mostly founded himself. I refer to what is said at p. 274. I think I should read a substantial passage:

"I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

Those last few sentences form the gist of the Crown's argument, and on it is founded the broad, general proposition that if a document is expressed as, and on the face of it intended to operate as, a transfer, it cannot in any respect take effect by way of trust—so far I understand the argument to go. In my judgment, that statement is too broad and involves too great a simplification of the problem, and, in my view, it is not warranted by authority. I agree that if a man purporting to transfer property executes documents which are not apt to effect that purpose, the court cannot then extract from those documents some quite different transaction and say that they were intended merely to operate as a declaration of trust which *ex facie* they are not, but if a document is apt and proper to transfer the property—is, in truth, the appropriate way in which the property must be transferred—it does not seem to me to follow from the earlier statement that, as a result, either during some limited period or otherwise, there may not arise, for the purpose of giving effect to the transfer, some trust. The simplest case will, perhaps, provide an illustration. If a man executes a document transferring all his equitable interest, say, in shares, that document, operating, and intended to operate, as a transfer, will give rise to and take effect as a trust, for the assignor

will then be a trustee of the legal estate in the shares for the person in whose favour he has made an assignment of his beneficial interest. For my part, I do not think that *Milroy v. Lord* (1) is an authority which compels this court to hold that in this case, where, in the terms of the judgment of TURNER, L.J., the settlor did everything which, according to the nature of the property comprised in the settlement, was necessary to be done by him in order to transfer the property, the result necessarily negatives the conclusion that, pending registration, the settlor was a trustee of the legal interest for the transferee.

The view of the limitations of *Milroy v. Lord* (1) which I have tried to express was much better expressed by JENKINS, J., in the recent case which also bears the name of *Re Rose* (2) (though that is a coincidence). It is true that the main point, the essential question to be determined, was whether there had been a transfer eo nomine of certain shares within the meaning of a will. The testator in that case, Rose, by his will had given a number of shares to one Hook, but the gift was subject to this qualification, "if such . . . shares have not been transferred to him previously to my death". The question was: Had the shares been transferred to him in the circumstances? He had executed (as had Mr. Rose in the present case) a transfer in appropriate form, and handed the transfer and the certificate to Hook, but, at the time of his death, the transfer had not been registered. It was said, therefore, that there had been no transfer, and (following the argument of counsel for the Crown) there had been no passing to Hook of any interest, legal or beneficial, whatever, by the time the testator died. If that view were right, then, of course, Hook would be entitled to the shares under the will. But JENKINS, J., went a little more closely into the matter because it was obvious that on one view of it, if it were held that there was a "transfer" within the terms of the will, though the transfer was inoperative in the eye of the law and not capable of being completed after the death, then Mr. Hook suffered the misfortune of getting the shares neither by gift inter vivos nor by testamentary benefaction. Therefore, JENKINS, J., considered *Milroy v. Lord* (1) and in regard to it he used this language ([1948] 2 All E.R. 978):

"I was referred to *Milroy v. Lord* (1), and also to *Re Fry* (3). Those cases, as I understand them, turn on the fact that the deceased donor had not done all in his power, according to the nature of the property given, to vest the legal interest in the property in the donee. In such circumstances it is well settled that there is no equity to complete the imperfect gift. If any act remains to be done by the donor to complete the gift at the date of the donor's death, the court will not compel his personal representatives to do that act and the gift remains incomplete and fails. In *Milroy v. Lord* (1) the imperfection was due to the fact that the wrong form of transfer was used for the purpose of transferring certain bank shares. The document was not the appropriate document to pass any interest in the property at all."

Then he refers to *Re Fry* (3), which is another illustration. JENKINS, J., continued (*ibid.*):

"In this case, as I understand it, the testator had done everything in his power to divest himself of the shares in question in favour of Mr. Hook. He had executed a transfer. It is not suggested that the transfer was not in accordance with the company's regulations. He had handed that transfer together with the certificates to Mr. Hook. There was nothing else the testator could do."

I venture respectfully to adopt the whole of the passage I have read which, in my judgment, is a correct statement of the law. If that be so, then it seems to me that it cannot be asserted on the authority of *Milroy v. Lord* (1), and I venture to think it also cannot be asserted as a matter of logic and good sense or principle, that because, by the regulations of the company, there had to be

a gap before Mrs. Rose could, as between herself and the company, claim the rights which the shares gave her vis-à-vis the company, Mr. Rose was not in the meantime a trustee for her of all his rights and benefits under the shares. That he intended to pass all those rights, as I have said, seems to me too plain for argument. I think the matter might be put, perhaps, in a somewhat different fashion though it reaches the same end. Whatever might be the position during the period between the execution of this document and the registration of the shares, the transfers were on June 30, 1943, registered. After registration, the title of Mrs. Rose was beyond doubt complete in every respect, and if Mr. Rose had received a dividend between execution and registration and Mrs. Rose had claimed to have that dividend handed to her, what would Mr. Rose's answer have been? It could no longer be that the purported gift was imperfect; it had been made perfect. I am not suggesting that the perfection was retroactive, but what could he say? How could he, in the face of his own statement under his seal, deny the proposition that he had, on Mar. 30, 1943, transferred the shares to his wife? By the phrase "transfer the shares" surely must be meant transfer to her "the shares and all my rights, title and interest thereunder". Nothing else could sensibly have been meant. Nor can he, I think, make much of the fact that this was a voluntary settlement on his part. Being a case of an unlimited company, as I have said, Mrs. Rose had herself to undertake by covenant to accept the shares subject to their burdens—in other words, to relieve her husband of his liability as a corporator. I find it unnecessary to pursue the question of consideration, but it is, I think, another feature which would make exceedingly difficult and, I think, sensibly impossible, the assertion on Mr. Rose's part of any right to retain the dividend I have mentioned. Nor is the Crown's argument made any easier by the circumstance that another emanation of the Crown has adjudicated that stamp duty ad valorem under s. 74 of the Act of 1910 was payable on this transfer as a disposition of the subject-matter transferred.

For the reasons I have stated, I do not think that *Milroy v. Lord* (1) covers the case and I agree with ROXBURGH, J., in his conclusion to that effect. I also think that on principle the statement which counsel for the Crown has made the foundation of his argument, if it covers this case, is too widely stated. If, as I have said, the phrase "transfer the shares" is taken to be and to mean a transfer of all rights and interests in them, then I can see nothing contrary to the law in a man saying that so long as, pending registration, the legal estate remains in the donor, he was, by the necessary effect of his own deed, a trustee of that legal estate. Nor do I think that that is an unjustifiable addition to or gloss on the words used in the transfer. I find it, indeed, for my part, a less difficult matter in the way of interpretation than to say that this was, on its terms, merely a conditional gift, merely a transfer as a gift to Mrs. Rose of a particular right, viz., the right to get herself registered and thenceforward, but not before, to enjoy the benefits which the donor previously had in these shares. That, I think, is nothing like what the deed sets out to do. I have said that I reject the proposition that the distinction between a case such as this and a case such as *Milroy v. Lord* (1) is, as counsel for the Crown urged, indefensible. I think it is sensible and real, and for these reasons I would dismiss the appeals.

JENKINS, L.J.: I agree. The combined effect of the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), the Customs and Inland Revenue Act, 1889, s. 11 (1), and the Finance Act, 1894, s. 2 (1) (c), together with subsequent legislation affecting the period of time before the death of a deceased within which transactions inter vivos are to be taxable is that any disposition made by a deceased person purporting to operate as an immediate gift inter vivos not made at least the prescribed minimum period before the death attracts duty. Furthermore, any gift, whenever made, of which bona fide possession and enjoyment is not assumed forthwith on the gift and thenceforth retained for at least the

prescribed minimum period prior to the death to the entire exclusion of the donor, or of any benefit to him, by contract or otherwise, likewise attracts duty. As the law stood at the date of the death, on Feb. 16, 1947, of the deceased with whom this case is concerned, the relevant minimum period before the death had in general been increased to five years, but, by virtue of certain transitional provisions applicable to his case, a transaction of either of the kinds I have mentioned would escape duty, provided that any such gift or disposition made by him was made before Apr. 10, 1943, and provided, further, that as regards any gift or disposition made by him before that date bona fide possession and enjoyment had been assumed by the donee to the entire exclusion of the deceased and any benefit to him, by contract or otherwise, from before the same date, Apr. 10, 1943.

The question in this case, therefore, is whether the transfers of shares, admittedly effected, so far as the deceased was concerned, on Mar. 30, 1943, and, therefore, before the critical date, were caught by the provisions to which I have referred so as to attract duty. There is no doubt, as my Lord has said, that on Mar. 30, 1943, the deceased did execute, under seal, instruments of transfer purporting in each case to transfer ten thousand shares in the company, the instruments of transfer complying strictly with the clause in the company's articles which states the manner in which shares are to be transferred. Furthermore, before Apr. 10, 1943, those transfers, and the relative share certificates, were duly delivered to the respective transferees or their agent. So far, all seems plain, but, as the property transferred consisted of shares in a company, a further event was necessary to perfect the legal title of the transferees, and that further event was the entry of the names of the transferees in the company's register of members as holders of the shares transferred.

By art. 9 of the company's articles of association

"The company shall be entitled to treat the person whose name appears upon the register in respect of any share as the absolute owner thereof, and shall not be under any obligation to recognise any trust or equity or equitable claim to or interest in such share, whether or not it shall have express or other notice thereof."

Article 28, dealing with transfers, provides:

"The instrument of transfer of any share in the company shall be in writing, and shall be executed both by the transferor and transferee, and duly attested, and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof."

By art. 29:

"Shares in the company shall be transferred in the following form, or as near thereto as circumstances will permit . . ."

Then is set out the form of transfer used in the present case. Lastly, the articles contain provisions of a not unusual character restrictive of the transfer of shares. I need only refer to art. 33, the first sentence of which is in these terms:

"The directors may at any time, in their absolute and uncontrolled discretion and without assigning any reason, decline to register any proposed transfer of shares."

On the deceased executing the transfers and handing them over, together with the relative share certificates, to the transferees or their agent, the matter, then, stood thus. The deceased had done all in his power to divest himself of and to transfer to the transferees the whole of his rights, title and interest, legal and equitable, in the shares in question. He had, moreover, complied strictly with the procedure prescribed by the company's articles. Nevertheless, he had not transferred the full legal title, nor could he do so by the unaided operation of

any instrument of his, for under the articles to which I have referred the company was only bound to recognise, and in fact would only recognise, the registered holder of a share, and none other, as the absolute owner of the share. The deceased had thus done all he could, in appropriate form, to transfer the whole of his interest, but so far as the legal title was concerned it was not in his power himself to effect the actual transfer of that, inasmuch as it could only be conferred on the transferees in its perfect form by registration of the transfers. But he had, in my judgment, transferred to the transferees the right to be placed on the register in his stead as the owners of the shares, subject to the directors' power to refuse registration.

That being the nature of the transactions, two questions arise: (i) When was the disposition or gift made? (ii) If it was made before Apr. 10, 1943, did the transferees forthwith (or at least before the last-mentioned date) assume possession or enjoyment under the gift and thenceforth retain the same to the entire exclusion of the deceased, or any benefit to him by contract or otherwise? As to the first question, with respect to those who have contended otherwise, it seems to me plain enough that this gift or disposition must have been made on the date when the deceased executed instruments of transfer and delivered them, with the certificates, to the transferees. After all, any transaction of gift imports a donor and a donee, a disposition by the donor and receipt of the subject-matter of the disposition by the donee. In this case, the only gift or disposition by the deceased, the only act of bounty on his part as regards either parcel of shares, took place before Apr. 10, 1943. This claim for duty could not have been made at all except on the footing that the transferees derived their beneficial title to these shares from a disposition or gift made by the deceased. To say that the gift was made on the date subsequent to Apr. 10, 1943, when the company's directors in fact registered the transfers, and was, therefore, dutiable, seems to me a quite untenable proposition, for the registration of the transfers was an act over the doing or refusing of which the deceased had no relevant control, and was, moreover, an act the doing of which he could not, consistently with his own deeds, oppose. In my view, the directors of the company, when they registered the transfers, registered them because, by virtue of the transfers, the transferees had become owners of the shares, and as such had become entitled to get in the legal estate by being put on the register in respect of the shares. The second question—i.e., whether the disposition or the gift operated to the entire exclusion of the transferor, and so forth—can be expressed alternatively by the question: Was this an incomplete gift which was only completed by the registration? That, I think, is the real basis of the Crown's contention. The Crown claims that this was an incomplete gift because until the moment of the registration of the transfers the company could not be compelled to recognise any other person than the deceased as the holder of the shares.

It seems to me that the formulation, in terms of an incomplete gift, of the character and effect of the disposition constituted by the execution of the transfers and delivery of them to the transferees with the certificates involves considerable difficulty. I can understand that in given circumstances a gift might, rightly or wrongly, be claimed to be incomplete because it could be recalled by the donor. If here it could be said that the deceased, had he changed his mind at any moment before registration, could, by the taking of appropriate proceedings, recall the transfers and recover the certificates and restrain the directors of the company from registering the transfers, then I would understand the proposition that the gift was incomplete, inasmuch as the property had never passed irrevocably to the donees. But that argument is disclaimed by the Crown, for reasons which I can well understand. It seems to me impossible to suppose that any such action could have been brought by the deceased in this case with any prospect of success. That contention having been disclaimed,

it is said, on the part of the Crown, that nevertheless the gift is incomplete because, although the deceased could not recall it, he remained the owner of the shares until the transferees were registered in respect of them. That proposition seems to me to disregard entirely the form of the transfers. Indeed counsel for the Crown in the end said that the effect of the transfers was no more than some sort of conditional authority or promise that, if the directors of the company chose to register the transfers, then but not otherwise the transferees should become the owners of the shares. That is a proposition which I cannot accept, and it seems to me to read into the transfers, which are simple and straightforward documents, apt, as I think, to effect an immediate out-and-out transfer and nothing else, conditions of which the language of the documents themselves contains no trace whatever, for the purpose of bringing these transactions within the charge for duty. Accordingly, I adhere to the view I have already expressed, that these transfers were nothing more nor less than transfers of the whole of the deceased's title, both legal and equitable, in the shares, and all the advantages attached to the shares, as from the date on which he executed and delivered the transfers, subject, of course, as regards the legal title, to the provisions of the articles of association of the company as to registration, and to the directors' discretionary power to refuse registration.

If that was the effect of the transfers, what was the position between the delivery of the transfers and the actual registration of the transferees as the holders of the shares? Counsel for the Crown has referred us to the well-known case of *Milroy v. Lord* (1), which has been his sheet-anchor. He says that on this authority we must be forced to the conclusion that, pending registration, the transfers had no effect at all, and he arrives at that conclusion in this way. He says that these transfers, while purporting to be transfers of the property in the shares and not declarations of trust, did not transfer the property in the shares because registration was necessary in order to get in the legal title. He says further that being transfers purporting to be transfers of the property in the shares and failing of their effect as such for want of registration, they could, pending registration, have no operation at all because in *Milroy v. Lord* (1) it was held that a defective voluntary disposition purporting to operate as a transfer or assignment of the property in question would not be given effect to in equity as a declaration of trust. I agree with my Lord that *Milroy v. Lord* (1) by no means covers the question with which we have to deal in the present case. If the deceased had in truth transferred the whole of his interest in these shares so far as he could transfer the same, including such right as he could pass to his transferee to be placed on the register in respect of the shares, the question arises, what beneficial interest had he then left? The answer can only be, in my view, that he had no beneficial interest left whatever: his only remaining interest consisted in the fact that his name still stood on the register as holder of the shares, but, having parted in fact with the whole of his beneficial interest, he could not, in my view, assert any beneficial title by virtue of his position as registered holder. In other words, in my view the effect of this transaction, having regard to the form and the operation of the transfers, the nature of the property transferred, and the necessity for registration in order to perfect the legal title, coupled with the discretionary power on the part of the directors to withhold registration, must be that, pending registration, the deceased was in the position of a trustee of the legal title in the shares for the transferees. Thus in the hypothetical case put by the Crown of a dividend being declared and paid (as it would have been paid in accordance with the company's articles) to the deceased as registered holder, he would have been accountable for that dividend to the transferees, on the ground that by virtue of the transfers as between himself and the transferees the owners of the shares were the transferees, to the exclusion of himself.

In my view, to arrive at a right conclusion it is necessary to keep clear and distinct the position as between transferor and transferee and the position as

between transferee and the company. It is, no doubt, true that the rights conferred by shares are all rights against the company, and it is, no doubt, true that, in the case of a company with ordinary regulations, no person can exercise his rights as a shareholder vis-à-vis the company, or be recognised by the company as a member, unless and until he is placed on the register of members. But, in my view, it is a fallacy from that to adduce the conclusion that there can be no complete gift of shares as between transferor and transferee unless and until the transferee is placed on the register. In my view, a transfer under seal in the form appropriate under the company's regulations, coupled with delivery of the transfer and certificate to the transferee, does suffice, as between transferor and transferee, to constitute the transferee the beneficial owner of the shares, and the circumstance that the transferee must do a further act in the form of applying for and obtaining registration in order to get in and perfect his legal title, having been equipped by the transferor with all that is necessary to enable him to do so, does not prevent the transfer from operating, in accordance with its terms as between the transferor and the transferee, and making the transferee the beneficial owner. After all, where duty is concerned the only relevant type of ownership is beneficial ownership, and the situation of the legal estate does not affect the question. For these reasons, as well as those given by my Lord, I am of opinion that the learned judge came to a right conclusion in this case, and that the shares comprised in these transfers did not attract duty on the death of the deceased.

MORRIS, L.J.: I am in agreement with the judgments which my Lords have delivered.

Appeals dismissed.

Solicitors: *Solicitor of Inland Revenue; Merrimans and Withers & Co.* (for the taxpayers).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re JENION (deceased). JENION AND OTHERS v. WYNNE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Morris, L.JJ.), March 21, 24, April 7, 1952.]

Legitimacy—Presumption of legitimacy—Rebutting evidence—Statements by mother during lifetime—Statements by natural father—Admissibility—Matrimonial Causes Act, 1950 (c. 25), s. 32 (1) (2).

All the children of the intestate, who was married in 1900 and died on Nov. 14, 1949, were born during the lifetime of her husband. The intestate and her husband lived together for some years, but, in view of the intestate's association with one, J.R., her husband left her, and she thereafter lived with J.R. (who died in 1930) as his wife. On the question of the legitimacy of a child of the intestate, the court was asked to receive the evidence of a friend of the intestate (a cousin of J.R.) of statements made to him by the intestate to the effect that the child was not that of the intestate's lawful husband, and to admit birth certificates based on information supplied by the intestate which also indicated the child's illegitimacy. It was also sought to have admitted evidence of statements of J.R. to the effect that he was the father of the child in question.

HELD: (i) the Matrimonial Causes Act, 1950, s. 32 (1), had the effect, not only of rendering admissible the oral evidence of a spouse tending to bastardise a child born during wedlock, but also of rendering admissible evidence having that effect whatever form it took, and, therefore, the evidence offered ought to be admitted.

(ii) while the evidence of J.R. would be admissible as part of the *res gestae*, the statements would not be admissible as direct evidence of paternity

as declarations against interest for in the circumstances that J.R. had assumed responsibility for the maintenance of all the children of the intestate, legitimate and illegitimate, his pecuniary interest was unaffected, nor could his statements satisfy the requirements as to admissibility on the ground that the fact was one of which he had peculiar or direct personal knowledge.

Per JENKINS, L.J.: Now that the direct evidence of a husband or wife as to non-access has been made admissible by s. 7 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, re-enacted in s. 32 (1) of the Matrimonial Causes Act, 1950, his or her indirect evidence to the like effect, provided it is admissible in other respects, must also be admissible, inasmuch as the reason for its exclusion which formerly obtained has ceased with the abrogation of the rule in *Russell v. Russell* ([1924] A.C. 687) in relation to direct evidence.

FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 32 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 29, p. 417.

Cases referred to:

- (1) *Re Bromage*, [1935] Ch. 605; 104 L.J.Ch. 299; 153 L.T. 313; Digest Supp.
- (2) *The Aylesford Peerage*, (1885), 11 App. Cas. 1; 3 Digest 367, 80.
- (3) *Russell v. Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; 27 Digest 297, 2743.
- (4) *Mayo v. Mayo*, [1948] 2 All E.R. 869; [1949] P. 172; [1949] L.J.R. 48; 2nd Digest Supp.
- (5) *Perring v. Perring & Simpson*, [1949] 2 All E.R. 334; 113 J.P. 417; 2nd Digest Supp.
- (6) *Battle v. A.-G.*, [1949] P. 358; [1949] L.J.R. 1015; 2nd Digest Supp.
- (7) *Re Davy*, [1935] P. 1; *sub nom. Davy v. A.-G.*, 103 L.J.P. 115; 151 L.T. 562; Digest Supp.
- (8) *Lloyd v. Powell Duffryn Steam Coal Co., Ltd.*, [1914] A.C. 733; 83 L.J.K.B. 1054; 111 L.T. 338; 7 B.W.C.C. 330; *revisg. sub nom. Ward v. Pitt (H.S.) & Co. Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K.B. 130; 82 L.J.K.B. 533; 108 L.T. 201; 22 Digest 100, 700.
- (9) *Banbury Peerage Case*, (1811), 1 Sim. & St. 153; 57 E.R. 62; 3 Digest 358, 2.
- (10) *Morris v. Davies*, (1837), 5 Cl. & Fin. 163; 7 E.R. 365; 3 Digest 359, 12.
- (11) *Whitelocke v. Baker*, (1807), 13 Ves. 510; 33 E.R. 385; 22 Digest 119, 935.
- (12) *Atchley v. Sprigg*, (1864), 33 L.J.Ch. 345; 10 L.T. 16; 3 Digest 360, 24.

APPEAL by the defendant from an order of SIR LEONARD STONE, Vice-Chancellor of the County Palatine Court of Lancaster, dated Oct. 8, 1951.

On Nov. 14, 1949, Robina Jenion died intestate, leaving six children. The defendant, Sarah Ann, the eldest surviving daughter, took out letters of administration, and, on her alleging that the other five children were illegitimate and that she was entitled to the whole estate, those five children began an administration action against her. The Vice-Chancellor held that the four youngest children were illegitimate, but, having rejected evidence of statements made by the intestate as to the legitimacy of the children, decided that in the case of the eldest surviving son, James William Jenion, the presumption of legitimacy was not rebutted, and, therefore, the defendant and James William Jenion, the second plaintiff, were entitled to equal shares in the estate.

Sir Lynn Ungood-Thomas, Q.C., and *J. Turner*, for the defendant, the administratrix.

Salt, Q.C., and *A. O. Hughes* for the second plaintiff, James William Jenion.

Curr. adv. vult.

April 7. The following judgments were read.

SIR RAYMOND EVERSLED, M.R.: The late Robina Jenion, née Parker (hereafter called "the intestate"), was married on July 22, 1900, to

William Henry Jenion, described in the marriage certificate as a carter. She was then eighteen years old, and her husband was twenty. She died on Nov. 14, 1949, having survived her husband by sixteen years. She left (perhaps surprisingly in the circumstances) an estate of the value of £2,400 and letters of administration to her estate were duly granted to the defendant.

It is not in dispute that, for some time, the intestate and her husband lived normally together in the city of Liverpool as husband and wife. At some date—and so far as it can be accurately ascertained it is of the utmost importance to fix it—one, James Rooney, a dock labourer, who had usurped her husband in the intestate's affections and enjoyed their advantages during the husband's absences at work, was caught by the husband in the intestate's embraces when the husband returned unexpectedly from work. The injured Mr. Jenion forthwith departed from the matrimonial home, and James Rooney stepped at once into his place. At some time—again the date is important in so far as it can be fixed—the two of them, James Rooney and the intestate, moved to No. 36, Prospect Street in the same city of Liverpool, and in that house the intestate remained at all material times during her life. The judgment of the Vice-Chancellor has established that the first, third and fourth plaintiffs were all (and there were more of them as well) issue of the union between the intestate and James Rooney. As to the last plaintiff, it appears that about 1925 James Rooney suffered the same fate which he had himself imposed on William Henry Jenion—he was himself supplanted in the intestate's affections by an Irish labourer, a lodger in their house—and the last plaintiff (according to the Vice-Chancellor) was the issue of the intestate by her Irish lover. It is not the least strange part of the somewhat squalid history that each one of the intestate's children, so far as the evidence goes, was registered (with variations to which I must later refer) as a child of a father of the name of Jenion, for it appears that, for this purpose—and, perhaps also to preserve appearances in Prospect Street—the succeeding partners of the intestate's life were content to be known in the district in which they lived by the intestate's married name of Jenion.

The story of the somewhat turbulent life of the intestate is, then, remarkable. If she was inconstant, she was prolific. The period of her child-bearing extended for about a quarter of a century. During this period she bore a large number of children. The exact number is unknown, but it is stated to have been not less than twelve or thirteen. Of this large number, the five plaintiffs and the defendant are the only known survivors, and the question raised in the proceedings was the simple one: Which of the six are entitled to participate in their mother's estate? The claim of the plaintiffs was that either they were all legitimate or all illegitimate, and that in any event (in the latter alternative by virtue of s. 9 (1) of the Legitimacy Act, 1926) all were entitled to share. The learned Vice-Chancellor had no difficulty in finding as a fact that the defendant was legitimate, but that all the plaintiffs (other than the second) were not, and so he held that the intestate's estate was equally divisible between the second plaintiff and the defendant. There is no appeal against any of the findings of the Vice-Chancellor save only his conclusion that the defendant failed to establish the illegitimacy of the second plaintiff. It is the case of the defendant that the only proper inference from the admissible evidence is that the second plaintiff was, like his co-plaintiffs, not the lawful child of the intestate and her husband, William Henry Jenion.

There is no doubt of the law to be applied. In the course of his careful judgment, the Vice-Chancellor quoted substantially from the judgment of LUXMOORE, J., in *Re Bromage* (1), and I need not repeat the citations. Since all the children born to the intestate were born in fact during the lifetime of her husband, William Henry Jenion, the onus is on the defendant in challenging the legitimacy of the second plaintiff to prove, and to prove beyond reasonable doubt, that at the time of his conception there was no access in fact by her husband to the

intestate—no access, that is to say, in the sense in which in cases such as the present that word is used, no sexual intercourse between them. In the case of all the plaintiffs, save the second, the Vice-Chancellor so concluded, but as regards the second plaintiff the view of the Vice-Chancellor was that the admissible evidence fell short of what was required by the standards to which I have referred.

The relevant evidence before the Vice-Chancellor consisted of that of the defendant herself, one James Nugent (a police officer who was a second cousin of James Rooney), and Mrs. Barratt, a neighbour in Prospect Street. As regards Mrs. Barratt, she did not move to Prospect Street till 1914, and she could not, therefore, speak of events relative to the legitimacy of the second plaintiff, who was born on Oct. 22, 1911. As regards Mr. Nugent, the Vice-Chancellor stated that he regarded him as a reliable witness. He, Mr. Nugent, said that he began to visit the intestate and James Rooney and to see them regularly when he was "about twelve years of age". Since at the date of the trial (October, 1951) Mr. Nugent was fifty-three, this starting date (so to say) is taken back to about 1910. In the course of his judgment the Vice-Chancellor places this date at 1911, too late, having regard to the fact that the second plaintiff, according to the ordinary course of natural events, would be conceived in January, 1911, for the purpose of the defendant's case. Counsel for the defendant has criticised the judgment in regard to this piece of arithmetic, but, even if the Vice-Chancellor was unduly cautious in this matter, it is, I think, obvious that the commencing date of Mr. Nugent's experience is too imprecise to justify on that account alone this court in taking a different view from the Vice-Chancellor on the effect of the evidence as a whole.

As regards the defendant herself, her evidence consisted both of her recollections of early childhood and also of statements or declarations bearing directly on the matter in hand made in her presence both by the intestate and James Rooney. The Vice-Chancellor said that he regarded the defendant (who was, of course, materially interested in the result of the trial) as an unreliable witness. He also expressed the view that her evidence of declarations by the intestate and James Rooney (as also the evidence of Mr. Nugent of similar declarations) was wholly inadmissible. There is, to my mind, force in the criticism of counsel for the defendant that the Vice-Chancellor's rejection of the defendant's credibility (to some extent on the ground that her early youth, having been plainly unhappy, had also been forgotten) was related only to the recollection she expressed of her early infancy. I do not, however, think it right, having regard to what the Vice-Chancellor said of the defendant as a witness, for this court to give weight (save in so far as it is corroborated) to any part of the defendant's evidence. But there still remains the evidence of Mr. Nugent, regarded by the Vice-Chancellor as reliable, of like declarations. If, as the Vice-Chancellor held, such declarations were wholly inadmissible, there was little or nothing beyond the defendant's own evidence sufficient to distinguish the case of the second plaintiff from that of his co-plaintiffs, for the Vice-Chancellor regarded the various birth certificates produced before him as being (on the same principle as applied to the declarations) inadmissible as evidence of the facts stated therein or to be deduced therefrom in so far as they tended to disprove legitimacy..

As regards the plaintiffs (other than the second plaintiff) the Vice-Chancellor said:

"In my opinion these facts do establish that for many years before Sept. 20, 1926 [the date of the birth of the last of the intestate's children] there was no access to the body of the intestate by her husband. The circumstances in which she was living precluded any such act as being possible without a number of people knowing about it, and far from anyone knowing about any such thing the evidence is entirely negative. But the question remains: Since what date was such a state of affairs in existence ?

Mr. Nugent's visits to 36, Prospect Street only go back to 1911; Mrs. Barratt only came to live at No. 33 in 1914. There is no acceptable evidence as to when the intestate and James Rooney first went to live in Prospect Street as if they were man and wife."

As I think, however, the evidence given by Mr. Nugent of declarations made in his hearing is (if admissible) in all the circumstances sufficient to turn the scale and to answer the question posed by the Vice-Chancellor so as to place the beginning of the "state of affairs" to which he alludes beyond reasonable doubt, sufficiently prior to the conception of the second plaintiff as to justify the conclusion that (in accordance in fact with these declarations) the defendant is the only legitimate child of the intestate. As I have indicated, I accept the view of the Vice-Chancellor that once the menage at 36, Prospect Street began, the circumstances or "state of affairs" were such as to preclude any access to the body of the intestate by her husband being possible in fact. I do not forget that until the outbreak of the first world war it appears that William Henry Jenion still resided in Liverpool—in fact (for a time at least) with the mother of the intestate.

It is, therefore, said by counsel for the second plaintiff that, being so close in Liverpool, it is not unlikely that the intestate visited her mother's house, and, therefore, visited her husband from time to time after the separation. And I do not forget that the question is not whether husband and wife were, in ordinary language, separated, or whether they were on terms of amiability, but whether in fact the husband had access to the body of the wife. But Mr. Nugent, who knew both the intestate and his second cousin, James Rooney, intimately, deposed to the fact that when the intestate left Prospect Street and went visiting she was accompanied by Mr. Rooney, and I can see no ground for differing from the conclusion of the Vice-Chancellor, after hearing all the evidence, that once the establishment had been set up at Prospect Street there was, in fact, thereafter no access on the husband's part to the body of the intestate. It seems to me, therefore, that, if on proper evidence it is proved that the establishment in Prospect Street was set up sufficiently early to be prior to the date of the second plaintiff's conception, then there is no ground for distinguishing (and the Vice-Chancellor would not himself have distinguished) the case of the second plaintiff from that of his co-plaintiffs, or from concluding that, with reasonable certainty at the time of the second plaintiff's conception, there was in fact no access by the husband to the intestate's body.

In the circumstances it will, I think, be convenient first to consider whether the Vice-Chancellor was correct in his view that none of the declarations made by the intestate or by James Rooney was admissible at all as evidence in the present case, and I will first confine myself to the declarations attributed to the intestate. In my judgment, the Vice-Chancellor was incorrect in his conclusion that evidence of these declarations was inadmissible. On any view these declarations must, as I think, have been admissible on the issue of legitimacy as part of what is called the *res gestae*, i.e., evidence not of the facts stated in the declarations but of the fact that such statements were made. This conclusion follows, I think, inevitably from *The Aylesford Peerage* (2). I agree, however, that these declarations, if only admissible to that limited extent, must of necessity carry relatively little weight. In my opinion, however, the effect of the Law Reform (Miscellaneous Provisions) Act, 1949, s. 7, now replaced by the Matrimonial Causes Act, 1950, s. 32, is to make such declarations evidence directly of the facts therein stated. The Matrimonial Causes Act, 1950, s. 32 (reproducing the Law Reform (Miscellaneous Provisions) Act, 1949, s. 7) provides:

"(1) Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period. (2) Notwithstanding anything in this section or any rule of law, a husband or

wife shall not be compellable in any proceedings to give evidence of the matters aforesaid."

The argument of counsel for the second plaintiff, which was accepted by the Vice-Chancellor, was that s. 32 (1) only made admissible for the purpose specified evidence given orally by a husband or wife. In support of this argument he relied, first, on the opening formula: "Notwithstanding any rule of law", the effect of which is (he contended) to relax what he said was the general rule against the reception of evidence from a husband or wife relating to marital intercourse only to the extent of admitting such evidence when given orally in the witness box. Counsel found support for this view in s. 32 (2), which, according to its natural sense, could only be applicable to oral evidence. If this argument is correct, it follows that evidence of declarations made, whether oral or written, by a deceased husband or wife to prove the absence of marital intercourse, would remain (as the Vice-Chancellor held them to be) inadmissible to prove that fact.

I have reached a different conclusion. In my judgment, the natural interpretation of the language is that in any proceedings after the coming into force of the new legislation evidence of a husband or wife proving that marital intercourse did or did not take place during any period is admissible whatever form such evidence takes according to the ordinary rules of evidence. The words used are "the evidence" not "the oral evidence". To contrast evidence, on the one hand, with declarations, on the other, is to contrast the whole with that which it comprehends, for "declarations" are but a kind of evidence which may or may not be admissible according to the general rules of evidence. If the evidence of a husband or wife is admissible for the specified purpose, then I cannot think that such evidence was intended to be subject to some special limitation or not to be in other respects conformable to the general law so as to exclude, for example, the power of the court to admit under the Evidence Act, 1938, a written statement by a spouse suffering from mental incapacity. To have imposed on the evidence rendered admissible by s. 32 (1) limitations of that character would, in my view, have required clear words, and possibly an elaborate formula.

It has long been held that in pedigree cases hearsay evidence is admissible on the ground that on the nature of the case better evidence would not be available. In *The Aylesford Peerage* (2) it was clearly stated by the EARL OF SELBORNE (11 App. Cas. 10), that the written declarations of the deceased Lady Aylesford were not directly admissible to prove the illegitimacy of her child

"not . . . on the *lis mota* principle, but on the principle that the mother would not for that purpose have been a competent witness herself, if living."

In my judgment, if, as a result of the recent legislation, the mother has become for the purpose a competent witness, if living, it follows that the objections to the reception of her written declarations after her death are necessarily removed.

The "rule of law" referred to in the opening words of s. 32 (1) is the rule (and I take the language of the headnote in *Russell v. Russell* (3)),

"That neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock."

By the opening words of s. 32 (1) Parliament meant no more, in my view, than to say that, notwithstanding the existence of that rule (the authority of which as laid down by the courts it recognised up to the passing of the Act), the evidence of the husband or wife should thenceforth be admissible for the specified purpose of proving that marital intercourse did or did not during any period take place.

Nor do I think that the argument of counsel for the second plaintiff is assisted by s. 32 (2). It is true that s. 32 (2) can only relate to cases in which the husband or wife is living, and, therefore, capable of giving evidence orally and in person. But the sub-section is, in my opinion, only designed, naturally enough, to protect a husband or wife from the embarrassment and distaste of having to go into (and

be cross-examined on) matters of such peculiar intimacy in a court of law, unless he or she is willing to undergo the ordeal. The obvious consideration underlying the sub-section can have no sensible relevance in the case of declarations by deceased spouses. Nor do I think, with all respect to him, that there is much substance in the Vice-Chancellor's fear that the view which I have formed is likely to cause to be agitated or re-agitated stale claims to titles or inheritances. As I have already stated, declarations of the kind here in question were always admissible as part of the *res gestae* and if any claim had been agitated before the passing of the new legislation its re-agitation would now be prevented, *prima facie*, by the doctrine of *res judicata*. I, therefore, conclude that, as a result of the Law Reform (Miscellaneous Provisions) Act, 1949, and the Matrimonial Causes Act, 1950, the evidence of Mr. Nugent (and of the defendant) of declarations made by the intestate to the effect that the second plaintiff was not her lawful child, are admissible as direct evidence of that fact. It follows also that whether or not *Mayo v. Mayo* (4) was at the time rightly decided: see *Perring v. Perring & Simpson* (5); the statements contained in the various birth certificates, for which the intestate was as informant responsible, are similarly admissible as evidence to the same effect.

As regards the declarations made by James Rooney that of all the children living at Prospect Street only the defendant was the child of William Henry Jenion, different considerations may apply. James Rooney's relationship to any of the plaintiffs was that of natural father, if, in fact, he or she was his child. In *Battle v. A.-G.* (6), HODSON, J., held, following the decision of LANGTON, J., in *Re Davy* (7), that declarations by the father of a man alleged to be the natural father of a particular individual were admissible in evidence on the question of that individual's legitimacy. Whether or not this is so, at least James Rooney's statements would, in my judgment, be admissible as part of the *res gestae*. His declarations would not, however, in my judgment, be admissible as direct evidence of paternity on the ground that they were declarations against interest, for at the time they were made Rooney was living at Prospect Street with the intestate as man and wife and had assumed responsibility for the maintenance of all the children legitimate and illegitimate alike, so that his pecuniary interest was, after the declarations, left exactly where it had been before. Nor does his statement: "I am the father" satisfy the condition that the fact is one of which he has peculiar or direct personal knowledge: see per HAMILTON, L.J., delivering the judgment of the Court of Appeal in *Lloyd v. Powell Duffryn Steam Coal Co., Ltd.* (8) ([1913] 2 K.B., at p. 141). But the House of Lords in the same case ([1914] A.C. 733), while accepting the view of the Court of Appeal, held that declarations of a putative father were admissible on the issue of paternity as part of the *res gestae*. Still, as evidence of paternity, Rooney's declarations cannot in any case be of great weight, and I do not attach more significance to them than as lending some (though slight) corroboration to the declarations proved to have been made by the intestate.

It will be convenient first to refer to the birth certificates. The first birth recorded is that of a daughter born in August, 1902, in Rathbone Street, Liverpool. The name of the father is given as William Henry Jenion therein described as "labourer in dye works". It is not in dispute that this child was the lawful child of Mr. and Mrs. Jenion, and that she died in early infancy. The next is that of the defendant herself born in May, 1904. The father is described as William Henry Jenion, carter, and, as I have said, the Vice-Chancellor found as a fact that she was legitimate. There follow the birth certificates of the five plaintiffs, beginning with the birth of the second plaintiff in 1911 and ending with that of the fifth plaintiff in 1926, together with the certificates of the birth of four more children at various dates between 1911 and 1926, all of whom died in infancy. The birth of each of these nine children is recorded as having occurred at 36, Prospect Street, and in each case the occupation of the father is stated

as having been that of a dock labourer, the occupation which was, according to the evidence, consistently followed by James Rooney. In every case the father's surname was given as Jenion, but it is, on the other hand, a significant fact that the father's Christian names in the case of the second plaintiff and of the child next born (a boy, John Joseph, who was born in 1913 and soon died) and also in the case of the fifth plaintiff, the last of the series, were given as William Henry, whereas in the case of the other six children the father's Christian name was given as "James". It is now admitted that by James Jenion was meant James Rooney, and the Vice-Chancellor held that the explanation of the use of the name William Henry Jenion in the case of the last plaintiff (who was the issue of the intestate's association with the Irish lodger) is to be found in the fact that in the circumstances the intestate was reluctant to use the name she had attributed to James Rooney and fell back on that of her lawful husband, though he had long since left Liverpool and was then, in fact, living in London, where he died.

The explanation of the use of the name of William Henry Jenion in the case of the first two children born in Prospect Street, the second plaintiff and John Joseph, is much more difficult. To the natural suggestion that it indicated the legitimacy in fact of the two boys it is objected that, though the intestate's husband followed more than one calling—"carter" and "labourer in dye works" have been already noted, and when he died in London he was described in the certificate of his death as a "bacon warehouseman"—he never at any time, according to the evidence, followed James Rooney's occupation of a dock labourer. Moreover, the date of the birth of the second child (June, 1913) and consequently the date of his conception were in any case after the time when, according to the Vice-Chancellor's findings, the establishment at Prospect Street had started and the "state of affairs" had arisen such as excluded access of William Henry Jenion to the body of the intestate. Counsel for the defendant has, accordingly, argued that the use of the name William Henry Jenion in the first two of these birth certificates signifies no more than that the intestate, for the purpose of registering the births of her children, clung for some time after she had wholly separated from her husband to the name of the man to whom she was married—as she reverted to it in 1926 after the birth of the offspring of her association with the Irish lodger. In my opinion, the evidence of these certificates taken as a whole tends rather to support the defendant's case than the contrary. But I agree with the Vice-Chancellor that this evidence, together with that of Mr. Nugent and of the defendant, but excluding the evidence of the declarations made by the intestate, corroborated (for what they are worth) by the declarations of James Rooney, would not suffice to discharge the onus laid on the defendant.

But, in my judgment, the case takes on an entirely different complexion when regard is had to the proved declarations of the intestate and James Rooney. I need not refer to the evidence itself, for it is quite clear from Mr. Nugent's evidence that statements were made to him both by the intestate (who, as he said, made no secret of the matter) and by James Rooney, before the birth of the last plaintiff, that all the children living at Prospect Street save "Cissy" (meaning the defendant) were their children, and that only "Cissy" was the lawful issue of the intestate's marriage. The defendant gave evidence no less clear of declarations made to her to the same effect both by her mother and by Rooney, and though, as I have said, the defendant was regarded as unreliable, particularly in her recollections of early childhood and the move to Prospect Street, in this respect she was at any rate corroborated by Mr. Nugent. And in judging of the significance of this evidence there is another (as I think) important matter. It is clear that, in addition to the children whose births were recorded in the certificates before the court, there was (amongst others) another child, Robina, born not long before the second plaintiff, who lived to maturity and was living at Prospect Street at the time the declarations were made to which Mr. Nugent

and the defendant deposed. It is unfortunate that the birth certificate of this child, Robina, was not forthcoming. But, if the evidence of Mr. Nugent as regards the intestate's declaration to him (to refer only to this matter) is true—and the judge regarded him as a truthful witness, it follows that the children other than "Cissy" to whom the intestate alluded included a child born before the second plaintiff, and, therefore, that the Prospect Street establishment and the "state of affairs" to which the Vice-Chancellor referred originated at a date substantially anterior to the time when the second plaintiff must have been conceived.

On this evidence, therefore, when added to the other indications in the case, I feel, for my part, no doubt that the matter which the Vice-Chancellor obviously regarded as doubtful and difficult, but which he would, as I read his judgment, have decided otherwise than he did if the evidence which he excluded be admissible, must be resolved in the defendant's favour, that is, that on the issue of legitimacy no valid distinction can be drawn between the case of the second plaintiff and that of his co-plaintiffs—in other words, that the defendant has proved beyond reasonable doubt that the second plaintiff was not the lawful issue of the intestate. I think, therefore, that the appeal ought to be allowed and a declaration made to the effect that the defendant is the only lawful issue of the intestate and as such entitled solely to her estate.

JENKINS, L.J.: Robina Jenion (hereinafter called "the intestate") died in Liverpool a widow and intestate on Nov. 14, 1949, leaving her surviving the six parties to this action, of whom she was admittedly the mother. On Apr. 22, 1950, the defendant, Sarah Ann Wynne (formerly Jenion), was granted letters of administration to the estate of the intestate out of the Liverpool District Probate Registry, and she claimed to be beneficially entitled to the whole of the residuary estate on the ground that she was the only surviving lawful child of the intestate. In these circumstances the five plaintiffs commenced the present action in the Palatine Court of Lancaster contending that they also were lawful children of the intestate and claiming administration of her estate. The defendant, by her defence, denied the legitimacy of the five plaintiffs, who (in effect) alleged in reply that, if the plaintiffs and the defendant were not all of them lawful children of the intestate, then none of them was a lawful child of hers, an alternative state of facts which, if made good, would, having regard to the Legitimacy Act, 1926, s. 9, have produced the same result as if they had all been lawful children of the intestate, inasmuch as on this hypothesis the intestate would have left no legitimate issue her surviving. The formal issue when the matter came before the learned Vice-Chancellor, therefore, was (in effect) whether all or any and, if so, which of the six parties were lawful children of the intestate, but it appeared at the outset that the legitimacy of the defendant was in fact unquestionable, and the substantial issue, therefore, was whether in addition to the defendant all or any and, if so, which of the five plaintiffs were or was the lawful children or child of the intestate.

It is not in dispute that all five plaintiffs were born to the intestate during the subsistence of her marriage to one William Henry Jenion which took place on July 22, 1900. The defendant, unquestionably a child of this marriage, was born on May 26, 1904. Of the five plaintiffs the eldest, James William Jenion, was born on Oct. 27, 1911, and the youngest, Moireen Murphy (formerly Jenion) was born on July 21, 1926. The intestate's husband, William Henry Jenion, did not die until July 7, 1933. In these circumstances, there was a presumption with respect to each of the five plaintiffs that he or she was a lawful child of the marriage of the intestate to William Henry Jenion. As appears from the fifth answer of the judges in the *Banbury Peerage Case* (9), and the speech of LORD LYNDEHURST in *Morris v. Davies* (10), the citations from which contained in the passages from the judgment of LUXMOORE, J., in *Re Bromage* (1), referred to in the learned Vice-Chancellor's judgment in the present case, I need not repeat at length, this presumption is only to be rebutted by evidence proving

beyond reasonable doubt that no sexual intercourse took place between the husband and the wife at any time when by such intercourse the husband could, by the laws of nature, be the father of the child; and (per LORD LYNTHURST, in *Morris v. Davies* (10) (5 Cl. & Fin. 265)):

“ . . . that presumption of law is not lightly to be repelled. It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.”

The learned Vice-Chancellor held (in effect) that on the admissible evidence in the present case the presumption of legitimacy was not rebutted as regards the plaintiff James William Jenion, but was rebutted as regards the other four plaintiffs, Joseph Jenion, Edith Jenion (now Coxon), Catherine Jenion (now Lee) and Moireen Jenion (now Murphy). Accordingly, by his order dated Oct. 8, 1951, the learned Vice-Chancellor declared that the plaintiff, James William Jenion, and the defendant were the persons who on the death of the intestate became entitled to any property of hers as to which she died intestate, and directed the usual administration accounts and inquiry, but, except as to the account of debts, not to be prosecuted without his leave in person. There is no appeal by the unsuccessful plaintiffs, but the defendant appeals (in effect) on the ground that the presumption of legitimacy should have been held rebutted as regards all the plaintiffs so as to leave the defendant solely entitled to the residuary estate of the intestate as the only legitimate child of the intestate her surviving. The contest is, therefore, now confined to the defendant and the plaintiff, James William Jenion, who is the only respondent, and the question in the appeal is whether the presumption of legitimacy was rightly held by the learned Vice-Chancellor not to have been rebutted in his case.

It will be convenient next to state the undisputed facts of the matter. As I have said, the intestate and William Henry Jenion were married on July 22, 1900. The certificate of their marriage describes him as William Henry Jenion, aged twenty, a bachelor, and by occupation a carter, and her as Robina Parker, aged eighteen, spinster, and both as of College Lane, Liverpool. The following births of children to the intestate were proved by certificate or from entries in the register: (1) On Aug. 23, 1902, at 14 Court Rathbone Street, Liverpool, Mary Esther, the father being described as William Henry Jenion, labourer in dye works. This child died in infancy. (2) On May 26, 1904, at 10 Rathbone Place, Liverpool (the defendant) Sarah Ann, the father being described as William Henry Jenion, carter. (3) On Oct. 27, 1911, at 36, Prospect Street, Liverpool (the plaintiff) James William, the father being described as William Henry Jenion, dock labourer. (4) On June 13, 1913, at 36, Prospect Street, Liverpool, John (since deceased), the father being again described as William Henry Jenion, dock labourer. (5) On Nov. 6, 1914, at 36, Prospect Street, Liverpool (the plaintiff), Edith, the father being described as James Jenion, dock labourer.

In all the remaining registrations of births the address is given as 36, Prospect Street, and in all of them (except the last) the father is described as James Jenion, dock labourer. The remaining registrations of births are:—(6) On July 23, 1916 (the plaintiff) Joseph. (7) On Aug. 21, 1919, Paul (since deceased). (8) On Dec. 27, 1920 (the plaintiff) Catherine. (9) On Sept. 22, 1922, Hugh (since deceased). (10) On July 24, 1924, Constance Ann (since deceased). (11) On

July 21, 1926 (the plaintiff) Moireen, the father in this case being once more described as William Henry Jenion, dock labourer. This formidable list of registered births admittedly does not include all the intestate's children; and, in particular, it is common ground that there was a daughter, Robina, no registration of whose birth has been traced, but who was born in 1908 or 1909 and died at the age of about twenty. As I have said, William Henry Jenion, the husband of the intestate, died on July 7, 1933. The certificate of his death shows him to have died in London and states his occupation at that time as

"bacon warehouseman". At some date between the birth of the defendant at 10, Rathbone Place on May 26, 1904, and the birth of the plaintiff, James William Jenion, at 36, Prospect Street on Oct. 27, 1911, the intestate parted company with her husband and set up house at 36, Prospect Street with one James Rooney, a dock labourer, and she and Rooney lived together at that address as man and wife for many years, i.e., down to the death of James Rooney in 1930, or at all events down to a date subsequent to the birth on July 21, 1926, of the plaintiff Moireen Murphy. There seems to be no doubt that during the Prospect Street period James Rooney commonly used the name of Jenion in place of Rooney and was accepted by the neighbourhood generally as the intestate's husband "James Jenion".

The learned Vice-Chancellor held, and I see no reason for differing from him in this, that the evidence sufficed to rebut the presumption of legitimacy as regards the children of the intestate conceived after the date on which the intestate and Rooney had set up house together at 36, Prospect Street, inasmuch as there was on the evidence no reasonable possibility of the intestate's husband having had access to her after that date. That finding clearly concluded the case against all the plaintiffs other than James William Jenion, for there is no doubt that the intestate and Rooney had set up house together at 36, Prospect Street before his birth on Oct. 27, 1911, and the eldest of the remaining plaintiffs, Edith, was not born until Nov. 6, 1914. But had the intestate and Rooney set up house together at 36, Prospect Street before the date at which in the ordinary course of events the plaintiff James William Jenion must have been conceived, that is, in January, 1911? The learned Vice-Chancellor held (in effect) that the admissible evidence did not suffice to prove this beyond reasonable doubt.

So far as material for the present purpose, the evidence before the learned Vice-Chancellor and the questions of admissibility arising thereon were as follows: (i) The oral evidence of the defendant as to (a) events within her own recollection and (b) statements made to her by the intestate and by Rooney. The learned Vice-Chancellor did not regard the defendant as a reliable witness in either respect, and held that in any case her evidence as to statements made to her by the intestate was inadmissible as those statements tended to bastardise the intestate's children born during her marriage and were, therefore, inadmissible on the principle stated in *Russell v. Russell* (3), notwithstanding s. 7 of the Law Reform (Miscellaneous Provisions) Act, 1949, and the re-enactment of sub-s. (1) and sub-s. (2) of that section contained in s. 32 of the Matrimonial Causes Act, 1950. The learned Vice-Chancellor did not, I think, express any opinion as to the admissibility of the defendant's evidence of statements made to her by Rooney. (ii) The oral evidence of one James Nugent, a police constable and second cousin of James Rooney. The learned Vice-Chancellor accepted his evidence as reliable. It included evidence of statements made to the witness by the intestate (which the learned Vice-Chancellor held to be inadmissible on the ground above stated) and also of statements made to him by Rooney to which the learned Vice-Chancellor referred in his judgment, without, I think, expressing any view as to their admissibility. (iii) The oral evidence of a Mrs. Barratt, whose knowledge only went back to 1914, and whose evidence, therefore, had no material bearing on the legitimacy of the plaintiff, James William Jenion, apart from her account of a conversation or conversations with the intestate to which counsel for the plaintiff, James William Jenion, attached some importance. (iv) Documentary evidence in the shape of the birth certificates and entries in the register of births. Inasmuch as the intestate herself was the informant in all these cases the learned Vice-Chancellor held this evidence to be inadmissible on the ground already stated in so far as it tended to bastardise any of the plaintiffs.

Before considering the evidence in greater detail, I will deal with the question of the admissibility of the evidence of the defendant and Mr. Nugent as to the statements made to them by the intestate, of the documentary evidence of

statements made by her in the shape of the registered particulars of the births of her children, and of the evidence given by the same two witnesses as to statements made by Rooney. So far as the statements (oral or documentary) by the intestate herself are concerned the law, as I understand it, may be thus summarised: (i) statements oral or documentary made by a deceased person de jure related by blood or marriage to a particular family on questions concerning the pedigree of that family are admissible in evidence under an exception made, owing to the necessity of such cases, from the general rule as to the inadmissibility of hearsay evidence; but (ii) direct evidence of a husband or wife (by which expression I mean evidence given by a husband or wife in person in a judicial proceeding, whether orally or by affidavit or by any other means permitted under the relevant rules of procedure) tending to bastardise a child born to the wife during the subsistence of his or her marriage, was formerly inadmissible on the principle stated in *Russell v. Russell* (3), but was made admissible by the Law Reform Act, 1949, s. 7 (1), now re-enacted as the Matrimonial Causes Act, 1950, s. 32 (1). (iii) On the same principle, down to the commencement of the Law Reform Act, 1949, the indirect evidence of a husband or wife (by which expression I mean evidence of the terms of some statement oral or documentary made by the husband or wife dehors the relevant judicial proceeding and proved in such judicial proceeding by the evidence of some third party, or, in the case of a document proving itself, by production of the document) though admissible in other respects (for example, as a statement by a deceased husband or wife as to pedigree, or as an admission by a living husband or wife as party to an action) was inadmissible in so far as it tended to the result mentioned in (ii) above.

This leaves open the question whether such indirect evidence of a husband or wife, if admissible in other respects, has now been made admissible notwithstanding the rule in *Russell v. Russell* (3) by the statutory provisions above referred to which have clearly abrogated that rule so far as the direct evidence of a husband or wife is concerned. The Matrimonial Causes Act, 1950, s. 32 (1) and (2), re-enacting the Law Reform Act, 1949, s. 7 (1) and (2), provide:

“(1) Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period. (2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.”

It is reasonably plain that these provisions are in terms appropriate to direct evidence given by the husband or wife personally in the proceedings in question orally or by affidavit or other permitted means rather than to secondary evidence of some statement or admission made by him or her dehors the proceedings. Nevertheless, I think the right view must be that this statutory abrogation of the rule in *Russell v. Russell* (3) as regards the direct evidence of a husband or wife necessarily had the effect of also abrogating the rule with respect to such indirect evidence of a husband or wife as would have been admissible apart from the rule. In *The Aylesford Peerage* case (2) the EARL OF SELBORNE said (11 App. Cas. 9):

“We know that unless given post litem motam and for a special purpose which might exclude them, the declarations of deceased members of a family (and I am not at all aware that the mother would be excluded) are admissible in evidence for the purpose of proving relationship. Therefore, declarations of that kind by the mother would have been admissible on that principle, if not excluded upon the other principle; and the Vice-Chancellor held that such declarations could not be received for the purpose of proving the legitimacy of the child, which was in controversy; not, as I understand, on the *lis mota* principle, but on the principle that the mother would not for that purpose have been a competent witness herself, if living. I accede to that . . .”

This passage seems to me to show that the only reason why the indirect evidence of a deceased husband or wife admissible in other respects was inadmissible in so far as it tended to bastardise children born during his or her marriage was that the husband or wife if living would not have been competent to give evidence to the like effect. In other words, while the rule stood, to admit the indirect evidence of a husband or wife as to non-access would have been to admit in indirect form evidence which in direct form would not have been admissible. It seems to me to follow that now that the direct evidence of a husband or wife as to non-access has been made admissible by statute his or her indirect evidence to the like effect, provided it is admissible in other respects, must also be admissible, inasmuch as the reason for its exclusion which formerly obtained has ceased with the abrogation of the rule in *Russell v. Russell* (3) in relation to direct evidence. *Cessante ratione legis, cessat ipsa lex*.

Accordingly, I think that the evidence of the defendant and of Mr. Nugent in the present case as to the terms of statements made to them by the intestate which tend to show what issue she had of her marriage to William Henry Jenion is admissible as evidence of the truth of the facts so stated by the intestate, even though such statements also tend to bastardise children born during her marriage to him, because (i) they are statements concerning the pedigree of the Jenion family made by a person competent to make them as the wife of William Henry Jenion and the mother of the legitimate issue of her marriage to him; and (ii) the objection to their admissibility in so far as they tend to bastardise children born during her marriage to William Henry Jenion, which would, undoubtedly, have excluded them before the commencement of the Law Reform Act, 1949, based as it was on the inability of the intestate if living to have given direct evidence to the like effect, has been abrogated by s. 7(1) of that Act as now re-enacted by the Matrimonial Causes Act, 1950, s. 32 (1).

The learned Vice-Chancellor, who took a different view, considered (in effect) that these statutory provisions only abrogated the rule in *Russell v. Russell* (3) to the extent of admitting the direct evidence of a living husband or wife, and that to treat them as extending to admit the indirect evidence of a deceased husband or wife, in the form of statements made before the change in the law, would be to give them a retroactive effect which he declined to attribute to them. He was impressed by the possibility of the re-opening of old pedigree and peerage cases if the change in the law was held to make admissible such past and previously inadmissible statements. To my mind, the admissibility of such indirect evidence follows, for the reasons I have endeavoured to state, from the admissibility of direct evidence to the like effect. As to the danger of re-opening past controversies, I confess I am less impressed by this possibility than the learned Vice-Chancellor seems to have been, and in any case the admissibility of evidence for any particular purpose in any particular proceeding must, in my view, be judged by reference to the law of evidence as it stands at the date at which the question of admissibility falls to be determined. Thus, under the Evidence Act, 1938, a written statement by a deceased person complying with the various conditions of admissibility prescribed by the Act would, I apprehend, be admissible in any proceedings taken after the commencement of the Act, although it was made, and the person making it died, before such commencement, and although as the law stood when it was made, and when the person making it died, it would not have been admissible.

A point was sought to be made of the provision in s. 32 (2) to the effect that a husband or wife is not to be compellable to give evidence of the kind mentioned in sub-s. (1). Therefore, it was suggested, indirect evidence of a deceased husband or wife to the effect mentioned in sub-s. (1) could not be admissible because he or she would not have been compellable to give direct evidence to the like effect. But, in my view, competence, not compellability, is the test. The question here is not whether a living spouse can be compelled to give evidence, but whether a statement in fact made by a deceased spouse can be received in evidence, and

the answer to that question must, in my view, depend on whether he or she could have given direct evidence to the like effect if living, and not on whether he or she could have been compelled to do so. The admissibility of the birth certificates, so far as they are to be regarded as statements by the intestate, follows by parity of reasoning from what I have said above with regard to her oral statements.

A Different considerations apply to Rooney's statements. He was not related to the Jenion family, but was a mere interloper. It would appear, therefore, that the "pedigree" exception to the general rule as to the exclusion of hearsay evidence does not strictly apply to his case, and, as at present advised, I am not satisfied that the extension of the exception which has been allowed in cases under the Legitimacy Act, 1926, to declarations of deceased putative relations, or allegedly putative relations, of the person seeking a declaration of legitimacy (as to which see *Re Davy* (7); *Battle v. A.-G.* (6)) is applicable here, though I find it unnecessary to express any concluded opinion on the point for the purpose of deciding the present case. It was suggested in the course of the argument (I think I was myself responsible for the suggestion) that Rooney's statements, in so far as they were admissions of his paternity of the children born at 36, Prospect Street, might be admissible as declarations against interest, as being calculated to involve him in financial liability for their maintenance, but this view does not appear to be tenable having regard to the case in this court of *Lloyd v. Powell Duffryn Steam Coal Co., Ltd.* (8), and particularly the passage in the judgment of the court delivered by HAMILTON, L.J. ([1913] 2 K.B. 141). It is true that the actual decision was reversed in the House of Lords, but their Lordships appear to have accepted the view that the statements of the deceased putative father were not admissible as declarations against interest, and to have admitted them, not as evidence of their truth, but on the ground that the fact that they were made was evidence of conduct on the part of the putative father which showed him to have believed himself to be the father of the unborn child. In other words, the statements were admitted, not as evidence of their truth, but as part of the *res gestae*.

E Accordingly, in my view, evidence of the terms of any statements made by the intestate is admissible as evidence of the truth of the facts stated by her, though tending to bastardise children born during her marriage; but I propose to proceed on the footing that evidence of the terms of any statements made by Rooney as to his paternity of the children born at 36, Prospect Street is not admissible as evidence of the truth of the facts stated by him. The statements said to have been made by Rooney were, of course, oral statements and, therefore, not within s. 1 of the Evidence Act, 1938, which, moreover, by s. 6 (2) (b) would, it seems, on a strict application of the rule in pedigree cases, have excluded even a written statement by him concerning the pedigree of the Jenion family.

F It was argued that the statements of the intestate and Rooney, even if not admissible as evidence of their truth, were nevertheless admissible in evidence as part of the *res gestae*, and reference was made for this purpose to *The Aylesford Peerage* (2), to which may be added *Lloyd v. Powell Duffryn Steam Coal Co., Ltd.* (8). The principle underlying this ground of admissibility is thus stated by the EARL OF SELBORNE in *The Aylesford Peerage* (2) (11 App. Cas. 10):

H "But I cannot hold that a letter otherwise admissible, which is an important act of conduct done by the mother, is to be excluded in whole or in part (if it were possible to divide one part from the other) because it may contain such declarations. These declarations are facts as well as statements. It is a fact that for some purpose or other the mother wrote a letter containing such statements at such a time. Your Lordships will not take them as proving the fact; but the fact that the mother did write such a letter, at such a time and for such a purpose, as it appears to me, is a thing which, on the principles which were certainly acted upon in *Morris v.*

Davies (10) (and which appear to me to be sound principles, and quite consistent with the rule), ought not to be excluded from consideration."

If I am right in my view as to the admissibility of the intestate's statements as evidence of their truth, this alternative ground of admissibility only requires consideration as regards Rooney's statements. I confess I am in doubt as to the precise extent and effect of this rule, particularly in its application to a mere statement of fact regarding the paternity of a child made many years after the event. Before the abrogation of the rule in *Russell v. Russell* (3) evidence that a deceased married woman had said: "The children born during my marriage were not my husband's but another man's" would not have been admissible to prove the truth of that statement. How, then, could it advance the matter to admit the same evidence, not as proof of the truth of the statement, but as proof of the fact that, true or false, the woman did make it? To adduce from the fact that it was made that the woman would have been unlikely to make it if it was not true, and, therefore, that it was probably true, would have amounted to nothing less than doing indirectly the very thing the rule forbade, that is, admitting the woman's statement by a circuitous route as evidence tending to bastardise her children born in wedlock. But short of this, what evidential value could it have? So far as I can see, none, except in the purely negative sense that the statement did not contradict any inference of illegitimacy which might be deducible from the other evidence in the case. Statements evidencing (for example) a course of conduct in relation to the arrangements made for the birth, maintenance and upbringing of the child, or to the treatment accorded to the child in later years, are obviously in a quite different category. As to Rooney's statements treated as part of the *res gestae* (if it be right so to treat them) they can, in my view, carry the matter no further than this, that Rooney did not in these statements contradict any inference as to his paternity of the children born at 36, Prospect Street which can properly be drawn from the other evidence in the case, but on the contrary showed that (rightly or wrongly) he believed himself to be their father, a circumstance which, in my view, can add virtually nothing to the other evidence in the case.

The defendant's evidence as to her early years at 36, Prospect Street, was confused, both as to dates and as to the number and ages of the children in existence at any given time, and I am not surprised that the learned Vice-Chancellor regarded it as unreliable. It is clear, however, that at the time of her earliest recollection her home was 36, Prospect Street, and, although she suggested that some distinction between her and the other children was made (inferentially a distinction between the Jenion child, on the one hand, and the Rooney children, on the other), the learned Vice-Chancellor's conclusion from her evidence and that of the plaintiff, James William Rooney, was to the effect "that all the intestate's children from time to time surviving were brought up at 36, Prospect Street", and "that James Rooney was the man of the house and was called father by all the children including the defendant".

The more material points in the defendant's evidence were these: (i) that she had never in her life seen William Henry Jenion either at 36, Prospect Street or elsewhere: (ii) that when the defendant was about sixteen, the intestate told her that the intestate and William Henry Jenion had ceased to live together when the defendant "was a baby", and also told her of what was apparently an amorous intrigue between the intestate and Rooney, which seems to have gone on for a while undiscovered by William Henry Jenion, who, however, did ultimately discover it, whereupon he "walked out and never came back again"; and Rooney "went and lived with" the intestate: (iii) that at about the same period the intestate told the defendant that the defendant's father lived in London and worked for Liptons as a carter: (iv) that the intestate told her that Rooney was the father of all the children other than the defendant. She could not be certain of the date of this statement, but thought it was probably when

she was twenty-one: (v) that on an occasion apparently about 1926 she had a meeting with Rooney, who was in a state of agitation, because, according to him, he had found a strange man (not the intestate's husband) in bed with the intestate, and in the course of the interview told the defendant that he was not her father but that he was the father of all the other children.

- A Police-constable Nugent's evidence was to the effect that he was Rooney's second cousin, and that he had known Rooney since he (the witness) was about three years of age; that so long as he had known Rooney "he was living in Prospect Street with a Mrs. Jenion"; but that the witness's first personal recollection of visiting 36, Prospect Street and seeing Rooney and Mrs. Jenion there was when he was about twelve years of age (i.e., the witness having been born in 1898, about 1910); that he never saw any man other than Rooney who appeared to be on terms of intimacy with Mrs. Jenion; that he had never met William Henry Jenion; and that Rooney used to visit the witness's mother and father, always accompanied by Mrs. Jenion. Police constable Nugent also deposed to an occasion shortly after his demobilisation in 1920 from service in the first world war, when Rooney had told him that he (Rooney) was not the father of the defendant but was the father of all the other children. Police constable C Nugent also said (and this is more important) that (apparently at about the same period) the intestate told him that she was living with Rooney but that her husband's name was Jenion; and (to give what I take to be the combined effect of a number of answers by the witness) that the defendant and a child who died were the only children she had by Jenion, and that Jenion "was down in London", which was what Rooney had also told the witness as to Jenion's whereabouts. D The only passage in Mrs. Barratt's evidence which need be referred to relates to a conversation she said she had with the intestate at some time after moving to Prospect Street in or about 1914. According to Mrs. Barratt, Mrs. Jenion said that she was married to a man by the name of Jenion and that she lived with her mother in Stanhope Street in the south end of Liverpool.

- E On the footing that the intestate's statements are admissible as evidence of the truth of the facts stated, I would have little hesitation in holding the presumption of legitimacy rebutted in the case of the plaintiff, James William Jenion, as well as in the cases of the other four plaintiffs, if the defendant's evidence on the points mentioned above could be accepted in its entirety. But the matter is complicated by the decidedly adverse view which (as already mentioned) the learned Vice-Chancellor formed of the defendant's evidence. As F I understand his judgment, he, in effect, rejected in its entirety as wholly unreliable all her evidence as to statements made to her by her mother, quite apart from the question of the admissibility of such statements if made. The one point on which he seems to have accepted her evidence was the fact that, so far as she knew, she had never seen William Henry Jenion. It follows, in my view, that, except on this one point, the whole of the defendant's evidence must be ignored for the purposes of the present appeal.

- G How does the matter then stand? The whole of the circumstances point to a complete and permanent breach between the intestate and her husband on account of her relations with Rooney, followed by her setting up house with Rooney at 36, Prospect Street in circumstances excluding any reasonable possibility of access to her by the husband, quite apart from the obvious improbability of his desiring or seeking such access so long as her association with Rooney continued. H Police constable Nugent, whose evidence the learned Vice-Chancellor did accept, first saw the intestate and Rooney at No. 36, Prospect Street when he was about twelve, that is to say, about 1910. The learned Vice-Chancellor puts it at about 1911, but I see no ground for this. When a reliable witness says "about 1910" I think one can fairly take the date as between late 1909 and early 1911. Thus, his evidence does not exclude the possibility that the intestate and Rooney had only just set up house together at No. 36 when

he first saw them there, that he first saw them there in the first half of 1911, but after January in that year, and that James William Jenion had, therefore, been conceived before they had set up house together at No. 36, and, consequently, before the date as from which the possibility of further access to the intestate by her husband can be considered as for all practical purposes excluded. Other passages in Police constable Nugent's evidence seem to suggest that Rooney's association with the intestate as man and wife had been going on for some time before he first visited them at No. 36, but it must be admitted that the matter is so far not placed beyond reasonable doubt. But it seems to me that all reasonable doubt is really resolved by the intestate's statement to Nugent, which, for the reasons above indicated, I hold to be admissible, to the effect that the defendant and one other child who died were her only children by her husband William Henry Jenion. This statement must be considered in the light of the fact that the child Robina, born in 1908 or 1909, was in existence at the date when it was made. The intestate was thus saying in effect that Robina and all the children born after her were not William Henry Jenion's children but Rooney's. She could only have been mistaken about this as regards Robina on the footing that at the date of the conception of Robina she was carrying on clandestine sexual relations with Rooney while still living with her husband. But to make out the possibility of a mistake on her part as regards the child whose legitimacy is actually now in question, namely, the plaintiff, James William Jenion, one would have to assume that the intestate, while still living with her husband, was indulging in clandestine intercourse with Rooney for a period of as long as two or three years down to January, 1911, and that her husband did not discover this, and leave her on the strength of it, until after the conception in January, 1911, of the plaintiff James William Jenion. This hypothesis is, I think, too improbable to merit acceptance.

I would add that I think the defendant's evidence to the effect that, so far as she knew, she had never seen her father, William Henry Jenion, points in the same direction. The defendant was six-and-a-half in January, 1911. The learned Vice-Chancellor declined "to accept as in any way reliable her evidence of events at that time", but I should have thought that, if her father had in fact been living with her mother until she was as old as six-and-a-half and had then left, the defendant would in all probability have remembered it. As already indicated I do not think Rooney's statements (if admissible, not as evidence of their truth, but as part of the *res gestae*) can have any effect except in the negative sense that they are not inconsistent with, and indicate, for what little it is worth, a belief on the part of Rooney consistent with the conclusion against the legitimacy of the plaintiff, James William Jenion, to which the other evidence seems, in my view, to lead. The passage from Mrs. Barratt's evidence to which I have referred, and on which counsel for the plaintiff, James William Jenion, placed considerable reliance, cannot, in my view, alter the result. "Lived" in the intestate's statement as reported could equally well mean "lived before she was married to him" or "lived when she first met him" as "lived at the date of her statement to Mrs. Barratt" and might even mean "used to live when they were living together". Even if the meaning assumed by counsel is the right one, inasmuch as William Henry Jenion's leaving his wife was due to his having been ousted by Rooney, I do not think his residence in Liverpool, even with the intestate's mother, as opposed to his residence in London, would appreciably have altered the position as regards possibility of access, with which geographical considerations had in this particular case very little to do.

There remain the birth certificates. The circumstance that the plaintiff James William Jenion's father is named in his birth certificate as "William Henry Jenion", even with the somewhat suggestive description of "dock labourer", would be strongly in his favour, were it not for the fact that the same names and description were given in the case of John, who, born on June 13, 1913, must have been illegitimate, and reverted to in the case of Moireen, born on July 21, 1926,

who also must have been illegitimate. In view of this, however, I cannot regard the plaintiff James William Jenion's birth certificate as assisting one way or the other on the issue of his legitimacy. For these reasons I am of opinion that the presumption of the plaintiff James William Jenion's legitimacy is rebutted by evidence establishing the contrary beyond reasonable doubt, and I would accordingly allow this appeal.

- A **MORRIS, L.J.:** The contest which arose in this administration action concerned the status at birth of six of the children of the intestate. The learned Vice-Chancellor decided that the defendant and the second plaintiff were legitimate, but that the others were not. The others have not appealed, but the defendant, who is the appellant, has challenged the correctness of the decision that the second plaintiff, James William Jenion, the respondent, was legitimate.
- B No criticism of the general approach of the learned Vice-Chancellor can be made. He bore fully in mind that the presumption of the legitimacy of a child born during wedlock "is not lightly to be repelled". As LORD LYNDHURST said in *Morris v. Davies* (10) (5 Cl. & Fin. 265):

- C "It is not to be broken in upon, or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive."

- The useful citation made by the Vice-Chancellor from the judgment of LUXMOORE, J., in *Re Bromage* (1), served to emphasise the burden to be discharged in proving illegitimacy. As applied to the present case, it would not suffice to show that the intestate was having intercourse with or was living with a man other than
- D her husband, but it would have to be demonstrated to the satisfaction of a judge or jury that no sexual intercourse took place between the intestate and her husband at any time when by such intercourse the husband could by the laws of nature be the father of the child in question.

- In my judgment, the chief points of substance which are raised in this appeal are: (i) whether the evidence of statements made by the intestate concerning
- E the paternity of her children were admissible in proof of the truth of what was said, and (ii) whether, if they were, the decision in the action concerning the second plaintiff should have been different. I regard these as being the points of real importance for the reason that, if contentions advanced on behalf of the defendant as to other aspects of the case are held to be valid, I do not consider that they would also be decisive. It was, for example, submitted that the learned
- F Vice-Chancellor was in error when he said that Mr. Nugent's visits to 36, Prospect Street only went back to 1911. Mr. Nugent said that he was fifty-three years of age at the time of the hearing in October, 1951: he was not asked the date of his birth. His recollection was that he was "about twelve" when he first saw the intestate and Rooney together in Prospect Street: he thought that it would be "about 1910". Having regard to the vagueness of this piece of evidence I
- G do not consider that the case of the defendant is advanced even if it were thought that some possible slight measure of error was established.

- Again, it was submitted that even if the evidence as to the intestate's statements was not admissible in proof of the truth of what was said, the statements should have been admitted as part of the *res gestae*. In *The Aylesford Peerage* (2) the Committee of Privileges admitted on this basis certain declarations made
- H in letters written by Lady Aylesford. The facts in that case in reference to the letters were very different from any facts in the present case concerning the intestate's statements. Indeed, in the present case any probative value to be derived from the evidence that the intestate said that some of her children were illegitimate is either negligible or is non-existent if what was said is to be disregarded. There is no virtue in knowing the fact that the intestate said that some of her children were illegitimate if no dependence must be placed on what was said. Evidence of a bald and isolated declaration not linked with evidence

of conduct and action gives no guidance to the truth if no heed may be paid to the declaration itself. In the circumstances of this case, if, as was technically possible, the judicial mind was entitled to be receptive of evidence of the fact that the intestate said certain things, it was at once obligatory to jettison practically the whole of what was received, unless the evidence could be accepted as tending to prove the truth of what was said.

It becomes necessary to consider the bearing as regards the present case of the change in the law enacted in 1949. Notwithstanding any rule of law the evidence of a husband or wife is now admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period. Assuming that the statements of the intestate tended towards such proof, were they admissible? The evidence that certain statements were made was given by Mr. Nugent and also by the defendant. I cannot regard the evidence of either of these as being the evidence of the "wife", i.e., the intestate, in the proceedings. The language of the new provision now re-enacted as s. 32 (1) of the Matrimonial Causes Act, 1950, has reference to the testimony of a living spouse. There is further indication that this is so in sub-s. (2) where it is provided that a spouse is not to be compelled to give such evidence.

At the hearing before the Vice-Chancellor neither the husband nor the wife was available to give evidence and neither could give evidence and neither did give evidence. The new enactment did not, therefore, have operation in regard to a living spouse in the witness box. The matter does not, however, rest there. To the general rule that statements made by those not called as witnesses are inadmissible to prove the truth of the facts stated there are certain well-recognised exceptions. One of these is that statements made by deceased relatives are admissible to prove matters of pedigree provided that they were made ante litem motam. In *Whitelocke v. Baker* (11) LORD ELDON, L.C., said (13 Ves. 514):

"... declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles, and registry books, all are admitted upon the principle, that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth."

The statements to be admitted must, however, be statements that the deceased if living could make in the witness box. Thus, in *The Aylesford Peerage* (2) the EARL OF SELBORNE said (11 App. Cas. 9):

"In *Atchley v. Sprigg* (12) the Vice-Chancellor excluded declarations which I understand to have been made, not in the witness-box, but during her life, by the mother who was deceased, and which were offered, I presume, for the purpose of showing that the child was her child. We know that unless given post litem motam and for a special purpose which might exclude them, the declarations of deceased members of a family (and I am not at all aware that the mother would be excluded) are admissible in evidence for the purpose of proving relationship. Therefore, declarations of that kind by the mother would have been admissible on that principle, if not excluded upon the other principle; and the Vice-Chancellor held that such declarations could not be received for the purpose of proving the legitimacy of the child, which was in controversy; not, as I understand, on the *lis mota* principle, but on the principle that the mother would not for that purpose have been a competent witness herself, if living. I accede to that..."

Applying the reasoning of that passage to the present case, it would appear that as the intestate, if she had been living in 1951, could in some appropriate proceedings, e.g., in a legitimacy suit, have given evidence that she did not have marital intercourse during a particular period with her husband, the result

follows that after her death evidence could be given of her having made a statement to such effect.

A As against this point of view two considerations were urged. In the first place it was submitted that, as a living spouse was competent, but not compellable, to give evidence, the statement ought not to be heard of a deceased spouse who would in the nature of things not have an opportunity to exercise any option whether evidence of a statement should be given. In the second place, it was submitted that evidence should not be received of a statement made many years ago and at a time when the author of the statement could not have been heard to give evidence to the effect of the statement. The new statutory provision is introduced with the words "Notwithstanding any rule of law". It is arguable that the legislature had in contemplation a rule stated in broad terms to the effect that the declarations of a husband or wife should not be admissible to bastardise children born during wedlock, using the word "declarations" to denote the statements either of a living or of a dead spouse, and that the intention was to carve out of this rule a limited exception that, with the sanction of the solemnity of sworn testimony given voluntarily and subject to the scrutiny of cross-examination, a living spouse might elect to give evidence of non-intercourse. B While I appreciate the force of the view that I have defined, I have come to the conclusion that the better view is that there was no wider rule of law in contemplation than that which previously rendered inadmissible the evidence that the enactment expressly makes admissible. C

As to the two contentions which I have summarised above, the first is largely met when it is remembered that, though in a divorce suit neither spouse can be asked any question tending to show that he or she has been guilty of adultery D unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery, yet evidence can be given of some confession made. Applying the reasoning of LORD SELBORNE quoted above from the speech in *The Aylesford Peerage* (2), the position is reached that the statement of the intestate is admissible for the reason that the intestate, if living, would have been a competent witness to give evidence herself of what she stated. The same reasoning is E relevant when considering the second of the two contentions. If the intestate had been alive in 1951, she would have been permitted to give evidence to the effect of the statements attributed to her. If this second contention prevailed, then by a parity of reasoning there would have to be excluded from the operation of the Evidence Act, 1938, any statements recorded in writing before the passing of the Act.

F Since, for the reasons I have indicated, I have come to the conclusion that the evidence of the statements made by the intestate was admissible, it becomes imperative to decide what is the result that should follow. One possible course is that the matter should go back for further hearing. That would be most undesirable and is to be avoided unless inevitable. In my view, the matter can be decided without that necessity, and I propose to examine the position on the basis of the learned Vice-Chancellor's findings with the addition of Mr. Nugent's evidence as to the statements made by the intestate. The Vice-Chancellor G inclined to the view that the appellant's evidence as to what her mother (the intestate) had told her was not reliable evidence. For present purposes, that evidence must be disregarded. Mr. Nugent's evidence was accepted. He spoke not only in regard to what the intestate had said to him, but also to what Rooney H had said to him. In the nature of things, the statements of Rooney cannot be as informative as those of the intestate. Rooney could say that he believed he was the father of certain children. The intestate could say that she knew that her husband was not. We were not, however, invited to receive the evidence of Rooney's statements as evidence of their truth. As we were not so invited it is not necessary to consider the decision in *Battle v. A.-G.* (6).

Our attention was directed to some evidence given by Mrs. Barratt that the intestate said to her that she was married "to a man by the name of Jenion and

that he lived with her mother in Stanhope Street in the south end". It was said that the intestate would be likely to visit her mother and might meet her husband and that intercourse might have taken place. It was submitted, accordingly, that proof of non-intercourse was not established. The suggestion implicit in this submission seems to be at least improbable. The Vice-Chancellor was satisfied on the evidence that he accepted that for many years before Sept. 20, 1926, there was no access to the body of the intestate by her husband, but he was left in doubt in regard to the date as from which such a state of affairs existed. In the case of the second plaintiff, born in October, 1911, he did not find acceptable evidence to rebut the presumption of legitimacy, but in the case of a daughter born in November, 1914, and in the cases of all later born children he did find such evidence. If, however, the evidence given by Mr. Nugent as to what the intestate said is admitted in proof of what was said, then, in my judgment, the position is very different. The statement of the intestate amounts to saying that in reference to the times when all the various children, other than the defendant and one who died quite young, were conceived, marital intercourse did not take place between her and her husband. When the statement was made, a child, by name Robina, who was older than the second plaintiff, was alive. In my judgment, the Vice-Chancellor would have come to a different conclusion in regard to the second plaintiff if he had felt able to admit the evidence of the statement of the intestate. With its reception the evidence was such as to rebut the presumption of legitimacy. I consider, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors: *Joseph Norton*, Liverpool (for the defendant); *Pattinson & Brewer*, agents for *G. J. Lynskey & Sons*, Liverpool (for the second plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

LLOYDS BANK LTD. AND ANOTHER *v.* RAILWAY EXECUTIVE.

[COURT OF APPEAL (Somervell, Denning and Romer, L.J.J.), March 18, 19, 20, April 8, 1952.]

Railway—Level crossing—Duty to provide gate-keeper and lodge—Crossing originally accommodation crossing—Road taken over by local authority—Construction of additional line under private Act—Common law duty to take care—Railways Clauses Consolidation Act, 1845 (c. 20), s. 47—Railways Clauses Act, 1863 (c. 92), s. 6.

By s. 47 of the Railways Clauses Consolidation Act, 1845 "If [a] railway cross any . . . public carriage road on a level, the [railway] company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway . . . and shall employ proper persons to open and shut such gates." By the Great Northern Railway Act, 1846, which incorporated the Act of 1845, the defendants' predecessors obtained powers to construct two railway lines and to carry them on the level across, inter alia, an accommodation road at C. By s. 6 of the Railways Clauses Act, 1863, it is provided that railway companies shall erect and maintain a lodge at the point where the railway crosses on the level a public carriage road. Before 1898 the road on either side of the company's lines became a public carriage road owned by the local authority. By the Great Northern Railway Act, 1898, the company were granted powers to widen portions of their existing railways and to lay down additional lines, and by s. 6, subject to the provisions of the Acts of 1845 and 1863, "the company may in the construction of the railway carry the same across and on the level of the

public road . . . at [C.].” In or about 1902 a third line at C. was constructed under the powers conferred by the Act of 1898. On Oct. 16, 1948, M. was killed in a collision between his car and a train at the level crossing at C. The defendants had erected gates at the crossing, but no person was employed to open and shut them, no lodge had been erected and no steps had been taken to warn the public of the approach of trains. On a claim by M.’s executors for damages for breach of statutory duty and at common law,

HELD: although the section of the road occupied by the railway crossing had never become a public carriage road, in 1902 the company had taken advantage of the powers granted them by the Act of 1898 to lay the additional line, and the effect of s. 6 of that Act was that the company were thereafter bound to treat the crossing as a public level crossing subject to the obligations placed on the company by the Acts of 1845 and 1863, and, therefore, the defendants, in failing to provide a gate-keeper and a lodge, were in breach of their statutory duty.

Quaere, whether the laying of the additional line was an act necessary for making, maintaining, altering, repairing or using the railway within s. 16 of the Act of 1845.

Per DENNING and ROMER, L.JJ.: Apart from statute the defendants were under a duty at common law to prevent danger at these crossings. As the danger increases, so must their precautions increase. The defendants cannot stand by while accidents happen and say: “This increased traffic on the road is no concern of ours”. It is their concern. It is their trains which help to cause the accidents, and it is often the increased number of trains which increases the danger as well as the increased traffic on the road. The defendants must, therefore, do whatever is reasonable on their part to prevent the accidents. They need not at common law go so far as to turn the crossing into a public level crossing with all the statutory obligations incident thereto, but they must do all that may be reasonably required of them, in the shape of warnings, whistles, and so forth so as to reduce the danger to people using the crossing.

AS TO LEVEL CROSSINGS, see HALSBURY, Hailsham Edn., Vol. 27, pp. 86-89, paras. 172-176; and FOR CASES, see DIGEST, Vol. 38, pp. 307-318, Nos. 322-366.

Cases referred to:

- (1) *Great Central Ry. Co. v. Balby-with-Hexthorpe Urban Council*, A.-G. v. *Great Central Ry. Co.*, [1912] 2 Ch. 110; 81 L.J.Ch. 596; 106 L.T. 413; 76 J.P. 205; 26 Digest 292, 240.
- (2) *Stirling Western District Committee of the County Council v. North British Ry. Co.*, (1896), 23 R. (Ct. of Sess.) 929; 33 Sc. L.R. 459; 3 S.L.T. 323; 38 Digest 263, f.
- (3) *A.-G. v. Great Northern Ry. Co.*, [1916] 2 A.C. 356; 85 L.J.Ch. 717; 115 L.T. 235; 80 J.P. 337; 26 Digest 582, 2719.
- (4) *Copps v. Payne*, [1950] 1 All E.R. 246; [1950] 1 K.B. 611; 114 J.P. 118; 2nd Digest Supp.
- (5) *Cliff v. Midland Ry. Co.*, (1870), L.R. 5 Q.B. 258; 22 L.T. 382; 34 J.P. 357; 38 Digest 313, 347.
- (6) *Smith v. London, Midland & Scottish Ry. Co.*, 1948 S.L.T. 238; 1948 S.C. 125; 2nd Digest Supp.

APPEAL by the defendants from an order of LLOYD-JACOB, J., sitting as an additional judge of the King’s Bench Division, dated Dec. 19, 1951, in an action for damages under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934.

The plaintiffs, Lloyds Bank Ltd., and Margaret Outram Mellows, his widow, were executors of Arthur Holdich Mellows, deceased. The defendants were the successors of the London North Eastern Railway Co., formerly called the Great

Northern Railway Co. and were sued pursuant to s. 5 (9) and s. 14 (3) and (4) of the Transport Act, 1947.

On Oct. 16, 1948, the deceased was killed by a railway train while driving his motor car across a railway owned by the defendants at Connington near Peterborough. At the date of the accident there were gates at the crossing which had to be operated by those using it, and a friend who was travelling with the deceased got out of the car to open the gates. The visibility was bad, but the deceased, without waiting for his friend to signal him on, started to cross the level crossing when a train came into collision with the car. There had been previous accidents at this crossing with loss of life, but there was no system to ensure that a warning whistle was sounded by an engine approaching the crossing.

At the place in question the railway had been constructed in exercise of powers conferred on the defendants' predecessors under the Great Northern Railway Act, 1846, whereby they were authorised to carry a double line across, inter alia, what was described as an occupation road at Connington. A piece of the road, within the limits of which the lines were laid, was conveyed to the railway company in 1853, the company undertaking to preserve the crossing in a form suitable for the passage of wagons. At some time prior to 1891 the road on each side of the railway company's strip of land was taken over by the local authority as a public highway. By the Great Northern Railway Acts, 1891 and 1898, the company were authorised, subject to the provisions of the Railways Clauses Consolidation Act, 1845, and the Railways Clauses Act, 1863, to widen their existing railway and to lay down additional lines at various places including the strip at Connington, and in or about 1902 an additional line was laid. The plaintiffs claimed that, at the date of the accident, the road at Connington was a public road crossed on the level by the railway, and, therefore, was in law deemed to be a public level crossing so that the defendants were subject to the obligations placed on them by the Acts of 1845 and 1863—in particular the obligation to employ a person to open and shut the gates and to maintain there a lodge. Further, or alternatively, the plaintiffs claimed that the defendants were guilty of negligence. The defendants denied that the crossing was a public level crossing, or that they owed to the deceased any statutory duty, or that they were negligent. LLOYD-JACOB, J., held that the defendants were in breach of their statutory duty and were guilty of negligence at common law, but he also held that the deceased was guilty of contributory negligence and that, therefore, the defendants were liable for only three quarters of the damage suffered.

MacKenna, Q.C., and *Denny* for the defendants.

Gardiner, Q.C., and *Winn* for the plaintiffs.

Cur. adv. vult.

April 8. The following judgments were read.

SOMERVELL, L.J., stated the facts and continued: The first question is whether the piece of land bought by the company in 1853 as a section of an accommodation road has become a public carriage road irrespective of anything in the Great Northern Railway Acts of 1891 or 1898. I think the answer to this is clearly "No". The plaintiffs at one time alleged that the defendants' predecessors had dedicated this piece of land as a public highway. This allegation was withdrawn. There is no record or evidence as to any negotiations or agreement with the company at the time when the road east and west of the company's land was taken over as a public highway. There are, as the cases show, considerable limitations on the powers of a railway company expressly or impliedly to dedicate land as a highway: *Great Central Ry. Co. v. Balby-with-Hexthorpe Urban Council* (1). I think the proper inference is that this portion of the road did not become a public carriage way, leaving over any argument based on the words of the Acts, but that the company acquiesced in its user by members of the public, who would, of course, be entitled to use the public highway up to their gates on the east and west of their property and would want to cross the line.

The next submission on behalf of the defendants is that the third line was constructed under the powers of the Act of 1846 as read with s. 16 of the Railways Clauses Consolidation Act, 1845. Under s. 28 of the former Act the undertaking had to be completed within seven years, and the powers then ceased. It was not disputed that a double track line had been completed within that period on the section with which we are concerned. The relevant powers of the railway company after that period are to be found in s. 16 of the Act of 1845 which relates to the execution of the following works, viz., inclined planes, etc., alteration of course of rivers, drains, warehouses. We are concerned with the last two headings which I will set out.

“Alteration and repairs.—[The company] may from time to time alter, repair, or discontinue the before-mentioned works or any of them, and substitute others in their stead; and, General Power—they may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway.”

There is very little authority on the scope of these words. In *Stirling Western District Committee of the County Council v. North British Ry. Co.* (2) similar words in the Railway Clauses Consolidation (Scotland) Act, 1845, were construed and applied. The company were required by the Board of Trade to interlock signals and in connection therewith construct a loop line at a station, which had to cross a public level crossing adjacent to the station. It was held by the LORD JUSTICE-CLERK (LORD MACDONALD), LORD YOUNG concurring, that this was an act “necessary for using the railway”, and, therefore, within the company’s powers. LORD TRAYNER also agreed with this, but, in addition, relied on a different ground. Under their original powers, which had expired, the company were entitled to construct a double line. On this part of their undertaking they had only laid a single line. LORD TRAYNER thought that in these circumstances the laying of a double line would be a “substitution” within the words I have cited.

The question has to be considered in the light of the Acts of 1891 and 1898 under which power was sought and obtained, inter alia, to widen certain portions of the railway including that in question here. Was this third track a widening under the latter of these Acts, as the learned judge held, or something authorised under s. 16 of the Act of 1845 in relation to the old undertaking? Owing to the destruction of records there is no satisfactory evidence on this point. No further land was purchased. There are no written records as to its construction. We were told that, in addition to the plans which we have, specifications are deposited by the promoters with Bills of this kind. These might have been conclusive. There was evidence that the line was at one time called an engineers’ siding and later a down goods line. I do not propose to refer to such evidence as there was in detail. I think the judge was entitled to draw the inference that it was a “widening” under the powers conferred by the Act of 1898 and not an act necessary for making, maintaining, altering or using the railway as constructed under the Act of 1845. The question what is covered by s. 16 of the Act of 1845 is obviously a very important one. If any principles are to be laid down, it is desirable this should be done when full facts are available as to the circumstances and purpose of the construction. The decision on this point should not be regarded as a precedent. The court has to do its best in the absence of material.

This brings me to the next question which turns on s. 6 of the Great Northern Railway Act, 1898, which reads as follows:

“Subject to the provisions in the Railways Clauses Consolidation Act, 1845, and in Part I (relating to the construction of a railway) of the Railways Clauses Act, 1863, contained in reference to the crossing of roads on the level the company may in the construction of the railway carry the same across

and on the level of the public roads next hereinafter mentioned (that is to say):— . . . No. on Deposited Plan. 20. Parish. Connington . . . Provided that with respect to the following roads the company shall construct and maintain at each of the said level crossings a footbridge if and when so required by the road authority having jurisdiction over the road so crossed but when such footbridge shall have been completed to the satisfaction of such road authority all public rights of way for foot passengers over such level crossing shall be extinguished:— . . . No. on Deposited Plan. 20. Parish. Connington . . . ”

In the list of roads with the plan, No. 20 is referred to as a public road, be it noted in the singular, and the owner as Huntingdon Rural District Council. The plan shows the further strips of land which the company were authorised to purchase.

The first argument for the plaintiffs is that the words cited converted the section on the railway company's old land into a public highway. I doubt this. On the other hand, the section clearly contemplates the crossing of a public road, and, admittedly, on the new strips of land, which it was contemplated the railway would or might purchase, the road was a public road. The defendants admit that, if the widening had taken place on this new land, a public road would have been crossed with the consequence that the provisions of s. 47 of the Act of 1845 would have been applicable. If, however, the crossing is on the railway company's old land, there is, it is submitted, no crossing of a public highway and neither s. 47 nor the proviso to s. 6 of the Act of 1898 are operative. Such a result could not have been contemplated. With regard to the proviso, counsel for the defendants suggested that, if the new line was built on the new land, the footbridge, if required, would have to go over the old lines as well. On his argument I cannot see that this is right, but the idea of a footbridge over one of three lines is, of course, absurd.

I think the effect of the words of s. 6 of the Act of 1898 is to make the crossing of this road on the level, if done under the powers of the Act, the crossing of a public road for statutory purposes, whether on the new land or the old. If it had been intended to preserve, quoad this road, the right to treat it as an “accommodation” crossing if done on the old land, it would have been necessary to make express provision. On this basis the defendants were in breach of their statutory duty. [His LORDSHIP stated the facts, found the deceased guilty of contributory negligence and the defendants guilty of negligence at common law in not providing a whistle board, and continued:] With regard to the apportionment, this is a matter on which this court rarely interferes. I see no reason for doing so here. At the time of the previous accidents at the latest, it should have been realised that this was, from the point of view of danger, a public highway crossing with a substantial amount of traffic. I think the appeal should be dismissed.

DENNING, L.J.: When the railways were built over one hundred years ago, Parliament required the proprietors to make proper provision for the places where the railway crossed public highways and private occupation roads. In some cases it required the proprietors to make bridges to carry the roads over the railway. In other cases it allowed the proprietors to make level crossings. And Parliament said that, whatever the proprietors made, they had to maintain. But Parliament did not require the proprietors to make any provision for any increases in traffic along the highways or occupation roads. This was a pardonable oversight. As LORD SUMNER said in *A.-G. v. Great Northern Ry. Co.* (3) ([1916] 2 A.C. 380):

“If the legislature in 1845 did not see ahead beyond the end of the century, it, at any rate, exercised a degree of foresight that has not always been equalled in public affairs.”

The result is that in the course of the last hundred years many bridges which used to carry light country traffic now have to carry a great quantity of heavy goods traffic, but the railway company are under no statutory obligation to increase the strength of the bridges. Likewise, many level crossings which were made to permit a few carts to pass along an occupation road now have to submit to the burden of the traffic of a new housing estate, but the railway company are under no statutory obligation to post a crossing-keeper or to provide any additional precautions. The occupation road may have since become a public highway, used by children on their way to school, but still the defendants are under no statutory obligation to do anything more than their predecessors did one hundred years ago: *Copps v. Payne* (4). Theoretically the defendants might object to this increase in traffic, and might refuse to allow anyone to cross except the owners and occupiers of the lands on either side, but that is not a practical proposition. They cannot in practice separate those with a right to cross from those without. So the increased traffic goes unchecked and with it increased danger, but no increased precautions are required by statute, at any rate when the governing statute is the Act of 1845, as it usually is.

If the statute has stood still, however, the common law has not. It is, I think, now clearly established that the defendants must take reasonable care to prevent danger at these crossings, and this is an obligation which keeps pace with the times. As the danger increases, so must their precautions increase. The defendants cannot stand by while accidents happen and say: "This increased traffic on the road is no concern of ours". It is their concern. It is their trains which help to cause the accidents, and it is often the increased number of trains which increases the danger as well as the increased traffic on the road. The defendants must, therefore, do whatever is reasonable on their part to prevent the accidents. They need not at common law go so far as to turn the crossing into a public level crossing with all the statutory obligations incident thereto, but they must do all that may be reasonably required of them, in the shape of warnings, whistles, and so forth so as to reduce the danger to people using the crossing. This is, I think, clearly shown by *Cliff v. Midland Ry. Co.* (5) (L.R. 5 Q.B. 266); and *Smith v. London, Midland & Scottish Ry. Co.* (6). In the present case the judge has found that the defendants did not use reasonable care at this crossing, and I agree with him. The history of accidents was such as to demand extra precautions of them, and they took none. They should have taken steps by whistling or otherwise to warn road traffic of the approach of trains.

Even if this view is wrong, however, I think that in this particular case the statutory obligations on the company have not stood still. They depend, not on the Act of 1845, but on the Great Northern Railway Act, 1898. Although this road was an occupation road one hundred years ago when the railway was built, nevertheless, it had become a public road fifty years later when the railway was widened, and this makes a lot of difference. The important question we have to decide is what is the effect of the Act of 1898 on the position of this crossing?

When the railway was built, there were only two tracks along this section of it, an up track and a down track. Nothing was said in the Great Northern Railway Act, 1846, about the number of tracks the proprietors might build, but I think Parliament can only have contemplated two tracks. It was, I think, only on that basis that the proprietors were allowed to cross a large number of roads, both public and private, on the level. It is obvious that, if additional lines of railway were allowed so as to make three or four tracks along this section, there would be additional inconvenience, not to say danger, to persons using the roads. If three or four tracks had been contemplated in 1846, Parliament might well have insisted on bridges over the public roads, and the justices might have insisted on special precautions for the private roads. In these circumstances I do not think that the company had any right to lay more than two tracks at the level crossings without going to Parliament for permission to do so. The

company seem themselves to have taken that view, because in 1891 and 1898 when they contemplated widening "the main line on both sides" along this section, they went to Parliament for permission, and they only got permission on the terms of taking additional precaution at some of the level crossings: see, for instance, the provision about Holme Station crossing in s. 10 of the Act of 1891 where it is stipulated that the company should not lay more than one additional line of rails unless the siding crossing the road on the level was removed, and the provision as to footbridges in the Act of 1891, s. 10, and the Act of 1898, s. 6. A

Counsel for the defendants argued strongly that the company only needed permission to acquire extra land. They did not need permission, he said, to lay extra tracks on their existing land. I do not agree with this contention, at any rate, not so far as level crossings are concerned. I think it plain that the permission given in 1846 for level crossings was given on a two-track basis and did not apply to three or four tracks. The company realised this, because by s. 5 of the Acts of 1891 and 1898 they sought permission to widen "portions" of their existing railways "including . . . the laying down of additional lines of rails upon the said portions." That was one of the objects of the Acts which, it was recited, could "not be attained without the authority of Parliament." In 1891 and 1898 Parliament gave the company the permission sought. They permitted the company to lay the lines on certain conditions. What were the conditions so far as the Connington level crossing was concerned? This is the crux of the case. B C

It is quite plain that by 1898 the road on each side of the railway had ceased to be an occupation road and had become a public road. It was so described by Parliament. The short stretch belonging to the railway had not, however, become a public road. The railway company had not dedicated it to the public and had no power to dedicate it. Nevertheless, the road on either side was public. That meant that the crossing had become for all practical purposes a public level crossing. This was, I think, recognised by Parliament. The crossing was treated in the Act as a public level crossing. It was included among a number of public level crossings where the company were required to comply with the provisions of the Railways Clauses Consolidation Act, 1845, and the Railways Clauses Act, 1863, about public level crossings, and were required also to erect footbridges if the road authority required them to do so. In these circumstances, I am of opinion that, if the company availed themselves of the permission given by Parliament, they were bound to treat the Connington level crossing as a public level crossing. The company did, I think, avail themselves of the permission given by the Act of 1898. They laid an additional track at Connington level crossing, thus making the crossing into a three-track crossing instead of a two-track one. Counsel for the defendants argued that the company did not avail themselves of the statutory permission, because the line was only a siding and not an additional track. I do not think that is a correct view of the facts, but it does not matter. It was, in any case, an additional line of rails within s. 5 of the Act which required the permission of the Act, and subjects the company to the obligations of the Act. I readily agree that a railway company does not need to go to Parliament afresh for permission for every additional siding it makes. It does not need permission for any works on its own land which come within the wide powers given by s. 16 of the Act of 1845 and do not impinge on the rights of others. But when an additional siding or line of rails is made at a level crossing—and creates an additional danger for the users of it, over and above the danger authorised by the original Act—then it does impinge on the rights of others and permission must be obtained for it. In my opinion, therefore, from and after the laying of this additional line of rails, the company ought to have treated the Connington crossing as a public level crossing subject to all the obligations of the Acts of 1845 and 1863. In particular, they ought to have provided a crossing-keeper. Their failure to do so was, undoubtedly, one of the causes of the accidents at this spot. D E F G H

Colonel Mellows was guilty of contributory negligence. The judge has reduced the damages by one quarter on that account and we cannot interfere with his assessment. I think the judgment of the learned judge was right on both grounds and the appeal should be dismissed.

ROMER, L.J.: Apart altogether from the question whether the strip of land at Connington over which the railway runs has, in fact, become a part of the highway which it divides, it is quite evident that for many years past the defendants and their predecessors have been content to permit the public to regard it, and to use it, as such. Whether or not it would have been possible for the railway authorities to have confined its user to those for whose benefit the original accommodation road was made, they did not do so, and the result is that, as stated by the learned judge, some seventy-five to one hundred vehicles cross the strip in each twenty-four hour period. Accordingly, it seems to me that it is not open to the company to wash its hands of the matter and to adopt the attitude that, if members of the general public choose to use the crossing, they have no business to do so and must take the consequences. A position of great potential danger has arisen to the public from the acquiescence of the company in this user, and I cannot think that it is under no duty at common law to take such steps as are reasonably open to it to avert, or at least diminish, such danger.

The amount of traffic which uses the crossing is not only a material factor to be borne in mind when considering whether such a duty exists, but it is relevant to the degree of care which the duty, if established, involves: per LUSH, J., in *Cliff v. Midland Ry. Co.* (5) (L.R. 5 Q.B. 266). The element of substantial user which has been established in the present case does not, however, stand alone. In addition to it is the admitted fact that many accidents have taken place at this crossing in the last few years, in one of which several people lost their lives. In these circumstances I am satisfied that the defendants were negligent in failing to take any precautions against further disasters. The most obvious precaution was to set up a whistle board at the side of the line. The engine driver who was driving the train when the accident to Col. Mellows occurred did not use his whistle, but I gather from his evidence that he would have done so if he had been instructed to do so by a board. Had he done so, it is highly probable that no accident would have occurred. The failure of the defendants to order him to do so at this particular crossing amounted, in my opinion, to a dereliction of the duty which they owed to the public. The learned judge held that the deceased himself was not free from blame and in this I agree with him and with the reasons which he gave for arriving at this conclusion. He assessed the responsibility of the deceased for the accident at one quarter, and I see no sufficient reason for criticising this apportionment.

As to the other matters that were argued before us, I agree with my Lord in thinking that it would be better not to define the scope of s. 16 of the Act of 1845 in relation to this case, for the historical details of the matter are too obscure. But, in my opinion, the learned judge was well justified in the view which he took that the additional line which was laid across the strip early in the present century constituted a widening of the line as it then existed and was carried out under the powers conferred by the Act of 1898. The Act contained a recital—not the less significant because it is a usual feature of statutes of this description—that “the objects of this Act cannot be attained without the authority of Parliament.” Section 6 empowered the company in the construction of the railway to carry the same across, inter alia, the “public road” at Connington, which is the road that the company’s line bisects. The construction of the railway mentioned in s. 6 is a reference to the works authorised by s. 5 and on the proper interpretation of s. 5 it seems to me that “the additional lines of rails” thereby authorised were not confined to lines laid on extra land that the company might thereafter acquire but included also the laying of additional lines on land which the company already owned, and which would constitute a “widening” of the

railway. The Act, therefore, authorised the company to do something that it could not have otherwise done, namely, to widen its railway by laying an additional line across the strip at Connington. This the company proceeded to do shortly after the Act was passed, and in these circumstances a strong inference arises that the operation was effected under the powers of the Act and under those powers alone. On this footing it is, I think, immaterial that the company cannot be presumed to have dedicated the strip as part of the public highway prior to the Act of 1898 (for such a dedication would have interfered with the due performance of its statutory duties), nor is it material that the Act did not itself expressly (nor, I think, impliedly) make the strip a part of the highway which it crosses. What is material is that s. 6 of the Act provided in effect that, if the company exercised its power under that section to lay an additional line over this crossing, it could only do so on terms that the crossing was elevated to the status of a highway for the purposes of the Acts of 1845 and 1863. The company could not take advantage of the power while disregarding the corresponding obligation, and I, accordingly, agree with the learned judge that in making the extra line they became automatically bound to provide the whole crossing with the safeguards appropriate to a public level crossing, and in failing to make this provision they were in breach of their statutory obligation and are liable in damages accordingly. I, therefore, think that the learned judge was right in his conclusions both as to the liability of the defendants at common law and as to their statutory liability, and I, accordingly, agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *M. H. B. Gilmour* (for the defendants); *J. D. Langton & Passmore* (for the plaintiffs).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

PAGET PUBLICATIONS, LTD. v. WATSON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Byrne, JJ.), April 24, 1952.]

Criminal Law—Obscene publication—Cover of publication obscene—Destruction of whole publication—Obscene Publications Act, 1857 (c. 83), s. 1.

On a summons to show cause why copies of a publication seized under a warrant issued under the Obscene Publications Act, 1857, s. 1, should not be destroyed, the magistrate found that illustrations on the insides of the covers of the publication were the only obscene parts of the publication. The publishers submitted that in those circumstances there was no power to order the destruction of the whole publication. The magistrate overruled that submission and ordered the destruction of the whole publication.

HELD: a publication was an obscene publication even if only a part of it was obscene, and, therefore, the order to destroy the whole publication was right.

AS TO INDECENT PUBLICATIONS, see HALSBURY, Hailsham Edn., Vol. 9, pp. 395, 396, paras. 667-669; and FOR CASES, see DIGEST, Vol. 15, pp. 748-751, Nos. 8068-8095, and Digest Supps.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at the West London Magistrate's Court, on the complaint of the respondent, a warrant was issued under the Obscene Publications Act, 1857, s. 1, and thirteen thousand copies of a book called "Slick Bedtime Stories" were brought before the court whereupon a summons was issued to the appellants, as publishers of the book, to show cause why the said books should not be destroyed. For the respondent it was contended that the publication was obscene and an order for its destruction should be made, and that the court had no power to order the destruction of only the covers of the

publication, but that the entire books must be destroyed. It was contended for the appellants that the publication was not obscene, and that, if the court found that the illustrations which formed part of the covers were obscene, but not the remainder of the publication, an order should be made for the destruction of the covers alone. The appellants offered to give an undertaking to remove the covers of the books and destroy them before the books were removed from the custody of the court. The magistrate was of the opinion that the illustrations inside the covers of the publication were obscene, that the outside of the covers and the contents of the books were not obscene, that the books constituted articles which were not capable in law of being divided into separate components, that, unless he followed the "all or nothing" principle, he would be acting as a censor, that censorship of parts or passages of publications was not a function of the court under the Act of 1857, and that the appellants had not shown cause in law why an order should not be made for the destruction of the whole books, and, he, therefore, made an order for their destruction.

Hanlon for the appellants.

M. J. H. Turner for the respondent.

LORD GODDARD, C.J.: A warrant was issued under the Obscene Publications Act, 1857, authorising the police to seize certain books, namely, thirteen thousand copies of a publication called "Slick Bedtime Stories" and to have the publishers brought before the magistrate to show cause why the books should not be destroyed. The magistrate held that the illustrations inside both the back and the front of the cover were obscene. It is not for this court to consider whether he was right or wrong in that respect. If we had to consider it, we should say that undoubtedly, he was right. The magistrate has also held that the contents of the books were not obscene. If it was for this court to decide whether he was right or wrong about that, this court would have said he was wrong. We have seen sufficient of the contents to appreciate that the contents are grossly obscene in places, but we are only dealing with the cover.

It is suggested that the magistrate had no power to order the destruction of the whole of each book, and that he ought to have ordered the destruction of only the cover. The question raised by the Case Stated is whether the magistrate had power to make the order which he did make. In the opinion of the court, this point is unarguable. It is not necessary to show that a publication is obscene on every page. A publication may be obscene because part of it is obscene. Very few publications can be said to be obscene on every page, but this is an obscene publication, and, in those circumstances it is to be destroyed. It was not for the magistrate to go through the book page by page. In my opinion, his order was perfectly right, and the appeal is dismissed with costs.

OLIVER, J.: I agree. There was abundant evidence on which the magistrate could find that this was an obscene publication, and, therefore, it should be destroyed.

BYRNE, J.: I agree.

Appeal dismissed.

Solicitors: *Brandon & Nicholson* (for the appellants); *Director of Public Prosecutions* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Applied. WOOLLEY v. MOORE.
[1952] 2 All E.R. 797.

BLENKIN v. BELL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Byrne, JJ.), April 24, 1952.]

Street Traffic—Excessive speed—Shooting-brake with "C" licence—Use solely for carrying passengers—Road and Rail Traffic Act, 1933 (c. 53), s. 9 (2).

A shooting-brake or utility van, in respect of which a private carrier's "C" licence was held, while carrying passengers and not goods, was driven on a non-restricted road at a speed in excess of thirty miles an hour. On a charge against the driver of driving the vehicle at a speed greater than the speed specified in sched. I to the Road Traffic Act, 1934, as the maximum speed for a vehicle of that class or description, contrary to the Road Traffic Act, 1930, s. 10, as amended by the Road Traffic Act, 1934, s. 2,

HELD: in view of the provisions of s. 9 (2) of the Road and Rail Traffic Act, 1933, where a vehicle, which could be used for carrying either passengers or goods, was not carrying goods the conditions of the private carrier's licence held in respect of it did not apply, and, therefore, the vehicle in question was not subject to the speed restrictions applicable to the use of the vehicle under the "C" licence.

Hubbard v. Messenger ([1937] 4 All E.R. 48), distinguished.

AS TO EXCEEDING SPEED LIMITS, see HALSBURY, Hailsham Edn., Vol. 31, pp. 666, 667, paras. 974, 975, and FOR CASES see DIGEST Supps.

Case referred to:

(1) *Hubbard v. Messenger*, [1937] 4 All E.R. 48; [1938] 1 K.B. 300; 107 L.J.K.B. 44; 157 L.T. 512; 101 J.P. 533; Digest Supp.

CASE STATED by Durham justices.

At a court of summary jurisdiction sitting at Durham on Oct. 3, 1951, an information was preferred by the appellant, a superintendent of police, charging that the respondent unlawfully drove a motor vehicle at a speed greater than thirty miles an hour, the speed specified in sched. I to the Road Traffic Act, 1934, as the maximum speed in relation to a vehicle of that class or description, contrary to s. 10 of the Road Traffic Act, 1930, as amended by s. 2 (2) of the Act of 1934. It was proved or admitted that at the material time the respondent was driving at a speed of over thirty miles an hour. He held a "C" private carrier's licence in respect of the vehicle which was a shooting brake or utility van. It was equipped with pneumatic tyres and weighed less than three tons. Sometimes it was used for carrying goods, but at the time of the alleged offence it was being used solely for the carriage of passengers. The vehicle had in addition to the front doors a rear door on either side and a door at the back, and contained a seat for one passenger beside the driver and two rear seats for passengers. The rear seats were fixed to the floor by screws and bolts.

It was contended for the appellant that the vehicle was a goods vehicle licensed under a "C" licence and subject to the speed limit of thirty miles per hour, and that the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, did not except the vehicle from that speed limit. It was contended for the respondent that at the material time the vehicle was not a goods vehicle, but a passenger vehicle, and that it was not subject to the speed limit merely by virtue of the "C" licence. The justices were of the opinion that at the material time the vehicle was not being used under the authority of the licence, but as a private car carrying passengers, and was, therefore, not subject to the thirty miles speed limit. The information was dismissed and the appellant appealed.

D. H. Robson for the appellant.

Skelhorn for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Durham before whom the respondent was charged with unlawfully driving

a motor vehicle at a speed greater than thirty miles an hour, the speed specified in sched. I to the Road Traffic Act, 1934, as the maximum speed in relation to a vehicle of that class or description, contrary to s. 10 of the Road Traffic Act, 1930. The point for decision is whether or not the vehicle in question was to be regarded as a goods vehicle. The vehicle, as found by the justices, was a shooting brake or utility van, a class of vehicle considered by the court in *Hubbard v. Messenger* (1). Although counsel for the respondent has said that, in view of the make and construction of the vehicle, the present case should be distinguished from *Hubbard v. Messenger* (1), the court is giving its decision on the footing that this utility truck was of the same class and description as the vehicle in *Hubbard v. Messenger* (1). We are doing that without prejudice to the contention that the cases can be distinguished—in other words, we are going to decide this case on the ground that the vehicle could be described, at any rate when it was carrying goods, as a goods vehicle and not as a passenger vehicle, which means a vehicle constructed solely for the carriage of passengers and their effects.

The Road Traffic Act, 1930, removed a speed limit for a passenger vehicle, provided it was a passenger vehicle adapted to carry not more than seven passengers and was not a heavy motor car or invalid carriage. Schedule I, which dealt with limits of speed, provided by para. 2:

“Goods vehicles, that is to say vehicles constructed or adapted for use for the conveyance of goods or burden of any description:—(1) When not drawing a trailer—(a) Motor cars, if all the wheels are fitted with pneumatic tyres; and (b) Heavy motor cars, constructed or adapted for the conveyance of horses and their attendants and used solely for that purpose, if all the wheels are fitted with pneumatic tyres—thirty miles per hour.”

The Road and Rail Traffic Act, 1933, s. 1, set up a system of licensing for goods vehicles, and there were various forms of licences known as public carriers' licences, limited carriers' licences, and private carriers' licences, one or the other of which had to be taken out to enable a goods vehicle to operate on the road. A private carrier's licence is referred to in the Act as a “C” licence.

The vehicle with which we are now dealing had a “C” licence. Section 8 (1) of the Act of 1933 provides:

“It shall be a condition of every licence . . . (b) that any provisions (whether contained in any statute or in any statutory rules or orders) with respect to limits of speed and weight, laden and unladen, and the loading of goods vehicles, are complied with in relation to the authorised vehicles.”

Observe the use of the words “authorised vehicles” there. Under s. 8 (1) it is perfectly clear that every licence which is granted to a goods vehicle under the provisions of the Act—including a “C” licence—contains, or must be deemed to contain, a provision that the vehicle must not be driven on the roads at more than thirty miles an hour. By s. 9:

“(1) Subject to the provisions of this section, any person who fails to comply with any condition of a licence held by him, shall be guilty of an offence under this Part of this Act. (2) Notwithstanding that a vehicle is an authorised vehicle, the conditions of the licence shall not apply while the vehicle is being used for any purpose for which it might lawfully be used without the authority of a licence.”

The effect of that sub-section seems to be perfectly clear. A vehicle with a “C” licence must be deemed to have a condition attached to it that it shall only be driven at thirty miles an hour, but, if it is not being used as a goods vehicle, the condition shall not apply while it is being used for any purpose for which it might lawfully be used without the authority of a licence—in other words, if it is being used as a passenger-carrying vehicle and not as a goods vehicle no licence is

required and so the conditions of the licence will not apply. In the Road Traffic Act, 1934, sched. I, para. 2, goods vehicles are defined in this way:

" . . . vehicles constructed or adapted for use for the conveyance of goods or burden of any description."

and it is provided that such goods vehicles must not be driven at more than thirty miles an hour.

No doubt owing to the fact that there had been many prosecutions and a certain amount of dissatisfaction with regard to the use of shooting brakes, the Minister made the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, the effect of which was to substitute amended provisions for those in para. 2 of sched. I to the Act of 1934, and as a result the Act of 1934 must be read as prescribing a speed of thirty miles an hour for goods vehicles

" . . . which are authorised to be used under a licence granted under Part I of the Road and Rail Traffic Act, 1933 . . . "

In my opinion, the answer to this case is to be found in s. 9 (2) of the Road and Rail Traffic Act, 1933, which provides that, if the vehicle is not being used for the purpose of carrying goods or burden, it is not to be limited in the way that s. 8 would limit it. I can find no indication that the Road Traffic Act, 1934, is intended to repeal s. 8 or s. 9 of the Act of 1933, and it seems to me that the construction I have mentioned is consonant with reason and common sense. If a vehicle can be used for carrying either passengers or goods, and it is being used for carrying goods, as distinct from passengers' luggage, it requires a licence and certain restrictions are placed on its use on the road. If it were not used as a goods vehicle, it would not require a licence, and the speed limit is only applicable when it is carrying goods. In *Hubbard v. Messenger* (1) the point did not arise because there the vehicle was carrying goods and was restricted to thirty miles an hour. In my opinion, the justices came to a right decision.

OLIVER, J.: I agree.

BYRNE, J.: I agree.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.* and *Deacons & Pritchards*, agents for *Swinburne & Jackson*, Durham (for the appellant); *A. J. A. Hanhart*, agents for *Hadaway & Hadaway*, Newcastle-upon-Tyne (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

SULTAN OF JOHORE *v.* ABUBAKAR, TUNKU ARIS BENDAHARA AND OTHERS.

[PRIVY COUNCIL (Viscount Simon, Lord Porter, Lord Oaksey, Lord Radcliffe and Sir Alfred Bucknill), January 14, 15, 16, 17, 21, 22, 23, 24, April 22, 1952.].

A *Conflict of Laws—Impleading independent sovereign—Immunity from legal process—Waiver—Submission to jurisdiction by institution of proceedings—Continuation of proceedings by way of appeal—Japanese Judgments and Civil Proceedings Ordinance, 1946 (Singapore Ordinance No. 37 of 1946), s. 3.*

Before the occupation of Singapore by the Japanese in February, 1942, the Supreme Court of the Straits Settlements had jurisdiction to decide the title to immovable property in Singapore. In May, 1942, the Japanese military administration set up, in place of the Supreme Court, a High Court called the Syonan Kotohoin, staffed with judges appointed by the Japanese administration and exercising a jurisdiction corresponding with that formerly exercised by the Supreme Court. The practice and procedure of the Japanese court was in all material respects identical with the practice and procedure of the former Supreme Court. By an originating summons, taken out on May 3, 1945, the Sultan of J. applied to the Japanese court to determine the validity of two deeds, executed by him on Dec. 1, 1903, and Dec. 22, 1926, respectively, which dealt with two plots of land in Singapore. These plots were originally the private property of the sultan, but, under the terms of the deeds (if they were valid) and in the events which had happened, A., the sultan's son, had a beneficial interest in them. On June 18, 1945, the Japanese court declared that the gifts contained in the two deeds were void and that the sultan was beneficially entitled to the properties with which they dealt. In September, 1945, the Japanese were driven out of Singapore, and on Apr. 1, 1946, a new and separate colony of Singapore was created by the Singapore Colony Order in Council, 1946, made under the Straits Settlements (Repeal) Act, 1946. By art. 44 of the order judicial proceedings which had been commenced in the former Supreme Court of the Straits Settlements before the Japanese occupation were linked with the newly created Supreme Court of the Colony of Singapore. To provide an opportunity for (inter alia) reviewing decrees made by a Japanese court in the appropriate court of the colony so as to enable an appeal to be brought against a Japanese decree or a decree which ought not to stand to be set aside, the Japanese Judgments and Civil Proceedings Ordinance, 1946, was enacted in Singapore. By s. 3 (1), any person aggrieved by a Japanese decree could apply to the appropriate court of the colony for an order that the decree be set aside or that the applicant be at liberty to appeal against it, and, by s. 3 (2), the court, on hearing the application, might, subject to the provisions of the section, make such order thereon as might seem just. On Apr. 14, 1947, A. took out an originating summons under the ordinance, claiming to be a person aggrieved by the Japanese decree of June 18, 1945, and applying for an order that it be set aside or that he be at liberty to appeal against it. At the material time, the sultan was recognised by His Majesty's government as an independent sovereign entitled to the immunities in respect of litigation which attached to that status. He entered a conditional appearance to the originating summons of Apr. 14, 1947, but applied to have it set aside and all further proceedings under it stayed on the ground that, as he was a sovereign ruler, the court had no jurisdiction over him.

HELD: the originating summons taken out by A. under s. 3 (1) of the ordinance was concerned with the matter raised by the sultan in the Japanese court, viz., the title to the properties dealt with in the deeds of Dec. 1, 1903, and Dec. 22, 1926; on its true construction, s. 3 of the ordinance authorised

an application in the nature of an appeal from the Japanese decree, and the procedure authorised was essentially a carrying on of the proceeding already instituted and not a new and distinct proceeding, so that the steps taken by A., under s. 3, were in the nature of an appeal from the Japanese court to a court having jurisdiction to reverse the decision which the sultan had obtained and a continuation of the proceedings which the sultan had instituted; having invoked the jurisdiction of the Japanese court, the sultan could not object to being made a respondent in what was, in substance, an appeal in the proceedings, as his original submission to the original court bound him to accept the jurisdiction on appeal; and, therefore, he was disentitled to a stay of proceedings as he had waived his immunity.

Duff Development Co. v. Kelantan Government ([1924] A.C. 797), distinguished.

Per curiam: "Their Lordships do not consider that there has been finally established in England . . . any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances."

AS TO IMMUNITY OF FOREIGN SOVEREIGN, see HALSBURY, Hailsham Edn., Vol. 1, p. 27, para. 30; and FOR CASES, see DIGEST, Vol. 1, p. 46, No. 368, and pp. 48, 49, Nos. 384-395.

Cases referred to:

- (1) *The Charkieh*, (1873), L. R. 4 A. & E. 59; 42 L.J. Adm. 17; 28 L.T. 513; 1 Digest 110, 142.
- (2) *Duff Development Co. v. Kelantan Government*, [1924] A.C. 797; 93 L.J. Ch. 343; 131 L.T. 676; Digest Supp.
- (3) *The Parlement Belge*, (1880), 5 P.D. 197; 42 L.T. 273; 1 Digest 110, 140.
- (4) *Compania Naviera Vascongado v. Cristina S.S.*, [1938] 1 All E.R. 719; [1938] A.C. 485; 107 L.J.P. 1; 159 L.T. 394; Digest Supp.
- (5) *Lariviere v. Morgan*, (1872), 7 Ch. App. 550; *reversd. on the facts*, H.L. *sub nom. Morgan v. Lariviere*, (1875), L.R. 7 H.L. 423; 44 L.J.Ch. 457; 32 L.T. 41; 1 Digest 48, 390.
- (6) *Brunswick (Duke) v. Hanover (King)*, (1844), 6 Beav. 1 (49 E.R. 724); 13 L.J.Ch. 107; *affd.* H.L., (1848), 2 H.L. Cas. 1 (9 E.R. 993); 1 Digest 50, 403.

APPEAL from an order of the Court of Appeal of the Colony of Singapore (MURRAY-AYNSLEY, C.J., of Singapore, SIR H.C. WILLAN, C.J., of the Federation of Malaya, and EVANS, J.), dated Nov. 1, 1949, dismissing an appeal from an order of GORDON SMITH, J., dated Apr. 7, 1949, whereby he dismissed an application by the appellant, the Sultan of Johore, for an order that an originating summons taken out by the respondents should be set aside and all further proceedings under it stayed as the court had no jurisdiction over the appellant, he being a sovereign ruler.

By the originating summons, which was taken out in the High Court of the Colony of Singapore on Apr. 14, 1947, under art. 3 (1) of the Japanese Judgments and Civil Proceedings Ordinance, 1946, the respondents claimed that they were persons aggrieved by a decree of June 18, 1945, of a Japanese court in favour of the appellant, and applied for an order that the decree be set aside wholly or that they be at liberty to appeal against it. On the application by the appellant for the originating summons to be set aside and all further proceedings under it stayed, GORDON SMITH, J., held that the appellant had waived his immunity as a sovereign ruler by commencing the proceedings before the Japanese court (which had been set up in Singapore, in place of the former High Court, during the Japanese occupation), and that the proceedings which the appellant sought to stay were not new proceedings but a continuation of the earlier proceedings.

Harvey, Q.C., *Megaw* and *E. Lauterpacht* for the appellant.
MacKenna, Q.C., and *I. C. Bailleau* for the respondents.

April 22. **VISCOUNT SIMON:** This is an appeal from the decision of the Court of Appeal of the Colony of Singapore (MURRAY-AYNSLEY, C.J., of Singapore, SIR H. C. WILLAN, C.J., of the Federation of Malaya, and EVANS, J.) which arises in the following circumstances.

A The appellant became Sultan of Johore, by succession to his father, in 1895. By an indenture, dated Dec. 1, 1903, he purported to convey to his wife, in consideration of the natural love and affection which he bore to her, two plots of land belonging to him in Singapore with the dwelling-houses erected thereon. On Mar. 8, 1926, the lady died intestate, leaving surviving her the appellant and their only son, Tunku Abubakar (hereinafter called Abubakar), who is the first respondent. B Abubakar was granted letters of administration of his mother's estate. On her intestacy he was entitled to three-quarters of the estate and the appellant to one-quarter. An indenture, dated Dec. 22, 1926, between the appellant and Abubakar purported to convey these two properties to the appellant to hold on trust for the eldest daughter of Abubakar during her life, and after her death for any of her issue then living. On Mar. 1, 1939, this eldest daughter died intestate, an infant and unmarried, and Abubakar was, on Jan. 23, 1940, granted letters of administration of her estate. C By Mohammedan law, on the girl's death intestate, her father, Abubakar, would become entitled to five-sixths of the properties and her mother, Ungku Fatimah, would be entitled to one-sixth. By an indenture, dated June 28, 1944, between Abubakar, Ungku Fatimah and three individuals named as trustees, Abubakar and his wife assigned and transferred to the trustees certain properties and interests in properties in Singapore and in Johore, including the two properties above mentioned.

D In the course of the late war, the whole of Malaya (including Johore) and the colony of Singapore were invaded and for a time occupied by Japanese military forces. Singapore itself was thus occupied on Feb. 16, 1942, and this occupation continued until the Japanese were driven out in September, 1945. On effecting their occupation the Japanese authorities expelled the British administration from Singapore, the courts of that colony were closed and the British judges interned. E There had previously been a Supreme Court of the Straits Settlements, embracing Singapore, Penang and Malacca, which sat in Singapore. This was distinct from the Supreme Court of the Federated Malay States. The Supreme Court of the Straits Settlements had jurisdiction to decide the title to immovable property in Singapore. In May, 1942, the Japanese military administration set up, in place of the former Supreme Court of the Straits Settlements, a High Court called the "Syonan Kotohoin," staffed with judges appointed by the Japanese administration, which exercised a jurisdiction generally corresponding with that belonging to the former Supreme Court of the Straits Settlements. F The practice and procedure of the Syonan Kotohoin was, in all respects material to this appeal, identical with the practice and procedure of the former Supreme Court of the Straits Settlements.

G On May 3, 1945, the appellant took out an originating summons in the court of the judge at Syonan (Singapore), naming as defendant the Custodian of Enemy Property, Syonan. By this summons he applied to the Japanese court to determine the construction of the deeds of Dec. 1, 1903, and of Dec. 22, 1926, I have referred to, and to decide whether, having regard to the fact that the parties to these deeds were Mohammedans, the deeds were properly and lawfully executed under the law applicable to the parties and were valid. H The summons was heard by one Pillai, a Japanese-appointed judge of the Syonan Kotohoin. At the first hearing the defendant was represented, but on the adjournment for argument his representative was absent. Judgment in the appellant's favour was given by Pillai on June 18, 1945, and it was declared that Mohammedan law was applicable to the gifts contained in the two deeds and that the two gifts were void and of no effect, so that the properties with which they dealt reverted to the appellant as sole beneficial owner thereof.

When the Japanese were driven out in September, 1945, there followed a period during which authority was exercised by a British military administration, but on Apr. 1, 1946, a new and separate colony of Singapore was created by the Singapore Colony Order in Council, 1946 (S.R. & O., 1946, No. 464), made under the Straits Settlements (Repeal) Act, 1946, and the British Settlements Acts, 1887 and 1945. By art. 14 of this Order in Council, the Supreme Court of the Colony of Singapore was established, and it is this court which has been functioning in the colony of Singapore since that date. Judicial proceedings which had been commenced before the Japanese occupation in the former Supreme Court of the Straits Settlements were linked with the newly created Supreme Court of the Colony of Singapore by art. 44 of the Order in Council, which provided:

"All proceedings other than proceedings in the Prize Court commenced before Feb. 15, 1942, in any court of justice in or having jurisdiction in, the territory comprised in the colony may be carried on in like manner as nearly as may be, as if this order and the Act of 1946 had not been made or passed but in the corresponding court of the colony, and any such proceeding may be amended in such manner as may appear necessary or proper in order to bring it into conformity with the provisions of the Act of 1946 and of this order."

It was considered necessary, as a consequence of the ending of Japanese occupation and the establishment of the Supreme Court of the Colony of Singapore to provide an opportunity (i) for carrying on before the appropriate court of the colony proceedings which had been commenced but not concluded before a Japanese court during the occupation, and (ii) for reviewing decrees made by a Japanese court in the appropriate court of the colony with a view to enabling an appeal to be brought against such decree or with a view to setting aside such decrees as ought not to stand. These objects were secured by the Japanese Judgments and Civil Proceedings Ordinance, 1946 (Singapore Ordinance No. 37 of 1946), the long title of which reads:

"An ordinance to make provision with regard to judgments, orders and decrees of Japanese courts and for the carrying on of proceedings instituted in such courts during the period of Japanese occupation."

Section 4 of this ordinance provides:

"(1) A party to any proceedings commenced before a Japanese court which were pending at the cessation of the Japanese occupation, may apply to the appropriate court, within three months from the commencement of this ordinance or such extended time as the appropriate court may allow, for leave to carry on such proceedings as proceedings of the appropriate court. (2) Upon the hearing of the application the appropriate court may order such proceedings to be carried on as though they had been instituted before the appropriate court and may order such amendments and give such consequential or other directions in the matter as may seem just."

Section 3 of the ordinance provides:

"(1) Any party to the proceedings in which a Japanese decree was made or given or any person aggrieved by such decree may, within three months from the commencement of this ordinance, or within such extended time as the appropriate court may allow, apply in the prescribed manner to the appropriate court for an order—(a) that such decree be set aside either wholly or in part; or (b) that the applicant be at liberty to appeal against such decree. (2) Upon the hearing of an application under the provisions of sub-s. (1) of this section the appropriate court may, subject to the provisions of this section, make such order or orders thereon as, in the circumstances of the case, may seem just. (3) No Japanese decree shall be set aside

on the ground that the person or persons constituting the court whose decree is in question was or were not appointed in accordance with the provisions of, or did not possess the qualifications specified in, the existing laws.

(4) Without prejudice to the generality of the provisions of sub-s. (2) of this section, a Japanese decree may be set aside on any of the grounds following—

(a) that it was obtained as a result of such force or threat of force, injury or detriment to any party to the proceedings or other person as in the opinion of the appropriate court was sufficient to render the action of the party in relation to the proceedings involuntary; (b) that any necessary party did not appear personally but was represented by any person appointed by any Japanese authority; (c) that it was based on principles unknown to the existing laws; or (d) on any other ground which the appropriate court considers to be sufficient.”

Under this ordinance Abubakar, the first respondent, together with the two other respondents as trustees, took out an originating summons in the High Court of the Colony of Singapore, claiming that they were persons aggrieved by the decree of June 18, 1945, of the Japanese court in the appellant's favour, and applying to set aside this decree, or, alternatively, asking for liberty to appeal against the Japanese decree on grounds therein stated. On learning that the originating summons had been issued, the appellant's solicitors entered a conditional appearance on his behalf, which was followed up by a summons before the judge in chambers, in which the appellant applied that the originating summons might be set aside and all further proceedings under it stayed on the ground that the court had no jurisdiction over the appellant, who claimed to be “a sovereign ruler”. It is the decision on this summons which now comes before their Lordships on appeal.

The appellant's application was heard in the High Court by GORDON SMITH, J., in March, 1949, and by order, dated Apr. 7, 1949, the summons was dismissed with costs. The learned judge held that at the material time the appellant was a sovereign ruler, but that he had waived his immunity by issuing the originating summons in the Syonan Kotohoin during the Japanese occupation. He held that the proceedings now sought to be stayed were not new proceedings, but were a continuation of the earlier proceedings in which the appellant had for the time being succeeded.

The appellant appealed from the decision of GORDON SMITH, J., to the Court of Appeal of the Colony of Singapore. His appeal was dismissed, but the reasons given by the three learned judges materially differ and must be separately summarised. MURRAY-AYNSLEY, C.J., held that the appellant's claim to be a sovereign ruler could not be established otherwise than by a statement made on behalf of His Majesty George VI to that effect and that the communications then before the court from His Majesty's Secretary of State for the Colonies did not amount to such a statement. He further held that, if the sovereign status of the appellant had been duly established, there would have been no waiver by the appellant of his resulting immunity from the proceedings now taken against him by the respondents. SIR H. C. WILLAN, C.J., on the other hand, held that, in a case where certificates from the Colonial Office were not conclusive one way or the other, the court was not precluded from looking to other evidence in order to determine whether the appellant was an independent sovereign. He considered that the right view to take on all the material before him was that the appellant was an independent sovereign. On the question of waiver, however, he held against the appellant. Waiver of a sovereign's immunity, in a case where the sovereign has himself instituted proceedings, continued, in his view, to operate if the application now made by the respondents to reverse the decree which the appellant had obtained was a continuance of the proceedings instituted by the appellant in the Japanese court. He held that the provisions of the ordinance of 1946 had the effect of making the present application a continuation of such

proceedings, and, therefore, the claim by the appellant of immunity from the jurisdiction of the High Court of the Colony of Singapore failed. The third judge, EVANS, J., discussed the question whether other material can be considered on the question of sovereignty when there is no conclusive certificate from a Secretary of State before the court. He held that the Syonan Kotohoin was not the same court as that in which the respondents brought the present proceedings, and that the present proceedings were not the same as the proceedings started by the appellant. But his judgment was not based on his conclusion on these issues. The ground on which this learned judge gave his decision against the appellant was that the appellant, notwithstanding his claim to be an independent sovereign and notwithstanding the view that he had not waived his immunity, was none the less subject to the jurisdiction of the court inasmuch as the matter to be determined was

“ . . . one concerning land, which is undoubtedly within the jurisdiction and which is the subject of a private and personal claim of the Sultan, and not a claim of public property of the State.”

Counsel for the respondent cited various dicta, both English and foreign, in support of this view and referred in this connection to the statement in the judgment of SIR ROBERT PHILLIMORE, in *The Charkieh* (1)—a statement which was not, in fact, necessary for the decision—where that learned civilian stated (L.R. 4 A. & E. 97) that a sovereign's exemption from suit “is admitted not to apply to immovable property” and that this is one of “the universally acknowledged exceptions to the general rule of the sovereign's immunity . . .” As will appear hereafter, their Lordships do not find it necessary to pronounce on this proposition in the present appeal.

There are thus three main questions which have been raised in this litigation, the answers to which may be material in deciding it. First, is the appellant in this litigation to be regarded as a foreign sovereign? Secondly, if so, has he waived his immunity so as to disentitle him to a stay of proceedings on the respondents' originating summons? And, thirdly, if both the above questions are answered in the appellant's favour, does this sovereign immunity extend to exclude the jurisdiction of the court in a case where proceedings are connected with his claim to be entitled to immovable property situate within the jurisdiction of the court?

The first of these questions, which gave so much trouble to the courts below, appears to their Lordships to be now definitely answered in the appellant's favour. Subsequent to the judgment and order of the Court of Appeal, correspondence passed between twelve rulers of the Malay States and the then Colonial Secretary in which the former complained that the replies hitherto sent from the Colonial Office in answer to the request of the courts in Singapore for information as to the status of the appellant were ambiguous, and that the Secretary of State, instead of issuing the required certificate, appeared to wish to leave the courts to decide the matter in the light of the recent establishment of the Malay Federation. However, on Feb. 1, 1951, the Secretary of State wrote a further letter to the rulers of the Malay States in which it is categorically asserted that:

“His Majesty's government regard Your Highnesses as independent sovereigns in so far as your relations with His Majesty are concerned.”

At the hearing before the Board this document was tendered to their Lordships, without objection from the respondents, as containing the necessary and conclusive information from the proper quarter. Their Lordships so accept it and take judicial notice of the fact so certified. They can, therefore, proceed on the admitted basis that the appellant was recognised by His Majesty's government at the relevant time as an independent sovereign entitled to the immunities in respect of litigation which attach to that status. This renders it unnecessary to decide in this appeal a point on which some difference of opinion appears to be

expressed in the speeches of the majority in *Duff Development Co. v. Kelantan Government* (2), viz., whether the status enjoyed by a foreign sovereign in a British court can be established, in case of doubt, only by certificate issued by the appropriate Secretary of State on behalf of the Crown, or whether a court might be entitled, if the Crown failed to answer the inquiry in conclusive terms, to accept and act on "secondary information" of another kind. (Contrast the speeches of VISCOUNT CAVE and VISCOUNT FINLAY with that of LORD SUMNER.)

- A The second question concerns waiver. The appellant himself started the proceedings before the Japanese court, thereby invoking its jurisdiction on his behalf. As plaintiff, he obtained the decree declaring that he was the beneficial owner of the properties in question. If, therefore, the steps taken by the respondents with a view to reversing this decision are in the nature of an appeal from it to a court having jurisdiction to reverse the decision which the appellant has obtained, he could not object to being made respondent in these appeal proceedings, for his original submission to the original court binds him to accept the jurisdiction on appeal. If, on the other hand, the respondents' application to the High Court of the Colony of Singapore to reverse the decree is a "new" proceeding and not a continuation of the previous one, the appellant's objection that he is a foreign sovereign would prevail, so far as the new proceeding impinged on his sovereign immunity. In *Duff Development Co. v. Kelantan Government* (2), after the Kelantan government, which was recognised by the British Crown as a sovereign State, had agreed to arbitration and had itself applied to the British court to set aside the award, it was held that, when proceedings were taken against it to enforce the award, this was a different proceeding in which it was entitled to set up its sovereign immunity, notwithstanding that it had waived this immunity in the previous proceedings. VISCOUNT CAVE put the contrast thus ([1924] A.C. 810):
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" . . . the application for leave to enforce the award is a new proceeding, and though connected with the earlier application is distinct from it."

- E Here, as WILLAN, C.J., points out, the application of the respondents is concerned with the very matter raised by the appellant in the Japanese court, viz., the title to these properties. Their Lordships are of opinion that s. 3 of the ordinance of 1946, on its true construction, authorises an application in the nature of an appeal from the Japanese decree. The ordinance does not treat Japanese decrees as of no effect. Neither does it treat them as conclusive. It provides for their review, with the result that they might either be confirmed or modified or reversed. The procedure authorised is essentially a carrying on of the proceeding already instituted and not a new and distinct proceeding. The language of s. 3 actually speaks of an appeal, and the purpose of the ordinance is to provide a means of revising, and, if necessary, correcting, decrees made by the Japanese court during the occupation. No doubt, it is anomalous for a tribunal set up by one authority to operate as a Court of Appeal from the decisions of a tribunal
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- G set up by a different and previous authority, but this is what the ordinance of 1946 does, and s. 3 (4) indicates good and necessary reasons for doing it. Otherwise, an erroneous decision given by the Japanese court affecting private rights would stand without the possibility of correction. In the present instance the Japanese court has decided, whether rightly or wrongly, that deeds previously executed by the appellant which purported to convey his private property in
- H Singapore to others were invalid and that the properties still belong to him. In deciding this issue, the proper law to apply to the question of title is the same as it was before the Japanese occupation, inasmuch as military occupation, and even annexation, does not in itself change the law in the area occupied. The only change is in the court and in the judges who are to apply the law. The question, therefore, which is raised by the originating summons issued by the respondents and which is to be determined by the High Court of the Colony of Singapore is whether the decision of the Japanese court was right or wrong, and to determine

this the appellant is made respondent in what is, in substance, an appeal in proceedings which, by force of the ordinance of 1946, are a continuance of the proceedings which the appellant himself instituted, and, in any case, are put in the same position as an appeal by s. 3.

The conclusion that the appellant must be treated as having submitted to the jurisdiction in the respondents' current proceedings makes it irrelevant to consider the third question which would otherwise have called for decision. That is the question whether the principle that affords to a foreign independent sovereign immunity from process in our courts is subject to any exception in the case of proceedings that concern the title to immovable property situate within the area of the court's territorial jurisdiction. The point was, however, very fully argued during the course of the hearing and, moreover, in view of its public importance, their Lordships invited and received the assistance of the Attorney-General to aid their consideration. While, therefore, they think that it would be wrong to express an opinion on an issue that does not, properly speaking, now arise, they are unwilling to conclude their advice to Her Majesty without making reference to one aspect of this controversy which was much canvassed before them.

Their Lordships do not consider that there has been finally established in England (from whose rules the rules to be applied in the court at Singapore would not differ) any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances. It seems desirable to say this much, having regard to inferences that might be drawn from some parts of the Court of Appeal's judgment in *The Parlement Belge* (3), and from the speech of LORD ATKIN in *Compania Naviera Vascongado v. Cristina S.S.* (4). The word "implead" is capable of more than one meaning when used in relation to judicial proceedings which themselves comprehend a great variety of forms, and further distinctions have been suggested between what is direct and what is indirect impleading, but for the present purpose the definition of "impleading" can be taken to be that which is laid down by BRETT, L.J., delivering the judgment of the Court of Appeal in *The Parlement Belge* (3), where he compares the position of a ship-owner whose vessel is seized in proceedings alleging liability arising from a collision with the position of a subsequent innocent purchaser of the vessel. The lord justice says (5 P.D. 219):

"Either is affected in his interests by the judgment of a court which is bound to give him the means of knowing that it is about to proceed to affect those interests, and that it is bound to hear him if he objects. That is, in our opinion, an impleading."

Impleading, in this sense, does not depend merely on an answer to the more technical question whether a person is actually a party or ought to be regarded as a necessary party to the proceedings. There have certainly been cases in the Court of Chancery in which a foreign sovereign has been impleaded to the extent that the rights to a trust fund under the jurisdiction of the court have been the subject of adjudication, despite the fact that the sovereign has a possible interest in the fund. The best known case is *Lariviere v. Morgan* (5), and, although the decision in that case was reversed on its facts when it reached the House of Lords, LORD CAIRNS, L.C. (L.R. 7 H.L. 430), seems to have felt no doubt as to the propriety of the jurisdiction exercised. Indeed, in *Duke of Brunswick v. King of Hanover* (6), LORD LANGDALE, M.R., evidently contemplated (6 Beav. 39) that in proceedings of such a kind the name of the foreign sovereign would be included among those of the defendants. An action in rem against a ship impleads persons who are interested in the ship. That is settled law. There is even high authority for the view that such persons are or may be directly impleaded by such proceedings: see the *Cristina* case (4), per LORD ATKIN ([1938] 1 All E.R. 721) and per LORD WRIGHT (ibid., 730). If, however, it had been definitely determined that in no case could a foreign sovereign be impleaded without his consent, there could have been no justification for reserving the case of a

sovereign's ship engaged in ordinary commerce—a reservation that was, in fact, made by the majority of the House of Lords in the *Cristina* case (4). For a sovereign is impleaded by an action in rem against his ship, whether it is engaged in ordinary commerce or is employed for purposes that are more usually distinguished as public. The extent of the impleading is the same in the one case as in the other. Indeed, a great deal of the reasoning of the judgment in *The Parlement Belge* (3) would be inexplicable if there could be applied a universal rule without possible exception to the effect that, once the circumstance of a foreign sovereign being impleaded against his will can be established, a proceeding necessarily becomes defective by virtue of that circumstance alone. To say this is merely to disavow an alleged absolute and universal rule. It does nothing to throw doubt on the existence of the general principle. Nor is it necessary for their Lordships to express any opinion in this case on the question whether and, if so, to what extent proceedings which concern the title to immovable property within the jurisdiction form an exception from this general rule. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *E. F. Turner & Sons* (for the appellants); *Peacock & Goddard* (for the respondents).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

Re BANQUE DES MARCHANDS DE MOSCOU
(KROUPETSCHESKY). ROYAL EXCHANGE ASSURANCE v.
THE LIQUIDATOR.

Re BANQUE DES MARCHANDS DE MOSCOU
(KROUPETSCHESKY). WILENKIN v. THE LIQUIDATOR.

[CHANCERY DIVISION (Vaisey, J.), February 26, 27, 28, 1952.]

Company—Winding-up—Foreign bank—Bank nationalised by foreign decree—Debt situated abroad—Claim by customer against English assets.

A bank, which had its head office in Moscow, and a branch office in Petrograd, but no branch office in England, was dissolved, according to Russian law, on or about Dec. 14, 1917, by a decree of that date of the Soviet government by which the bank, in common with other banks, was nationalised, its assets and liabilities being taken over by the State Bank. On May 30, 1932, a winding-up order was made in England in respect of the bank. The R. company sought to prove in the liquidation of the bank in England in respect of the equivalent in sterling (at the rate of exchange current on Dec. 14, 1917) of (a) a sum of roubles 1,332,992 which, in December, 1917, stood to the credit of a current account with the bank in the name of the R. company; (b) a sum of roubles 4,500,000 which in December, 1917, stood to the credit of a deposit account in the name of the R. company; (c) a sum in respect of interest on the latter account; and (d) the value of bonds, shares and other securities deposited with the bank for safe custody by the R. company (as a customer) in Petrograd. The liquidator having rejected the proof of the R. company,

HELD: (i) the proper law of the contract between the R. company and the bank was Russian law, and so the claims of the R. company, which were against the bank in Russia, were regulated by Russian law; the effect of the Russian decree of nationalisation was to extinguish the rights of the R. company against the bank; and, therefore, at the date of the winding-up order in England there was no subsisting debt or liability owed by the bank to the R. company.

Dictum of MAUGHAM, J., in *Re Russian Bank for Foreign Trade* ([1933] Ch. 766), applied.

(ii) the Soviet State having taken possession of the securities deposited by the company with the bank, with regard to this part of the claim the bank would be entitled to plead that it had been evicted by title paramount, and, therefore, discharged from liability.

Ross v. Edwards & Co. (1895) (73 L.T. 100), applied.

Company—Winding-up—Services rendered—Claim for remuneration—Bank dissolved by Russian decree subsequently ordered to be wound-up by English court—Services rendered in relation to assets of bank after decree of dissolution, but before winding-up order.

Between March, 1930, and the date of the winding-up order in May, 1932, W., an expert in Russian law, assisted in various legal proceedings relating to the bank, and, largely owing to his advice with regard to a claim made in respect of assets of the bank by the Deutsche Bank, that claim was finally defeated. W. claimed in the winding-up of the bank in respect of his expenses and for a sum by way of remuneration.

HELD: although for the purposes of winding-up the bank it was necessary notionally to revivify it (notwithstanding its dissolution under Russian law), it could not be regarded as having been in existence at the time of the rendering of, and for the purpose of receiving, W.'s services, and, therefore, W. could not be regarded, whether as an agent of necessity or in any other capacity, as having rendered services to the bank for which he could claim in the winding-up.

AS TO DEBTS PROVABLE IN A WINDING-UP, see HALSBURY, 1949 Edn., Vol. 5, pp. 739-747, paras. 1200-1217; and FOR CASES, see DIGEST, Vol. 10, pp. 925-930, 932, 933, Nos. 6343-6370, 6385-6397.

Cases referred to:

- (1) *Re Russian Bank for Foreign Trade*, [1933] Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; Digest Supp.
- (2) *Princess Paley Olga v. Weisz*, [1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; Digest Supp.
- (3) *The Jupiter* (No. 3), [1927] P. 250; 97 L.J.P. 33; 137 L.T. 333; Digest Supp.
- (4) *Sedgwick, Collins & Co. v. Russia Insurance Co. of Petrograd*, [1926] 1 K.B. 1; 95 L.J.K.B. 7; 133 L.T. 808; *affd.* H.L., *sub nom.* *Employers' Liability Assurance Corpn. v. Sedgwick, Collins & Co.*, [1927] A.C. 95; 95 L.J.K.B. 1015; 136 L.T. 72; Digest Supp.
- (5) *Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 11 Digest 309, 17.
- (6) *Central Control Board (Liquor Traffic) v. Cannon Brewery Co., Ltd.*, [1919] A.C. 744; 88 L.J.Ch. 464; 121 L.T. 361; 83 J.P. 261; 11 Digest 548, 512.
- (7) *Bank Voor Handel en Scheepvaart v. Slatford*, [1951] 2 All E.R. 779.
- (8) *Ross v. Edwards & Co.*, (1895), 73 L.T. 100; 3 Digest 102, 288.
- (9) *Jebara v. Ottoman Bank*, [1927] 2 K.B. 254; 96 L.J.K.B. 581; 137 L.T. 101; *revsd.* H.L. *sub nom.* *Ottoman Bank v. Jebara*, [1928] A.C. 269; 97 L.J.K.B. 502; 139 L.T. 194; Digest Supp.
- (10) *Prager v. Blatspiel, Stamp & Heacock, Ltd.*, [1924] 1 K.B. 566; 93 L.J.K.B. 410; 130 L.T. 672; Digest Supp.
- (11) *Nicholson v. Chapman*, (1793), Hy. Bl. 254; 126 E.R. 536; 3 Digest 66, 89.
- (12) *Binstead v. Buck*, (1776), 2 Wm. Bl. 1117; 96 E.R. 660; 3 Digest 66, 88.

ADJOURNED SUMMONSES issued by two claimants in the winding-up of the Banque des Marchands de Moscou for orders that the decisions of the liquidator rejecting their proofs be reversed.

R. Gwyn Rees for the Royal Exchange Assurance, the applicants in the first summons.

Peter Foster for Marc Wilenkin, the applicant in the second summons.

Raymond Walton for the liquidator (in both summonses).

VAISEY, J.: These two cases relate to the validity or otherwise of two proofs in the liquidation of this company, the Banque des Marchands de Moscou (Koupetschesky), which is being wound-up. They raise quite different points, but, inasmuch as the background to both is the same, I shall try to deal with them, to begin with, together. This bank had no branch or office in London, but its headquarters were at Moscow, and it had a branch at Petrograd. On May 30, 1932, a winding-up order was made by this court in respect of this concern. A liquidator was duly appointed, and the assets which came into his hands were of very considerable amount, running into six figures, and there was also a very large number of claims against such assets, among them being these two, the first of which is a claim by the Royal Exchange Assurance, and the second a claim by a Mr. Wilenkin.

The claim of the Royal Exchange Assurance was embodied in a proof which is made up of various items. There is, first, a claim for a sum of roubles which, translated into English currency, amounts to £53,320. Secondly, there is a claim to simple interest on that sum at five per cent. per annum from Dec. 14, 1917, which was roughly speaking the date when, under Russian legislation, this bank was dissolved and ceased to exist, to May 30, 1932, which, as I have already said, was the date of the winding-up order. That sum amounts to no less than £38,420, but it is admitted that, so far as that part of the claim is concerned, it cannot on any footing or any view of the matter be substantiated. Then there is a claim to the further sum of 4,500,000 roubles, which being translated into English currency is £180,000. That represents the balance which on the said Dec. 14, 1917, stood to the credit of a deposit account of the Royal Exchange Assurance with the bank. Interest is calculated on that at £129,690 over the same period, i.e., from the dissolution of the bank in Russia to the date of the winding-up order, and although that sum is admitted to be not quite accurate, because the proper rate of interest is five per cent. less five per cent. of five per cent., which leaves a balance of $4\frac{3}{4}$ per cent., that is a mere matter of figures on which I need not further expatiate. Finally a claim is made to the value, on Dec. 14, 1914, of certain bonds, shares and securities which were deposited by the Royal Exchange Assurance with the bank for safe custody. Particulars of those have been supplied and they have been valued at a date which was anterior to the Russian revolution, the last date at which it was possible to attach any value to securities of that kind, at £369,393. The total, eliminating the interest, is something over £700,000. The first case before me relates to that proof.

Counsel for the liquidator has submitted to me that there is a very short and simple answer to this claim, and that answer rests, putting it broadly, on a principle which was laid down by MAUGHAM, J., in *Re Russian Bank for Foreign Trade* (1). The principle was laid down in clear terms, although it might be that in that case it was only said by way of dictum. Put shortly, the point which the liquidator takes on this proof is that these claims all relate to a debt or a liability which was owing or accrued in Russia, and the position of the Royal Exchange Assurance in this regard is no different in quality from the position of any other customer or debtor of the bank in Russia. It is not, and cannot be, I think, disputed that according to our law the debt is situate where the debtor is, and I do not think it can be disputed that these claims have to be regulated by Russian law and English law does not come into this matter at all. What is submitted on behalf of the liquidator is that here we have a debt or obligation that, undoubtedly, did exist prior to the legislation in Russia, which has been called confiscatory and which has, perhaps not unfairly, been so regarded, and that there were subsisting debts and obligations of the bank to its customers,

including the present claimants. It is said that that is all very well, but although the Russian legislation, by reason of its confiscatory character, has no extra-territorial effect, it is completely binding so far as concerns things which belong to the debtor and are referable to Russian territory, and here we have a debt or a claim, the remedy for which at the material date—that is to say, at the date when the confiscatory legislation took effect—was a debt which was liable to be discharged in Russia and nowhere else. The Royal Exchange Assurance, it is said, stands in no different position from any Russian customer or creditor of the bank, and the claims of the Royal Exchange Assurance and every other claim in Russia having regard to matters that have taken place in Russian territory have been effectively dealt with by the legislation to which I have referred.

In *Re Russian Bank for Foreign Trade* (1) MAUGHAM, J., lays down that, among other things, the Soviet decrees in question—the confiscatory decrees which nationalised banks and transferred their assets and liabilities elsewhere—could not have the effect of extinguishing or transferring debts regarded in English law as being locally situate in England, but from that it follows inevitably, as I think, that the decrees did have that effect in regard to debts and obligations which in English law are regarded as being locally situate, not in England, but in Russia. The learned judge put it in this way ([1933] Ch. 766):

“There is, however, a real question in dispute, and that is whether the debt to the petitioner was or was not locally situate in Russia at the date of the decrees of 1917 and 1918 above referred to. If it was locally situate in Russia, it seems to me that as the effect of the legislation the debt is no longer due by the bank as a corporation, and that the only claim of the petitioner is against the Soviet State. By the decree of December, 1917, the assets and liabilities of the bank within Soviet territory were taken over by the People’s Bank, and this in my opinion involves the destruction of the original debt and a kind of statutory novation (in some sense, perhaps, only a theoretical one) whereby the State bank became liable to discharge it. This legislation must be taken to be effective as regards property situate in the territory of the Soviet Republic (see *Princess Paley Olga v. Weisz* (2)) in which it was held that the English courts will not inquire into the legality of acts done by a recognised foreign government against or in relation to its own subjects in respect of property situate in its own territory. It seems to me to be clear that the same principle must apply, whether the property consists of chattels or of a debt regarded in this country as having a local situation. If, then, it were to be established that the debt of the petitioner was represented by a credit to him in the Archangel branch of the bank, I should be of opinion that that debt had ceased to exist . . . If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalisation decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable . . . The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet republic.”

After referring to *The Jupiter No. 3* (3), the learned judge said (*ibid.*, 767):

“Moreover, it is evident that our courts have never entertained the view that a debt incurred here by a foreign corporation permitted to carry on business here under English law can be discharged by a foreign statute . . . It may be observed that the decrees of the Russian legislature in relation to insurance companies were on the same lines as those in relation to private banking companies at any rate to this extent, that the insurance businesses in Russia were nationalised so that the assets of such companies, so far as Russian statutes could effect such a result, were transferred to the

Russian State. In the Court of Appeal SARGANT, L.J., in his judgment [in *Sedgwick, Collins & Co. v. Russia Insurance Co. of Petrograd* (4)] observed as follows ([1926] 1 K.B. 15): 'Nor do I think that the position of creditors here as against property of the Russia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which "nationalised" the undertaking and assets of the Russia Insurance Company.'

A I agree that those statements are obiter, but they seem to me to be founded on accurate principles, and they seem to me to govern the present case.

Other authorities were cited to me, for instance, *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (5) where it was held that, as the government of this country had recognised the Soviet government as the de facto government of Russia, the validity of the decree there in question, which was not the same
B decree as that with which we are now concerned, could not be impugned. In the judgment of SCRUTTON, L.J., the matter is put thus ([1921] 3 K.B. 558):

"But it appears a serious breach of international comity, if a State is recognised as a sovereign independent State, to postulate that its legislation is 'contrary to essential principles of justice and morality'. Such an allegation might well with a susceptible foreign government become a casus belli; and should in my view be the action of the sovereign through his ministers, and not of the judges in reference to a State which their sovereign has recognised. The English courts act on the rule 'that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms': *Central Control Board (Liquor Traffic) v. Cannon Brewery Co., Ltd.* (6). If it were they must give effect to it, and can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the State, and at present British citizens who may contribute to the State more than half their income in income tax and super tax, and a large proportion of their capital in death duties, can hardly declare a foreign State immoral which considers (though we may think wrongly) that to vest individual property in the State as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a State recognised by my sovereign as an independent sovereign State is so contrary to moral principle that the judges ought not to recognise it. The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the sovereign and not on the judges."

Then there is the case, to which allusion has already been made, *Princess Paley Olga v. Weisz* (2). It is sufficient if I read the headnote, which is:

"The English courts will not inquire into the validity of acts done by a recognised foreign government against its own subjects in respect of property situate in its own territory."

G Pausing there, it seems to me to be equally true that it will not inquire into the validity of acts so done against persons who dealt with it within its own territory. The headnote goes on:

"In 1918 a section of Russian revolutionaries took and retained possession of movables in Russia belonging to the plaintiff against her will. The act of those revolutionaries was subsequently adopted by the Soviet Republic, which was recognised in 1924 by the British government as the de jure government of Russia. In 1928 the movables in question were sold in Russia by the Soviet Republic to the defendants, who brought them to England. In an action by the plaintiff to recover those movables or damages for their detention or conversion:—Held, that the action failed, as the court could not inquire into the validity of the acts of a foreign sovereign Power which had been recognised by the government of this country."

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It is perfectly clear that these courts do not recognise acts of that character which are done with respect to property which is within their jurisdiction, as, for instance, the assets of a company in this country, but that is not the case here. We are here dealing with a matter which, both in regard to the property in question, i.e., these debts and claims, and in regard to the proper forum for their liquidation and satisfaction, is entirely Russian. It seems to me that on those principles the claim of the Royal Exchange Assurance must fail.

I might, perhaps, refer to a recent decision of DEVLIN, J., in *Bank Voor Handel en Scheepvaart v. Slatford* (7), where it was held that

“(i) foreign legislation purporting to have effect over property within the territory of the United Kingdom would not be recognised by the English courts, it being immaterial (a) whether or not the legislation was confiscatory, and (b) that it was the legislation of an allied government made with the purpose of keeping property out of the hands of a common enemy; the question whether foreign legislation should, in particular circumstances, be recognised on the ground of public policy was a matter, not for the courts, but for the legislature . . .”

and, therefore, it was held that a decree of the Netherlands government was ineffective to transfer certain gold and bank balances to that government and that they could be and were rightly vested in the Custodian of Enemy Property.

Counsel for the applicants admitted that, if the case was governed by the principle laid down by MAUGHAM, J., in *Re Russian Bank for Foreign Trade* (1), the claim of his client must necessarily fail. I think it does fail, and I think that it fails on that comparatively short and simple ground. It seems to me that the claim of the Royal Exchange Assurance is governed by Russian law. I think that that was the proper law of the contract between those claimants and the bank. I think that that claim can be and could have been discharged according to the provisions, and, I think, only according to the provisions of Russian law, and that the rights and remedies of the claimants were all put an end to by one or other of the decrees applicable in this case. The first of those decrees was dated Dec. 14, 1917, and can be referred to as a decree of nationalisation of the banks, and the second was a decree of the People's Commissars dated Jan. 26, 1918; and I do not think it can be disputed that, according to the plain meaning and plain language of those decrees, the liabilities and assets of this bank in Russia were transferred to and made over to the People's Bank or the Russian State. The decree of Dec. 14, 1917, provided:

“In the interests of the proper organisation of national economy, in the interests of a thorough eradication of banking speculation and the complete emancipation of the workers, peasants, and the whole labouring population from exploitation by banking capital, and also with the object of establishing a single People's Bank of the Russian Republic, genuinely serving the interests of the people and the poorest classes, the Central Executive Committee hereby decrees: 1. Banking business is declared a State monopoly. 2. All existing private joint stock banks and banking houses are merged with the State Bank. 3. The assets and liabilities of the liquidated banks are taken over by the State Bank. 4. The method of effecting the merger of private banks with the State Bank shall be determined by a special decree. 5. The temporary administration of the business of private banks shall be entrusted to the council of the State Bank. 6. The interests of small depositors shall be fully safeguarded.”

I do not think that the Royal Exchange Assurance would be likely to be regarded in Russia or anywhere else as a small depositor. Although the effect of that may be very devastating, in fact on the face of it, of course, it is quite capable of a beneficent construction. If the State bank really had taken over the assets and liabilities of the liquidated bank and was prepared to honour the obligations

of the liquidated bank, no harm would have been done, but that is not my concern. The matter strikes me in this way, that when once I have come to the conclusion that this decree must be regarded as valid, it is against the State bank that this claim should be made. The purpose of this decree is not so much confiscation as merger and transfer, and surely to transfer the assets of a particular corporation to a larger corporation in which the smaller is said to be merged is in itself innocuous.

The other decree is the decree of January, 1918, and is in these terms:

“Having in view to remove capitalists who owned shares of the abolished private banks, absolutely from the direction of the activities of the People’s Bank of the Russian Republic, which is being created, and continuing in this way the liquidation of the regime of the omnipotence of bankers, the Council of People’s Commissars decrees: 1. The joint stock capital of the late private banks (subscription, surplus and special) is transferred to the State Bank of the Russian Republic on the basis of complete confiscation. 2. All banking stock certificates are annulled and any payment of dividends thereon is absolutely terminated. 3. All banking stock certificates are subject to immediate surrender by the present holders to the local offices of the State Bank. 4. The holders of banking stock certificates who do not have them in their possession are obligated to submit to the offices of the State Bank registry lists of banking stock certificates belonging to them indicating their exact location. 5. The holders of banking stock certificates who shall have failed to surrender same (in accordance with para. 3) or who shall have failed to submit their registry lists (in accordance with para. 4) within a period of two weeks following the day of the publication of the present decree are punishable by confiscation of all the property belonging to them. 6. All dealings and instruments in connection with the transfer of the banking stock certificates are absolutely prohibited.”

Anyone interfering with this process is said to be punishable for terms of up to three years.

If those decrees take effect, and, I think, it must be assumed they have for this purpose taken effect, I think there is no longer, and there was not at the date of the winding-up, any subsisting debt owing from the bank to the claimants on which this proof could be founded. It is no business of mine to criticise the decrees or to express any view as to their propriety if, I think, as I do think, that they were wholly effective and must be assumed in these courts to have been fully effective, and I think that when the winding-up order was made the debt and the obligation on which this claim is founded had ceased to exist, either at the end of 1917 or the beginning of 1918, it matters not which.

The proof as originally delivered has been rejected. The amended proof, which, I suppose, is still before the liquidator, must also, in my opinion, be rejected. Though one feels some sympathy with the applicants, after all they took a risk in trading in a foreign country in the manner in which they did, and I do not see that anything can be done about it in this winding-up. The result is that as regards the first of these two summonses the claim fails.

There is one further point. As regards the securities which were deposited with the bank, not as security but merely for safe custody, there was the further point, which, I think, is a good point, that a bailee of goods who has been evicted by title paramount has no longer any liability under the bailment. That is, I think, established by *Ross v. Edwards & Co.* (8) in the Privy Council, to which the headnote is:

“In ordinary circumstances a bailee is estopped from disputing the title of the bailor; but, if there is an eviction by title paramount, the bailee is, in the absence of any special contract, discharged from all liability.”

In delivering the judgment of the Privy Council, LORD MACNAGHTEN said (73 L.T. 101):

"It is clear that the bailee after acknowledging that he holds the goods on account of the bailor cannot say to the bailor: 'The goods are not yours'; but it is equally clear that if there is that which amounts to eviction by title paramount the bailee is discharged from his promise. In that event he is under no liability to the bailor unless he has made a special contract with him or is in some way to blame for his loss."

Whatever may have been the value of this fund at the relevant or any other date, there is no doubt, I think, that these two decrees of the Soviet government have evicted the bank in the sense that the State has taken possession of these securities and thereby enabled the bank to plead and allege that they have in fact been evicted by title paramount. I think that, so far as concerns the claim to the securities or the value of them as distinguished from the claim in respect of the two accounts, the current and deposit accounts, that decision in the light of those decrees affords a ground upon which the liquidator is bound to reject the claim as regards the value of these particular securities.

The other claim is by Mr. Wilenkin, who is an expert in Russian law, and who has, undoubtedly, in the course of this extremely varied and tortuous litigation concerning the bank, rendered good services which have been a great deal of help. I have now to look at the way in which his claim is formulated. It rests on this. He says that between March, 1930, and the date of the winding-up order in May, 1932, he rendered such services to the bank or the liquidator, or those interested in the bank or the winding-up, as entitled him as of right to claim against the assets in the winding-up for those services. I say at once, that there may be no doubt about it, that, if this claim is sustainable, the amount for which Mr. Wilenkin seeks reimbursement, viz., £850, is regarded by the liquidator as in itself fair and reasonable. There is no doubt that, but for his intervention and activities, the Deutsche Bank, in circumstances which I need not describe in detail, might have got away with a judgment for a very large sum of money against these assets. The matter was carried to the Court of Appeal, where it was held that the claim could not be sustained, and, indeed, that the whole of the proceedings under which that judgment had been obtained was bad from beginning to end. Unless that appeal had been brought—and it is admitted that it was brought largely at the instigation and under the auspices of the present claimant—the Deutsche Bank would have obtained a judgment, to which as matters turned out, it had no shadow of right. Therefore, there is no doubt that Mr. Wilenkin has contributed something to the winding-up and to the rights of those interested in the winding-up, for which *prima facie* he ought to receive payment.

The claimant sets out and summarises what he is asking to be paid for in the proof which he has lodged. He claims the balance of remuneration and out of pocket expenses due to him for professional services rendered to the Moscow Merchants Bank from March, 1930, particularly as from March, 1931,

"when the hearing of the proceedings relating to the Deutsche Bank claim came before ROCHE, J., including further attendances at the court in June, 1931, in the same connection when the case was continued before ROWLATT, J., various attendances upon and conferences with Messrs. Slaughter & May in connection with the claim of Frederick Huth, in October, 1931, and subsequently; numerous discussions with Mr. Czamanski [one of the ex-directors of the bank] and advising him in connection with lodging appeal against the judgment given in favour of the Deutsche Bank; conferences with Messrs. Kimbers, Williams & Co., generally discussing with them the details of the appeal and choice of counsel, also conferences with counsel; assisting Messrs. Kimbers, Williams & Co. in connection with the preparation of the appeal; attendances at the

Court of Appeal daily . . . also numerous discussions with Mr. Czamanski throughout; various journeys to Paris and Liverpool, preparing various observations, perusing and amending various drafts; numerous letters and telegrams to Mr. Czamanski and others throughout, also various telephone conversations with him in Paris and Switzerland and elsewhere."

- What was the position when those alleged services were rendered? I say, A "alleged", because the difficulty is, to whom were those services rendered? At that time the winding-up order had not been made, and the difficulty is to discover to exactly what extent during that interim period (i.e., in the period between the dissolution of the bank in Russia and the date of the winding-up order in England) the bank was in existence from the point of view of our law. There is no doubt that to some extent a company, such as the bank, which is B being wound-up is deemed for some purposes to have been in existence before the winding-up order was made, but not for all purposes, and it is only hypothetically revived or re-constituted in regard to that interim period, that is to say, before the winding-up order was made, for the limited purpose of enabling the winding-up order to be carried into effect. I cannot find any authority that after the winding-up order has been made one has to look at C the past history and put the wraith of the company back into existence, enjoying activities and subjecting itself to obligations just as if it had never been dissolved. In all the various statements that have been made as to how far the company notionally exists, I cannot find any statement which justifies me in saying that it exists for the purpose of employing agents for straightening out its affairs, and so forth, during that period when it is completely dead, subject D only to such measure of revivification as must be deemed to have arisen through the making of the winding-up order. It seems to me that if I were to hold that the company was, so to speak, hypothetically revived *ex post facto* (if I may coin a phrase which is both hybrid and unsatisfactory) there is no limit to the amount of revivification which must be attributed to a company in the situation which I have been trying to describe.
- E I think that Mr. Wilenkin's activities may have been very useful and may have produced a very satisfactory result, but I cannot see that on any ground they could have been provided to the company, which was dissolved, or to the liquidator, who was not appointed, or to the people who were interested in the equity, if there was an equity, in this bank. One is driven back to this strange notion of an agency of necessity. But an agent has first to have a principal. Where in this F case is the principal? I cannot find one. The only ground on which this claim could be allowed would be if I decided as a matter of law that this company, for the purpose of Mr. Wilenkin's activity, was in existence and was in fact employing Mr. Wilenkin in and about its business and actions. It seems to me that these metaphysical conceptions are extremely difficult, and when there is a hypothesis on a hypothesis such as I have when it is said that the non-existent company was G none the less deemed to be employing a non-appointed agent to conduct its non-existent affairs, one gets into a maze of metaphysics (if that is the right word) from which there is no logical escape. The whole thing seems to me to be far too subtle and complicated to convince anybody that one could adopt it as a ground for admitting such a claim as the present.
- H There is no doubt that when the bank was dissolved in Russia it was dissolved for all purposes, and that during the interregnum, i.e., before its partial revivification by the making of the winding-up order, it could neither sue nor be sued. That, I think, is quite clear on the authorities. So far as there were any assets which ought to have belonged to it if it had not been dissolved, if I may put it in that hypothetical way, I take it that those would have become vested in the Crown as *bona vacantia*, and that the Crown's title, no doubt, was defeasible. There is no suggestion that Mr. Wilenkin can be deemed to have been acting as agent, either of necessity or otherwise, for the Crown. I cannot see that the

making of the winding-up order on any of the authorities can be held to have had the effect of validating things that were done for the benefit of the bank while it was, so to speak, in the grave. I find the greatest difficulty in formulating a way in which this claim can be put. It has been said in these courts that the principle relating to agents of necessity ought not to be extended. I think it would be extending it very much if I were to extend the doctrine of agency of necessity to agency on behalf of a non-existent person. I cannot see my way to do that. It is true that the liquidator might have thought it proper to make some sort of *ex gratia* or compassionate grant to Mr Wilenkin for any expenses to which he had been put, but to say that Mr. Wilenkin has some sort of right in the winding-up which he can enforce by putting in and establishing a proof seems to me to go beyond anything which the principles, as I understand them, can possibly justify.

I think, perhaps, it may be useful for me to refer to a short passage in the judgment of SCRUTTON, L.J., in *Jebara v. Ottoman Bank* (9) as throwing some little light on this conception of the agency of necessity. That case, I may say, was reversed in the House of Lords, but the observation of SCRUTTON, L.J., did not thereby lose any of its force, nor was it affected by the decision of the highest court. He said ([1927] 2 K.B. 270):

"It was argued that if the original contracts were void on the outbreak of war, the bank became agents of necessity and could justify their action in that way. I am not sure that it is not an answer to say that they never thought of themselves in that light, or considered whether it was necessary to act; they thought they were carrying out their contracts. But considerable difficulties arise on the question of agent of necessity in English law. Until recently it was treated as limited to certain classes of agents of whom masters of ships were the most prominent. High authorities had doubted whether it could be extended . . . Many of the authorities are collected in a recent judgment of McCARDIE, J., in *Prager's case* (10) . . . He takes the view that judges should expand the common law to meet the needs of expanding society, and proceeds to expand the doctrine of agent of necessity without clearly defining the limits, if any, of its expansion. The difficulty may be seen by considering the case of the finder of perishable goods or chattels which need expenditure to preserve them. If the finder incurs such expenditure, can he recover it from the true owner when he finds him, as his 'agent of necessity'? EYRE, C.J., raises this difficulty in the case above cited [*Nicholson v. Chapman* (11)], and cites *Binstead v. Buck* (12), the case of the pointer dog. The pointer dog was lost, and his finder fed him for twenty weeks, and claimed the cost from his owner when he appeared, but the claim was treated as unarguable. The expansion desired by McCARDIE, J., becomes less difficult when the agent of necessity develops from an original and subsisting agency, and only applies itself to unforeseen events not provided for in the original contract, which is usually the case where a shipmaster is agent of necessity. But the position seems quite different when there is no pre-existing agency, as in the case of a finder of perishable chattels or animals, and still more difficult when there is a pre-existing agency, but it has become illegal and void by reason of war, and the same reason will apply to invalidate any implied agency of necessity."

That is one of the cases which seems to give a very salutary warning that this is a doctrine with which I am not entitled to play (if I may use that expression) in order to give effect to a claim which I might consider on broad grounds to be not unmeritorious. It seems to me that in this case the attempt to base the claim on agency of necessity is a counsel of despair. No one suggests that this gentleman was the agent of the company before its dissolution; nobody suggests that there was a pre-existing agency which could be carried on by the services rendered; and it seems to me that the difficulty of finding the principal, the difficulty of

establishing the agency as a legal conception capable of being the foundation of a legal claim, defeats this argument.

Applications dismissed.

Solicitors: *Linklaters & Paines* (for the Royal Exchange Co., Ltd.); *Simpson, North, Harley & Co.* (for Marc Wilenkin); *Slaughter & May* (for the liquidator).
[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

MOSES *v.* LOVEGROVE.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Birkett and Romer, L.JJ.), April 25, 28, 29, 1952.]

B Limitation of Action—Land—Adverse possession—De-controlled dwelling-house—No rent paid by tenant—Accrual of right of action—House again controlled—Limitation Act, 1939 (c. 21), s. 9 (2), s. 10 (1), s. 16.

Landlord and Tenant—Lease—Rent book—Evidence of terms of tenancy.

C In 1934 the plaintiff purchased a dwelling-house to which the Rent Restrictions Acts applied, the defendant being then the tenant in occupation. In 1935 the house was de-controlled. On May 28, 1938, the defendant made the last payment of rent. On Sept. 1, 1939, the premises became again controlled by the Rent and Mortgage Interest Restrictions Act, 1939. In an action for possession and arrears of rent of six years the defendant pleaded that both claims were barred by reason of the Limitation Act, 1939. The plaintiff, while conceding that there was adverse possession from June, 1938, till September, 1939, contended that (i) the re-introduction of rent control ended the defendant's adverse possession, and (ii) that the rent book given to the defendant constituted a lease in writing within the meaning of s. 9 (3) of the Limitation Act, 1939.

E HELD: (i) the existence of adverse possession did not postulate an unqualified right to recover the property in the owner thereof, and therefore, the coming into operation of the Rent and Mortgage Interest Restrictions Act, 1939, while qualifying the plaintiff's right to recover, did not have the effect of terminating the period of adverse possession.

(ii) the rent book did not constitute a "lease in writing" within s. 9 (3).

FOR THE LIMITATION ACT, 1939, s. 9 (2), s. 10 (1) and s. 16, see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1170, 1171, and 1175, respectively.

F Cases referred to:

(1) *Re Jolly*, [1900] 2 Ch. 616; 69 L.J.Ch. 661; 83 L.T. 118; 32 Digest 484, 1467.

(2) *Warren v. Murray*, [1894] 2 Q.B. 648; 64 L.J.Q.B. 42; 71 L.T. 458; 32 Digest 453, 1194.

G APPEAL by the plaintiff from an order of His Honour JUDGE SIR GERALD HURST, K.C., made at Bromley County Court, and dated Feb. 5, 1952, dismissing an action by the plaintiff for the recovery of possession of a dwelling-house and arrears of rent.

Heathcote-Williams, Q.C., and *Ricardo* for the plaintiff.

Bassett, Q.C., and *Chope* for the defendant.

Cur. adv. vult.

H April 29. SIR RAYMOND EVERSLED, M.R.: The plaintiff claims possession of premises at 7, Kent Road, West Wickham, Kent, and to recover £163 odd as six years' arrears of rent in respect of the same premises. The defence to the claim is that the plaintiff's title has been extinguished under s. 16 of the Limitation Act, 1939. The county court judge decided in favour of the defendant's contention, and I think he was right. There is no dispute as to the facts. The plaintiff purchased the property in 1934. The defendant was then

the tenant in occupation, paying a rent of either 7s. 9d. or 6s. 11d. a week. In 1935 the plaintiff successfully applied under the current rent restriction legislation to have it declared that the house was free from the control of that legislation. Thereupon the plaintiff informed the defendant that the rent for the premises would thenceforth be at the rate of 10s. 6d. per week. There ensued a correspondence, the substance of which was that the defendant denied, I assume wrongly, the right of the plaintiff to increase the rent. That matter, however, is irrelevant. The vital fact is that on May 28, 1938, the defendant made his last payment to the plaintiff in respect of rent. Since that date he has paid no rent to the plaintiff, nor has he made any acknowledgement whatever of the plaintiff's title as his landlord. One other circumstance must be mentioned, for it is that on which the whole argument of the plaintiff in this court has rested. As a result of the Rent and Mortgage Interest Restrictions Act, 1939, on Sept. 2 of that year, these premises were again brought within the ambit of the rent restriction legislation so that thenceforward any tenant of the premises under a letting to which the Acts applied would be entitled to the protection of those Acts. A B

I can dispose in brief terms of two subsidiary points that emerged during the hearing, either in this court or below. In the first place, it was suggested and argued in the court below (but in this court counsel for the plaintiff only faintly adumbrated it) that there was here a lease in writing so as to exclude the particular provisions of s. 9 (2) of the Limitation Act, 1939. The alleged lease in writing consisted of the rent book, which was put in evidence. The judge rejected the view that the rent book was such a lease in writing within the meaning of the Act, and I think he was right in that conclusion. The rent book is what it purports to be, and what it is called, a rent book, that is, a book containing acknowledgements of the payment of weekly sums of rent, and containing also, in pursuance of the terms of the legislation, a reference to the terms on which the tenant was holding his tenancy. On the face of it, it was not intended to be, and is not, a contract for granting a tenancy, still less a lease creating an estate. It is at most a book evidencing the terms on which the tenant held. C D

The second matter was this. It was argued in the court below that since the defendant was admittedly the tenant of the plaintiff up to the time when he ceased to pay rent, therefore, all his subsequent occupation, albeit without any payment of rent or other acknowledgement, was referable to his having been a tenant of the plaintiff, so that at no stage was he ever in adverse possession of the premises. That point was expressly abandoned by counsel for the plaintiff in this court, and, therefore, I do not spend further time on it, for it is now conceded by him that from the expiration of one week after May 28, 1938 (that is, after the last payment of rent) until the impact on these premises of the Rent and Mortgage Interest Restrictions Act, 1939, there was adverse possession on the part of the tenant within the meaning of the Limitation Act, 1939. The argument is that, when, on Sept. 2, 1939, the premises were again brought within the scope of the rent restriction legislation, then, by reason of the terms and the effect of that legislation, the adverse possession of the defendant ceased because thenceforward, by virtue of the Acts, the plaintiff had no right as of course to recover possession against the defendant, the tenant. The most that she had, according to the argument, was the right to go to the county court and invoke the exercise in her favour of the discretion vested in the county court judge to grant possession, if he thought it reasonable in all the circumstances so to do. That qualified right, it is said, is not such as is consistent with adverse possession on the part of the defendant. E F G H

Such a view, if it were well founded, would be somewhat startling, for it would necessarily follow that in the case of premises within the Rent Restrictions Acts, unless the statutory period under the Limitation Act, 1939, had expired before they came within the Acts, the Limitation Act could never run in favour of the tenant so long as the Rent Acts remained on the statute book. A further reason

for thinking such a conclusion surprising is that the rent restriction legislation is intended to protect tenants, but, if counsel for the plaintiff is right, in this instance it would have the effect of preserving to the landlord a right in respect of this property which indubitably otherwise she would have lost.

Section 4 (3) of the Limitation Act, 1939, provides:

- A "No action shall be brought by any . . . person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him . . . "

I turn to s. 9 to see when, in such a case as this, where the parties originally were in the relationship of landlord and tenant, the right of action accrued to the landlord. That appears from s. 9 (2):

- B "A tenancy from year to year or other period, without a lease in writing, shall, for the purposes of this Act, be deemed to be determined at the expiration of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued at the date of such determination: Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date of the last receipt of rent."
- C

It is from s. 9 (2) that I derive the conclusion that the right of action, subject to what follows in s. 10, accrued to the plaintiff at the latest at the expiration of the week following May 28, 1938, when the last payment of rent was made. The conclusion which I have stated is subject to s. 10 which provides:

- D "(1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as 'adverse possession') and where under the foregoing provisions of this Act any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land. (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken into adverse possession."
- E

- F Section 16 provides that when the period prescribed by the Act for any person to bring an action to recover land has expired the title of the person dispossessed is extinguished. Finally, in the definition section, s. 31, there is found:

"'Action' includes any proceeding in a court of law, including an ecclesiastical court."

- G Reverting to s. 10, it is on the second sub-section that the argument of counsel for the plaintiff rests, for it is said that, while he concedes that the right of action did accrue on the date in 1938 which I have mentioned, nevertheless, by virtue of the rent restriction legislation which became applicable to the premises in September, 1939, thenceforward there ceased to be adverse possession on the part of the defendant. It will follow from the passages which I have read from the Limitation Act, 1939, that for the limitation period to run and extinguish the title of the plaintiff, two conditions must be satisfied—(i) that a right of action accrued at a date (in this case) not less than twelve years before the proceedings, and (ii) that thereafter throughout the intervening period there has been adverse possession by the person in occupation. Counsel for the plaintiff has conceded not only that the right of action accrued in June, 1938, but also that until Sept. 1, 1939, there was adverse possession on the part of the defendant. As a matter of principle, it seems to me, *prima facie*, reasonably
- H

clear that, if the nature of the possession of the defendant was adverse from June, 1938, to September, 1939, its quality cannot have been altered by the impact of another Act of Parliament designed to give protection to tenants against eviction by their landlords, but having nothing to do with the purpose and scope of the Limitation Act, 1939.

I think that the fallacy of the argument of counsel for the plaintiff lies in the assumption that adverse possession postulates in the other party an unqualified right to recover possession throughout the period alleged. I do not find in the section any language to justify that conclusion. In s. 10 (1) that which is defined as "adverse possession" is "land in the possession of some person in whose favour the period of limitation can run". According to the ordinary sense of the words, adverse possession must, I should have thought, be possession adverse to—that is to say, inconsistent with and in denial of—the right of the landlord to the premises, and if, as is conceded during the period from June, 1938, to September, 1939, the occupation of the defendant without payment of rent and without acknowledgment constituted such possession adverse to, and in denial of, the plaintiff's title, I cannot see how it can be said that that situation is altered by the limitations placed by Parliament on the right of a landlord to recover possession of controlled premises under the legislation which then came into operation.

The matter may be tested in this way. Counsel for the defendant referred to *Re Jolly* (1), where COLLINS, L.J., used this language with reference to the Real Property Limitation Act, 1833 ([1900] 2 Ch. 619):

"At the end of the twelve years the possession of a tenant who has paid no rent becomes adverse during the whole time the adverse possession is validated by the statute, and it is not competent for the landlord to say that he still retains the right to recover rent which was not payable to him. I think that is emphasised by the position of a tenant under a lease for years as compared with that of a tenant under a lease from year to year. In the former case the non-payment of rent does not render the possession of the tenant adverse unless he pays rent to some person other than the lessor. But in the latter case the legislature has treated the mere non-payment of rent by a tenant from year to year as a payment to some person other than the landlord."

I test the matter by supposing that in this case the defendant had paid the rent, 7s. 9d. or 10s. 6d., or whatever it might be, to some person other than the plaintiff, either in the false belief that that other person was the landlord or else with the deliberate intention of creating a statutory title in favour of that other person and in defeasance of the plaintiff's right. In those circumstances it seems to me extravagant to suggest that payment over this period of rent to some other person was not possession adverse to the plaintiff. The only distinction here is that the defendant did not pay rent to anyone. That fact cannot avail the plaintiff since it is conceded on her behalf that, apart from the Rent Restrictions Acts, non-payment of any rent and the absence of any other acknowledgment, is, under the meaning of the Limitation Act, 1939, possession adverse to the person to whom the rent should have been paid.

The notion of adverse possession, which is enshrined now in s. 10 of the Act of 1909, is not new. The section is an enactment of the law in regard to the matter as it had been laid down by the courts in interpreting the earlier limitation statutes. I am content to make one reference to PRESTON AND NEWSOM'S *LIMITATION OF ACTIONS*, 2nd ed., p. 71:

"A right of action only accrues, and time only runs, if and so long as there is a person in possession and that person is not disqualified from relying on the statute. Thus, by s. 19, a trustee cannot avail himself of the statute against his beneficiary as the trustee's possession is not adverse. Again, a beneficiary in possession does not have possession adverse to the

trustees or his co-beneficiaries . . . possession may fail to be adverse by reason of the rule that 'possession is never adverse if it can be referred to a lawful title'."

A If the argument was capable of being sustained that a tenant retaining possession without paying rent or making other acknowledgment was still in possession by virtue of a title referable to his tenancy, the rest of the argument would be logical. In the absence of that being established, it follows necessarily that a tenant in the circumstances of this defendant, apart from the Rent Acts, is in adverse possession within the meaning of s. 10, and it seems to me that the Rent Acts have no bearing on the question we have to decide—whether in this case the conditions of the Limitation Act, 1939, are satisfied.

B I would be content to leave it there, but out of respect to the argument of counsel for the plaintiff I will add a few sentences in reference to the proper place which the Rent Acts have in such a case as this. First, however, I refer to one passage from *Warren v. Murray* (2), to which counsel for the plaintiff referred us. That was a case in which a person was in occupation under a contract to grant him a lease for ninety-nine years, such lease never having been granted. In the absence of the lease he was, in the eye of the law, only a tenant at will, and that tenancy could have been determined at any time and the owner could have recovered possession. Having regard to the existence of the contract, it was pointed out that a court of equity would, if asked, grant an injunction to restrain the owner exercising his legal rights, so that the effect was that the landlord had no right to go to the court and demand possession, and, therefore, it was said that no right of action had ever accrued. In his judgment, A. L. SMITH, D L.J., said ([1894] 2 Q.B. 658):

E "It seems to me evident that a person must have an effective right to make entry and to recover possession of the land in order that the statute may begin to run. If the argument for the plaintiff is correct, the trustees are to lose their property because they did not enter at a time when they really could not enter with any effect, inasmuch as a court of equity would at once have decreed specific performance and put an end to any entry they might have made. It seems to me impossible to hold that this constitutes an entry within the meaning of the Act. It is, however, said that the plaintiff's predecessors became tenants at will, and by virtue of s. 7 the statute began to run a year after they were let into possession. I do not so read the section. As in the case of s. 2, it seems to me that s. 7 requires that there should have been an effective right of entry or action before the section can apply at all. It provides at what time the right of entry or action shall be deemed to have accrued, but that assumes that there is a 'right' of entry or action. In this case there was no such right, and therefore the statute did not run."

G Those words were used at a time when such matters as rent restriction legislation were not in contemplation, but, in any event, they have no bearing on the present problem. The question there was not whether there was adverse possession, but whether a right of action had ever accrued. In the present case it is admitted that it did, and the only question is whether adverse possession thereafter continued. None of the authorities cited by counsel for the plaintiff is, in my judgment, authority for the proposition that the test of adverse H possession is, as he would have it, the existence of an absolute unqualified right to recover possession in the courts on the part of the owner of the property. We are not concerned with what the situation would have been if at the time the statutory period of limitation was alleged to begin to run the premises had been under the control of the Rent Acts so that the only right the landlord would then have had would have been the right to invoke the jurisdiction of the county court. If such were the circumstances, the question, no doubt, would arise whether there was a right of action within the meaning of s. 4 (3) and s. 9 of the

Limitation Act, 1939, by virtue of the qualifications put on that right by the rent restriction legislation. We have not to decide that question, but I must not be taken in any way to indicate the view that, if such were the facts, the right of action within the meaning of the Limitation Act, 1939, would not arise because of the qualifications imposed on a landlord by the Rent Restrictions Acts.

Under the definition of "action", which I have read, a right of action includes a right of proceeding in any court. If, by virtue of the non-payment of rent or some other denial of the landlord's rights, a landlord becomes entitled to invoke the jurisdiction of the court, it seems, *prima facie*, though I express no final view on the matter because it is unnecessary, that the "right of action" within the meaning of the Limitation Act, 1939, would cover a right to go to the county court and invoke the county court's jurisdiction. I must also not be taken to suggest that in a case such as the present, if after, say, nine or ten years of occupation on the part of a tenant without paying rent, without any acknowledgment of the landlord's title, and in denial of any rights on the part of the landlord, a landlord tries to recover possession, the defence on the Rent Restrictions Acts would be open to the tenant, or that he could, in such circumstances, successfully contend that the dwelling-house was a dwelling-house subject to a letting within the meaning of the Rent Act. That, again, it is unnecessary to decide, but assuming that as a practical matter, and certainly it would be a correct assumption if proceedings were taken shortly after the occupant ceased to pay rent, it would be necessary to satisfy a court that it was reasonable to make an order, still it does not seem to me that that consideration assists the defendant in the present case.

Possession, for the purposes of the Limitation Act, 1939, is none the less adverse because Parliament has thought fit to put certain serious qualifications on the right of a person whose land is in adverse possession to enter and to recover the possession of that property. After all, in order that the occupant may invoke the Rent Acts he must assert a tenancy, either a contractual tenancy or a statutory tenancy, and it obviously would not lie easily in the mouth of a defendant to assert a contractual tenancy if for years and years he has paid no regard whatever to any of the terms of the contract he alleges. The same, I think, would apply to a statutory tenancy, seeing that by s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, conditions of the statutory tenancy are defined thus:

"A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy . . ."

An occupant who observes none of the terms and conditions of the original contract of tenancy, *prima facie*, would be in difficulty in asserting that he was a statutory tenant.

It is, however, unnecessary to pursue this matter further. For the reasons I have indicated, I think that, undoubtedly, there was here the accrual of a right of action in June, 1938. So much is admitted. I think it equally clear that there was then adverse possession on the part of the tenant, the defendant, and I cannot see anything in the impact of the Rent Acts or otherwise which qualified or altered the character of the possession which had begun as adverse possession. I, therefore, think that the judge rightly concluded the matter in favour of the defendant, and I would dismiss the appeal.

BIRKETT, L.J.: I am of the same opinion. Counsel for the plaintiff has argued that, even if there were adverse possession in June, 1938, and it extended until September, 1939, nevertheless, when the Rent and Mortgage Interest Restrictions Act, 1939, came into force, all was cured inasmuch as after that date there could not be adverse possession. In support of that argument he

said that the test of adverse possession was the right of the landlord to recover possession, which he could not do after the passing of the Act of 1939. My Lord has discussed the test of adverse possession, and it is enough for me to say that I fully agree with the reasons given by him for saying that the provisions of the Rent and Mortgage Interest Restrictions Act, 1939, are irrelevant to this case.

- ROMER, L.J.:** I also agree. The defendant's former tenancy was plainly
- A an oral weekly tenancy, although it was rather faintly sought to be argued that it was a lease in writing, but my Lord has disposed of that in language with which I entirely agree. The tenancy being a weekly tenancy, time started to run by virtue of s. 9 of the Limitation Act, 1939, after the expiration of one week from the date of the last payment of rent, which was on May 28, 1938. As no notice to quit was given, the tenant could not thereafter be said to be in immediate
- B adverse possession in the ordinary sense, for he remained on under his contractual tenancy. Nevertheless, for the purposes of the Limitation Act, his tenancy ceased to exist, and, therefore, he is deemed to have remained on in adverse possession. Accordingly, the fact that for some purposes his contractual right remained in the absence of a notice to quit or a writ for possession is irrelevant, as also is the precise date on which the lessor could properly have started proceedings in ejectment.
- C The point is that from the date which I have mentioned the defendant is deemed to have had no contractual right to possession, and, therefore, to have been a trespasser or a squatter. Why should he be regarded as being in possession by virtue of permission or grant of the owner merely because of the passing of the Rent and Mortgage Interest Restrictions Act, 1939? That Act gave him no contractual right to possession; it created no contractual tenancy. By reason
- D of the Act the lessor could not eject him without an order of the county court, but that is merely a barrier in the way of the lessor's right of action for possession, and it conferred no title on the lessee so as to convert what was formerly deemed to be adverse possession into permissive possession or possession as of right.

- The cases cited to us, for example, *Warren v. Murray* (2), do not, in my opinion, assist the plaintiff's claim, because in those cases the owner could not evict the occupier in question inasmuch as the latter had some legal or equitable right derived from the owner entitling him to remain in occupation. Counsel for the plaintiff argued before us that the test of adverse possession is whether the owner has an unqualified right to sue for possession, and, if he has not that right, the occupation cannot be regarded as adverse. The fact that in the cases this has been in some sense treated as the test does not render the test exhaustive,
- F because usually the two things are co-extensive, that is to say, if the owner has given a contractual right or permission to occupy, he cannot bring an action for eviction, and vice versa.

- It seems to me that one can, in addition to looking at the position and rights of the owner, legitimately look also at the position of the occupier for the purpose of seeing whether his occupation is adverse. In my opinion, if one looks to the
- G position of the occupier and finds that his right to occupation is derived from the owner in the form of permission or agreement or grant, it is not adverse, but, if it is not so derived, it is adverse, even if the owner is, by legislation, prevented from bringing ejectment proceedings. In the present case, for the purposes of the Limitation Act, 1939, the defendant had no such derivative right from the plaintiff between June 4, 1938, and Sept. 1, 1939, and he acquired no such
- H right on the latter date, because the statutory protection afforded by the Act did not constitute a title referable to or emerging from the owner. So far as the owner is concerned, it in fact conferred no title to possession at all; it merely provided in some degree a defence to a claim for possession. For these reasons, which are in effect substantially the same as those which my Lord has given, I agree that this appeal fails. *Appeal dismissed.*

Solicitors: *David Morris* (for the plaintiff); *Piper, Smith & Piper* (for the defendant).
[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

L. D. TURNER, LTD. v. R. S. HATTON (BRADFORD), LTD.

[LEEDS ASSIZES (Hallett, J.), February 21, 22, 1952.]

Sale of Goods—Note or memorandum in writing—Particulars of transaction in document not signed by party to be charged—Letter signed by that party to third person referring to transaction—Sale of Goods Act, 1893 (c. 71), s. 4 (1).

The defendants having orally agreed to sell to the plaintiffs twenty-five tons of carpet thrums, the plaintiffs sent to the defendants a document, dated May 18, 1950, entitled "Confirmation of purchase" and containing all the material terms of the agreement. The defendants gave the plaintiffs no acknowledgment in writing of this document, but in a letter to their suppliers, dated May 22, 1950, and signed by them, they said: "If you would send a few tons at a time per rail it will be out of your way . . . as we have booked twenty-five tons with our customer".

HELD: on the evidence the letter of May 22 referred to the sale mentioned in the document of May 18; it supplied a recognition over the signature of the defendants of the transaction of which particulars were recorded in that document; and, therefore, the documents constituted a sufficient memorandum of the contract of sale within the Sale of Goods Act, 1893, s. 4 (1).

Observations of RUSSELL, J., in *Stokes v. Whicher* ([1920] 1 Ch. 418), applied.

AS TO THE MEMORANDUM IN GENERAL, see HALSBURY, Hailsham Edn., Vol. 29, pp. 33-37, paras. 34-38; and FOR CASES, see DIGEST, Vol. 39, pp. 383-389, Nos. 212-250, and Digest Supps.

Cases referred to:

(1) *Gibson v. Holland*, (1865), L.R. 1 C.P. 1; 35 L.J.C.P. 5; 13 L.T. 293; 39 Digest 383, 212.

(2) *Cave v. Hastings*, (1881), 7 Q.B.D. 125; 50 L.J.Q.B. 575; 45 L.T. 348; 46 J.P. 56; 12 Digest, Replacement, 159, 1022.

(3) *Ridgway v. Wharton*, (1857), 6 H.L. Cas. 238; 27 L.J.Ch. 46; 29 L.T.O.S. 390; 10 E.R. 1287; 39 Digest 386, 234.

(4) *Long v. Millar*, (1879), 4 C.P.D. 450; 48 L.J.Q.B. 596; 41 L.T. 306; 43 J.P. 797; 12 Digest, Replacement, 158, 1017.

(5) *Burgess v. Cox*, [1950] 2 All E.R. 1212; [1951] Ch. 383; 2nd Digest Supp.

(6) *Fowler v. Bratt*, [1950] 1 All E.R. 662; [1950] 2 K.B. 96; 2nd Digest Supp.

(7) *Stokes v. Whicher*, [1920] 1 Ch. 411; 89 L.J.Ch. 198; 123 L.T. 23; 12 Digest 159, 1028.

ACTION by the plaintiffs for damages for non-delivery of the balance of goods under three contracts. As regards the third contract the defendants pleaded (inter alia) that it was not enforceable as the requirements of s. 4 of the Sale of Goods Act, 1893, had not been complied with.

R. Lyons for the plaintiffs.

Hinchcliffe, Q.C., and *McKee* for the defendants.

HALLETT, J.: In this case the plaintiffs claim damages for non-delivery from the defendants. At the material time both the plaintiffs and the defendants were minded to deal in what are called carpet thrums, which is the waste wool resulting from the manufacture of carpets. There were, admittedly, two previous contracts made between the plaintiffs and the defendants for the sale and delivery of five tons of carpet thrums and ten tons of carpet thrums respectively, and as regards them no question arises, save that on the second contract there was short delivery to the extent of slightly over one ton. The dispute arises on a third contract which, according to the plaintiffs, was made between them and the defendants for the sale and delivery by the defendants to the plaintiffs of a further twenty-five tons of carpet thrums, deliverable by equal monthly

deliveries of five tons over the last five months of 1950. It is common ground that not a single ounce of that twenty-five tons has ever been delivered, and the total damages payable by the defendants to the plaintiffs (including a sum in respect of the second contract) have now been agreed at £9,484 7s. 4d.

Two points fall to be decided. First, the plaintiffs affirm and the defendants deny that there ever was the contract for twenty-five tons which I have mentioned. That is a pure question of fact. The other point, which arises only if on the first point I am in favour of the plaintiffs, is connected with s. 4 of the Sale of Goods Act, 1893. The practice of the plaintiffs has been, when they have made a purchase, to send to the sellers a printed form, headed "Confirmation of Purchase No.—" and stating "L. D. Turner, Ltd. to Messrs." (in this case "R. S. Hatton, Bradford.") "We beg to confirm our purchase from you this day as follows". Then there is "Description," "Quantity," "Price," and in certain cases provisions as to delivery and also a reference to terms, and that is signed on behalf of the plaintiffs by Mr. Turner. Part of the sheet at the bottom is a slip, separated by perforation from the rest of the page, which can be torn off, and that part of the document is addressed to the plaintiffs and states: "We acknowledge receipt of your contract No.—and agree that the details are correct". That is intended to be signed by the sellers.

As regards the first and second contracts, the acknowledgment part of the form was completed and signed by the defendants. As regards the third contract the plaintiffs sent to the defendants an exactly similar form dated May 18, 1950, the purchase number being 807, but the defendants did not complete the acknowledgment slip and the result is that that form bears no signature of the defendants or of an agent on their behalf. If it had been signed, there is no doubt it would have provided a perfect memorandum of the alleged contract. In a good many of the cases to which I have been referred by counsel the court has been faced with the problem whether the memorandum alleged to be found in one, two, three, or some other number of documents is an adequate memorandum, that is to say, whether it has recorded those essential particulars which have to be recorded to form a memorandum in accordance with the requirements of s. 4 of the Sale of Goods Act, 1893, or the corresponding section of the Law of Property Act, 1925—s. 40 (1)—but no such question arises here because here this is unquestionably an adequate memorandum of the transaction. The only difficulty from the point of view of the plaintiffs is that it is not signed by the defendants, and, if they are to satisfy the requirements of the section, they must import into this memorandum a signature by the defendants from somewhere else. I am quite clear that, unless the plaintiffs can get what they want from a letter dated May 22, 1950, they cannot get it at all and the defence raised under s. 4 of the Sale of Goods Act must succeed.

With regard to the first point, I have no hesitation in coming to the conclusion that the plaintiffs did enter into a verbal contract with the defendants whereby the defendants undertook to supply these twenty-five tons in accordance with the terms recorded on the document dated May 18, 1950. The letter of May 22, 1950, is from the defendants to a Mr. Wiseman of Glasgow, who from time to time supplied them with waste wool for re-sale, and it is as follows:

"We should, however, be pleased if you would let us have as much weight as you possibly can this coming month. If you would send a few tons at a time per rail it will be out of your way and will at the same time lighten our worry, as we have booked twenty-five tons with our customer."

Mr. Hatton, when cross-examined, admitted that on his story that there was no contract for the twenty-five tons with the plaintiffs that statement was a lie. He said it was a politic lie told in order to try to get from Mr. Wiseman the wool that was necessary to satisfy the plaintiffs' requirements.

Now I come to the second question—whether a sufficient signature can be got out of the letter. I have been referred to a number of cases, but, I think, it

is common ground that none of those is exactly in point, and, indeed, I have a feeling that in what I am proposing to decide I am possibly widening still further the gap in the cover afforded by s. 4 of the Sale of Goods Act, 1893. It has sometimes been suggested that a coach and horses has been driven through the section. I hope it will not be suggested that I have driven a six-wheeled articulated lorry through it. I have already pointed out that cases where difficulty has been created by the adequacy of the memorandum are clearly distinguishable. The first point to which I have addressed my mind is this. The letter is not addressed to the plaintiffs. It is addressed by the defendants to Mr. Wiseman, a third person. As regards that, I think there is adequate authority that, if in other respects a document is sufficient and satisfactory, it makes no difference that it is addressed to a third party by the party to be charged. The first authority for that in point of time, so far as I am aware, is *Gibson v. Holland* (1). In that case a letter, signed by the party to be charged, was written to that party's own agent—on the facts very different from the present case where the letter signed by the party to be charged is written to his supplier—but I can see no difference in principle as regards that. ERLE, C.J., said (L.R. 1 C.P. 5):

“Now, a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves, or between one of them and his own agent. Indeed, one would incline to think that a statement made by the party to his own agent would be the more satisfactory evidence of the two.”

The reasoning of those few words seems to me to be that a statement made by a party to his supplier cannot be of less value than a statement made to the opposite party to the alleged contract, namely, in this case the plaintiffs.

The next question which arises is much more difficult. At one time, undoubtedly, it seems to have been thought that the statement signed must contain an actual reference to the document said to have recorded the terms, but, to my mind, one must be careful how far one allows oneself to pay attention to some of the earlier cases. The view the law takes develops from time to time. I think the only safe thing to do in the year 1952 is to look at the latest authorities where the material points have been reviewed. In particular, there are two cases in 1950 from which, I think, I can safely derive guidance.

Before dealing with those cases I will refer to *Cave v. Hastings* (2) where the defendant in a letter to the plaintiff, signed by the defendant, referred to “our arrangement for the hire of your carriage”. There was no other arrangement for the hire of a carriage than that the terms of which were contained in a memorandum signed by the plaintiff, and it was held that the defendant's letter sufficiently referred to the document containing the terms of the contract to constitute a good memorandum of the contract within the Statute of Frauds, s. 4. It will be observed that the word “arrangement” in itself can, as it seems to me, perfectly well refer either to a verbal arrangement or to a written arrangement or to a verbal arrangement recorded in a written document. In *Ridgway v. Wharton* (3), the material word was “instructions”, and, again, I should have thought that “instructions” may refer obviously to something that is verbal or to something that is written, and other examples can be found mentioned in the text-books, for instance, in BENJAMIN ON SALE, 8th ed., at p. 238, note (g), there are some examples given, including *Ridgway v. Wharton* (3), *Cave v. Hastings* (2) and also *Long v. Millar* (4).

The two latest cases from which, however, I propose to derive assistance are a decision of HARMAN, J., in *Burgess v. Cox* (5) and a decision in the Court of Appeal in *Fowler v. Bratt* (6). In the latter case, two members of the court, DENNING, L.J., and JENKINS, L.J., do not discuss the point with which I am now concerned, there being other grounds on which that particular case turned, but SIR RAYMOND EVERSHED, M.R., did discuss it. He said:

"The general principle is thus stated, I think accurately, in WILLIAMS ON VENDOR AND PURCHASER (4th ed.), vol. 1, pp. 20 and 21 . . ."

and he read the passage, and continued:

" . . . at p. 7, the learned authors had discussed the older and stricter rule that if two documents were to be read together, they must in terms be the one connected to the other; but that, I think, is plainly not now the law. I think that clearly emerges from *Long v. Millar* (4) which was analysed by RUSSELL, J., in *Stokes v. Whicher* (7). I think that the observations in *Long v. Millar* (4) are indeed most pertinent to this case . . . '*Long v. Millar* (4)' said RUSSELL, J. 'comes to this: that, if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and, if that other transaction contains all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together.' Applying those principles, I am clearly of opinion that we can, and must read together the letters of Nov. 20 and 23."

So it is quite clear that the Master of the Rolls is accepting the words of RUSSELL, J., as correctly summarising the law. I have mentioned the judgment of HARMAN, J., in *Burgess v. Cox* (5), but, I think, I need say no more about it than that what HARMAN, J., appears in his judgment to have thought to have been the present state of the law is that which I am proposing to apply.

Applying those principles to the present case, can I spell out of the letter of May 22, 1950, a reference to some other transaction? I most certainly can. Having heard the evidence and taking the view which I do as to the making of the contract on May 18, I have not the slightest doubt that when the defendants used the expression "as we have booked twenty-five tons with our customer" they were referring to the transaction of sale of the twenty-five tons to the plaintiffs which is recorded in the document dated May 18. I reserved my view until I found whether there was any other possible explanation of those words. Conceivably there may have been some twenty-five tons of some different goods sold to some customer other than the plaintiffs, and, if there were some other transaction to which those words might apply, the position might be different, but it is not suggested that there is. There cannot be the slightest doubt about it that those words apply to the transaction now in question, and, indeed, even Mr. Hatton in his explanation of those words, while saying they state a lie, agrees that they refer to the negotiations, though he will not admit the obligations, into which he had entered with the plaintiffs. I spell out of the document a reference to the transaction of the sale of the twenty-five tons, and, indeed, I think the words "spell out" are rather understating it. I think it is a clear reference to it and nothing else. Then, said RUSSELL, J., in *Stokes v. Whicher* (7): "You are at liberty to give evidence as to what that other transaction is". I have had the evidence, and, to my mind, it abundantly establishes that the other transaction there referred to is the transaction I have already defined. "And, if", the passage goes on, "that other transaction contains all the terms in writing, then you get a sufficient memorandum within the statute by reading the two together". The other transaction did contain all the terms in writing. Here it is, as I have said, not merely adequate, but apart from the absence of signature a perfect memorandum of the other transaction. Therefore, applying the principles which RUSSELL, J., found in *Stokes v. Whicher* (7), and which SIR RAYMOND EVERSLED, M.R., thought it right to apply in *Fowler v. Bratt* (6) I have come to the conclusion that the letter of May 22, 1950, does supply that which is wanted, namely, a recognition over the signature of the defendants of the transaction of which particulars are recorded in the document of May 18. There is a signed recognition, to my mind, of the transaction of which the particulars have been adequately recorded to satisfy the requirements of the statute. As I have already said quite candidly, I do not think any

case cited to me exactly covers this case as regards the facts, but, applying the principles which seem to me to be recognised in the authorities, I am led to the conclusion to which I have arrived, namely, that here there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *A. V. Hammond & Co.*, Bradford (for the plaintiffs); *Cawthron, Priddin & Read*, Bradford (for the defendants).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

NEWSOM v. ROBERTSON (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Danckwerts, J.), April 29, 30, 1952.]

Income Tax—Deduction against profits—Travelling expenses—Barrister travelling between chambers and home where he did part of his professional work—Income Tax Act, 1918 (c. 40), sched. D, Cases I and II, r. 3 (a).

The taxpayer carried on the profession of barrister at chambers in London. At his home outside London he used a study for the purpose of doing work which he took home in the evenings and at week-ends. During vacations he seldom came to London, but did the greater part of his work at home. In computing the profits of his profession for assessment to income tax, he claimed deduction of the expenses which he incurred in travelling between his home and his chambers.

HELD: (i) on the evidence the taxpayer carried on his profession both at his chambers and at his home; he travelled between those two places, not merely, for the purpose of carrying on his profession, but also because one of those places was his home where he had chosen to live; and, therefore, the travelling expenses, during both term and vacation, were not incurred wholly and exclusively for the purposes of his profession, within r. 3 (a) of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918.

(ii) in any case the difficulty of splitting the expenses between the amount referable to professional purposes and the amount referable to other purposes precluded any apportionment.

AS TO DEDUCTIONS IN RESPECT OF TRAVELLING EXPENSES, see HALSBURY, *Hailsham Edn.*, Vol. 17, p. 221, para. 446; and FOR CASES, see DIGEST, Vol. 28, p. 89, Nos. 520-523.

Cases referred to:

- (1) *Smith's Potato Estates, Ltd. v. Bolland, Smith's Potato Crisps* (1929), *Ltd. v. Inland Revenue Comrs.*, [1948] 2 All E.R. 367; [1948] A.C. 508; [1948] L.J.R. 1557; 30 Tax Cas. 267; 2nd Digest Supp.
- (2) *Norman v. Golder*, [1945] 1 All E.R. 352; 114 L.J.K.B. 108; 171 L.T. 369; 26 Tax Cas. 293; 2nd Digest Supp.
- (3) *Spofforth & Prince v. Golder*, [1945] 1 All E.R. 363; 173 L.T. 77; 26 Tax Cas. 310; 2nd Digest Supp.
- (4) *Inland Revenue Comrs. v. Von Glehn*, [1920] 2 K.B. 553; 89 L.J.K.B. 590; 123 L.T. 338; 28 Digest 46, 236.

CASE STATED by the Special Commissioners of Income Tax.

In computing the profits of his profession of barrister for assessment to income tax, the taxpayer claimed to deduct the expenses of travelling between his home, where he carried on part of his professional work, and his chambers. The Special Commissioners found that he exercised his profession partly at his chambers and partly at his home. They held that the travelling expenses incurred during term time were not money wholly and exclusively laid out or expended for the purposes of his profession, within the meaning of r. 3 (a) of the Rules Applicable to Cases I and II of sched. D, but that during vacation the base of his operations

was changed to his home, so that travelling expenses then incurred were allowable. The taxpayer appealed against the disallowance of expenses incurred during term, and the Crown appealed against the allowance of expenses incurred during vacation.

Millard Tucker, Q.C., J. W. P. Clements and Abel-Smith for the taxpayer.
Heyworth Talbot, Q.C., and Sir Reginald Hills for the Crown.

A

DANCKWERTS, J.: This is an appeal by a barrister, practising at the Chancery Bar, against an assessment to income tax under Case II of sched. D, which is the Case under which professional earnings are taxed for the purpose of income tax under the Income Tax Act, 1918. There is also a cross-appeal by the Crown in respect of an allowance which was made by the Special Commissioners to this taxpayer in respect of a certain period of his activities.

B

Rule 3 of the Rules Applicable to Cases I and II of sched. D to the Income Tax Act, 1918, seems to me the only rule which is material in the present case. I was referred by counsel for the taxpayer also to r. 9 of sched. E, which applies in the case of persons who are assessed under sched. E as holding offices and employments and the like—a rule which, as is well known, is much more limited and severe as regards allowances of expenses than the rules applicable in the case of sched. D assessments, but, in my view, that rule is wholly immaterial for the present purposes.

C

Rule 3 is as follows:

D

“In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation: (b) any disbursements or expenses of maintenance of the parties, their families or establishments or any sums expended for any other domestic or private purposes distinct from the purposes of such trade, profession, employment or vocation.”

E

The facts in the present case have been found in considerable detail by the Special Commissioners, but I do not propose to go through the whole of them in detail. Substantially, the point is to be found in para. 3 of the Case where it is said that the taxpayer exercises his profession as a barrister partly at his chambers (15 Old Square) and partly at his home (the Old Rectory, Whipsnade), “as hereinafter more particularly described”. It is said in

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the Case that at his home he has a study which is a large room occupying about one-eighth of the house where he keeps a set of law reports and a number of legal text-books. He receives from the Inland Revenue, for income tax purposes, a “study allowance” under r. 3 (c) of the Rules Applicable to Cases I and II, being a proportionate part of the rates and the annual value of the entire house together with a sum in respect of the cost of lighting, cleaning and heating the study. As a member of the Bar during term time, the

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taxpayer carries on the greater part of his work at his chambers at 15 Old Square. On the other hand, he has the law reports and other facilities at his house, and when he comes back to his house at night after dinner he continues to do a considerable amount of work there. During the week-end and in the day time he also does work at his house. In the vacation he seldom goes to his chambers, but, it would appear, does his work for the most part—and he has to do quite a

H

lot of work in the vacation—at his house. Sometimes he has engagements which are not in London, and to those places where the engagements are he would appear very often to go from Whipsnade rather than from his chambers at 15 Old Square, Lincoln's Inn.

In a sense the Special Commissioners reached two conclusions. They found that the expenses of travelling between Whipsnade and London during term time were not expenses “wholly and exclusively laid out or expended for the purposes” of the taxpayer's profession, and, therefore, they disallowed that

portion of the expenses claimed which related to that period of the year. On the other hand, they thought that during the vacation the base of the operations of the taxpayer was changed to Whipsnade and they did allow expenses (which, of course, were a very small amount), in respect to the period of the vacation. Both parties are dissatisfied with the conclusion reached by the Special Commissioners. The conclusion at which I have arrived is that, in dividing the matter in this way, the Special Commissioners have come to a wrong conclusion. I think they have either misdirected themselves, or have reached a conclusion which is not supported by any evidence.

It seems to me that one must take the position throughout the period of assessment as a whole, and it is not right to split up the activities of the taxpayer into two bases, 15 Old Square in term time, and the Old Rectory, Whipsnade, in the vacation. It appears to me that the right way is to look at the expenses and to consider what is the purpose of the journeys in respect of which they are incurred throughout the period in question. One is a little startled to find, after so many years in which the Income Tax Acts have been in operation, that there is a claim of this kind made which, so far as I know, has not been put forward or allowed on a previous occasion. It seems to me, in some respects, a novel claim. The basis of the taxpayer's case is this. As found by the commissioners, he has two places of business. He practises his profession not only at 15 Old Square, but also at the Old Rectory, Whipsnade. The commissioners have found, says counsel for the taxpayer, that it is just the same as where a barrister may have two sets of chambers and would be entitled to be allowed the expenses in moving from one set of chambers to the other set of chambers. But that does not seem to me to be the right way to look at this case. It is, perhaps, a matter of first impression, but it is really a case, I think, in which the travelling in question is done for a dual purpose. As counsel for the taxpayer has said, that does not necessarily involve a disallowance of the whole of the expenses if they could be split, but, admittedly, it would be very difficult to split the expenses of travelling between the amount which is referable to professional purposes and the amount which is referable to other purposes in such a case as this. I think that is really the answer to the point on the question of splitting.

There are a number of cases to which I have been referred as illustrations in which it has been found that the expenditure was incurred by the taxpayer for more than one purpose—a commercial purpose in the sense that it was incurred for the purpose of earning the profits of the trade and also some outside purpose different from that—and the decisions of the courts have been that the expenses could not be claimed at all for the simple reason that they were not “wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation.” The cases in question are *Smith's Potato Estates, Ltd. v. Bolland, Smith's Potato Crisps* (1929), *Ltd. v. Inland Revenue Comrs.* (1); *Norman v. Golder* (2); *Spofforth & Prince v. Golder* (3), and *Inland Revenue Comrs. v. Von Glehn* (4). In my view, the result of the facts, as I see them, which have been found by the commissioners in the present case, is this. It is true that the taxpayer carries on his profession at two places, but he travels between those two places not simply for the purposes of carrying on his profession, but also because his home, as the commissioners have found, is at the Old Rectory, Whipsnade. He travels backwards and forwards between his home and his chambers in 15 Old Square, because he has to live somewhere and because he wishes to go backwards and forwards between his chambers and his home. It does not seem to me that it makes any substantial difference that he also carries on his profession and does a lot of work at a place which happens to be his home. His motive, his object, and his purpose in travelling between these places, as it seems to me, are mixed. I feel considerable sympathy over a claim of this kind as, indeed, with a claim by anybody to be allowed the expenses which he necessarily has to incur to get to his place of business from his home, whether

he actually works at his home or not. The days have long gone by, if they ever really existed, when a person lived over his shop or at his place of business. At the present time, a person is more or less tied to the particular place where he resides, because, under present housing and living conditions, it is not possible to alter one's residence at will. But there is the element in this case that the taxpayer has chosen to live at Whipsnade because he likes living in the country and enjoying the amenities which living at that place confers on him. Therefore, it seems to me that his expenditure on travelling between Whipsnade and Lincoln's Inn is due partly to the calls of his profession, but also partly to the requirements of his existence as a person having a wife and a family and a home. Therefore, it is not an expense incurred "wholly and exclusively for the purposes of the profession." It seems to me that the commissioners reached a right conclusion in respect of the period of term time, but were not justified in reaching a different conclusion as regards the period of the vacation.

Taxpayer's appeal dismissed. Crown's cross-appeal allowed.

Solicitors: *Darley, Cumberland & Co.* (for the taxpayer); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

HANILY v. MINISTER OF LOCAL GOVERNMENT & PLANNING AND ANOTHER

[QUEEN'S BENCH DIVISION (Parker, J.), April 28, 29, 1952.]

Compulsory Purchase—Building land—Compulsory purchase by Central Land Board—Power of board to acquire land for disposal for permitted development—"Development for which permission has been granted"—Valid permission not obtained before purchase and confirmation orders—Owner unwilling to sell at existing use value—Acceptance of offer from prospective purchaser at owner's price—Function of board to prevent sales for more than existing use value—Town and Country Planning Act, 1947 (c. 51), s. 43 (1) (2).

Town and Country Planning—Permission for development—Person hoping to acquire interest in the land—Obligation of authority to notify owner of application—Town and Country Planning Act, 1947 (c. 51), s. 14 (1).

Without the knowledge of the owner of land, which she was offering for sale, manufacturers applied to the local planning authority and obtained from them permission to develop the land by erecting a factory thereon. They then offered the owner £400 to £450 for the land on the basis of its existing use value, and, when the owner refused to accept less than £2,100, they applied to the Central Land Board to exercise their powers of purchase under s. 43 (1) and (2) of the Town and Country Planning Act, 1947. Negotiations by the district valuer for the purchase of the land by agreement were entered into, but on Apr. 28, 1950, the owner accepted an offer of £1,750 from a third party. The board, being thus unable to acquire the land by agreement, on July 14, 1950, made a compulsory purchase order in respect of the land which, on Dec. 20, was confirmed by the Minister of Town and Country Planning.

HELD: (i) any person who genuinely hoped to acquire an interest in land could apply for planning permission in respect of it and not only the owner of the land or a prospective purchaser applying with the owner's consent, and, therefore, the manufacturers were competent to make an application for planning permission.

Observations of VAISEY, J., in *Ayles v. Romsey & Stockbridge Rural District Council* (1944) (108 J.P. 176), considered.

(ii) the Town and Country Planning Act, 1947, did not require a local planning authority to notify likely objectors or the owner of the land of

their consideration of an application for planning permission, and, therefore, the permission granted without such notification was valid.

(iii) even if the planning permission were invalid, the compulsory purchase and confirmation orders were not thereby invalidated since s. 43 (1) of the Town and Country Planning Act, 1947, required only that planning permission should have been obtained before the actual acquisition of the land, and the orders did not constitute such acquisition, but merely authority for acquisition.

Travis v. Minister of Local Government & Planning ([1951] 2 All E.R. 673), followed.

(iv) as the Central Land Board were exercising their powers of compulsory purchase to prevent a sale at a price above that for existing use value, the compulsory purchase and confirmation orders were valid notwithstanding the existence of a prospective purchaser willing to pay a price acceptable to the owner.

Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Town & Country Planning ([1951] 1 All E.R. 982), applied.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 43 (1) (2), see HALSBURY'S STATUTES, Second Edn., Vol. 25, p. 551.

Cases referred to:

- (1) *Fitzwilliam's (Earl) Wentworth Estates Co. v. Minister of Town & Country Planning*, [1951] 1 All E.R. 982; *affd.* H.L. *sub nom.* *Fitzwilliam's (Earl) Wentworth Estates Co. v. Minister of Housing & Local Government*, [1952] 1 All E.R. 509.
- (2) *Ayles v. Romsey & Stockbridge Rural District Council*, (1944), 108 J.P. 175; 88 Sol. Jo. 135; 2nd Digest Supp.
- (3) *R. v. Hendon Rural District Council. Ex p. Chorley*, [1933] 2 K.B. 696; 102 L.J.K.B. 658; 149 L.T. 535; 97 J.P. 210; Digest Supp.
- (4) *Travis v. Minister of Local Government & Planning*, [1951] 2 All E.R. 673; [1951] K.B. 956; 115 J.P. 500.

MOTION to quash a compulsory purchase order and a confirmation order made under the Town and Country Planning Act, 1947, s. 43 (1) and (2).

The applicant was the owner of a piece of land which, on July 14, 1950, was made the subject of a compulsory purchase order by the Central Land Board under s. 43 (1) and (2) of the Town and Country Planning Act, 1947. On Dec. 20, 1950, the order was confirmed by the Minister of Town and Country Planning (later the Minister of Local Government and Planning). The applicant contended that the orders were invalid because (i) at the time they were made there was no valid planning permission for the development of the land under Part III of the Town and Country Planning Act, 1947, since the persons who had applied for the permission were not the owners of the land and had no interest in it sufficient to support the application, and since the local planning authority, in purporting to grant permission, had not notified the owner of the land that they were considering the application, and, therefore, had not exercised their functions under the Act in a judicial manner; and (ii) the orders were made for the purpose of preferring one approved development of the land to another and not to bring the land into development, there being, besides the prospective purchaser on whose behalf the board had acted, a prospective purchaser whose offer to acquire the land had been accepted by the owner. The respondents, the Minister and the Central Land Board, denied that the planning permission was invalid or that it was necessary to obtain planning permission under s. 43 (1) of the Act of 1947 before the making of the orders since the orders constituted, not the acquisition of the land within the meaning of that enactment, but merely the authority for the subsequent acquisition. They contended further that the orders were valid notwithstanding the existence of another prospective purchaser willing to pay the price asked by the owner since the board

were acquiring the land in pursuance of their powers in order to prevent sales at prices in excess of existing use value.

Sir Arthur Comyns Carr, Q.C., and *Kekwick* for the applicant.

The Attorney-General (Sir Lionel Heald, Q.C.) and *J. P. Ashworth* for the respondents.

PARKER, J.: This is a motion pursuant to para. 15 of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, on behalf of the applicant to quash a compulsory purchase order known as the Central Land Board (Southend Lane, Sydenham), Compulsory Purchase Order, 1950, and a confirmation order entitled the Central Land Board (Southend Lane, Sydenham) Compulsory Purchase Confirmation Order, 1950, on the ground that the making of those orders was not within the powers of the provision pursuant to which they purported to be made, viz., s. 43 (1) and (2) of the Town and Country Planning Act, 1947, empowering the Central Land Board to acquire land in certain circumstances. Section 43 provides:

“(1) The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development. (2) If the Minister is satisfied that it is expedient in the public interest that the board should acquire any land for any such purpose as aforesaid, and that the board are unable to acquire the land by agreement on reasonable terms, he may authorise the board to acquire the land compulsorily in accordance with the provisions of this section.”

The applicant was at all material times the owner of certain land at Southend Lane, Sydenham, in the metropolitan borough of Lewisham, on which there were eight cottages either condemned or partly demolished. In January, 1950, she was offering the land for sale for between £2,300 and £2,100, and was approached by a firm of sheet metal workers, Messrs. Blanshard Bros., who desired to acquire the site for the erection of a small factory. Unknown to the applicant, on Oct. 7, 1949, Blanshard Bros. had applied to the London County Council for planning permission for the erection of this factory, and on Dec. 16, 1949, they received what appears to be planning permission for its erection on the land. Blanshard Bros., however, having had the land valued on an existing use basis refused to pay more than £400 or £450. The applicant by her advisers was adamant that the least she would accept was £2,100, and towards the end of January and the beginning of February Blanshard Bros. in effect requested the Central Land Board to exercise their powers under s. 43 of the Act. As a result in April, 1950, the district valuer got in touch with the applicant with a view to purchasing the land by agreement. On Apr. 18 the applicant refused to sell at any price lower than that which she was asking. On Apr. 28 the applicant received an offer of £1,750 from a Mr. Terry, a builder or a joiner, who desired to acquire the site for the erection of a joinery workshop. This sum was finally accepted by the applicant and a draft contract was prepared by her solicitors and forwarded to Mr. Terry's solicitors for agreement. It was in those circumstances that, on July 14, 1950, the Central Land Board made the compulsory purchase order in question. There followed objections by the applicant. On Oct. 17 an inquiry at which the Minister of Town and Country Planning appointed somebody to hear the applicant's objections (an alternative procedure to a public inquiry) took place, the applicant appearing by counsel and voicing her objections. On Dec. 20 the Minister confirmed the compulsory purchase order.

Of the four grounds on which this motion is founded the fourth was by way of amendment no doubt as a result of the decision of the House of Lords on s. 43

(1) and (2) of the Act of 1947 in *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Housing & Local Government* (1). The first two grounds were abandoned, and the case has been argued on grounds (iii) and (iv) which were as follows:

"(iii) That the said orders were made, not for the purpose of the functions of the Central Land Board or for the purpose of bringing into development the land to which the said orders relate, but for the purpose of preferring one approved development of the said land to another. (iv) Alternatively that at the time of the making of the said orders and each of them there was no planning permission under Part III of the said Act for the development for the purpose of which the land was to be disposed."

On the last point it is said that the document of Dec. 16, 1949, purporting to give Blanshard Bros. permission to erect a factory is invalid and a nullity in that, if I accept the applicant's evidence on affidavit—which I do—the application was not made by her or with her consent, she being in October, November and December, 1949, owner of the land. Section 12 and the other sections in Part III of the Act of 1947 are silent as to who should be the applicant for permission to develop land and whether it can only be the owner or somebody who either has or is about to have some interest in the land. *Ayles v. Romsey & Stockbridge Rural District Council* (2) decided by VAISEY, J., on Mar. 16, 1944, concerned s. 10 of the Town and Country Planning Act, 1932, which is replaced, if not verbatim, in very much the same wording by s. 12 of the Act of 1947. Although the case is not very clearly reported, it is, I think, authority for this, that it is not anybody who can validly make an application for permission. The applicant in that case for permission—the plaintiff in the action—was a builder who, if his clients bought the land and obtained permission, would carry out the development for them. He deposited plans and applied for permission which was refused, and he then brought an action for a declaration that he had been or should have been granted permission. The report reads (88 Sol. Jo. 135):

"VAISEY, J., said that he was not disposed to think that an applicant under s. 10 (3) need necessarily have a present interest in the land . . . but he had difficulty in supposing that a person whose interest was only that he might be concerned as a contractor in building would be an applicant. The applicants should have been the owners of the land or the three persons who proposed to develop the land if consent were given."

Counsel for the applicant goes further and says that the only person who can make such an application is the owner of the land or a prospective purchaser who has the owner's consent. It is clear in the present case that the applicant knew nothing at all about the application for planning permission.

There is, however, in my view, nothing in Part III of the Act providing expressly or even impliedly that the applicant must be the owner or somebody applying with the owner's consent. If one looks at the matter before this difficult section—s. 43—became part of the law, it was clearly to any owner's advantage that planning permission in respect of his land should be given and it mattered not to him who obtained that permission. Once permission was obtained it would enhance the value of his land and he would be the last person to complain. It seems to me that under Part III of this Act anybody who genuinely hopes to acquire the interest in the land can properly apply for planning permission. It is said that the implication generally in ss. 18 to 23 of the Act of 1947 is that the person applying should be the owner or somebody with the owner's consent. I get very little help from those sections. It seems to me that more help is to be derived from the fact that the only person who is contemplated as an aggrieved person able to appeal to the Minister under s. 16 is a person who has himself applied for planning permission.

In the alternative it is said that, even if the application need not be made by the owner or with his consent, at least the planning authority must notify the owner and give him an opportunity to raise objections and generally to be heard. But there are no provisions in the statute or in the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958) (now superseded by the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950, No. 728), art. 12) relating to town planning for such matters as advertisement or notification of any particular person or of the owner. The only provision with regard to informing people of applications and permissions is, apparently, to be found in art. 12 of the order of 1948. That article provided for a register to be kept in which particulars were to be entered of any applications for permission and of any decisions resulting. That register is required to be kept in a particular form and at a convenient place, and by s. 14 (5) of the Act of 1947 is to be available for inspection of the public at all reasonable hours. It is, however, said that, although there is no statutory provision relating to this matter, the proceedings before the town planning authority are in the nature of judicial proceedings and on general principle in such proceedings the tribunal must give any person likely to be affected or interested an opportunity of appearing before it and being heard. Reference was made to *R. v. Hendon Rural District Council. Ex p. Chorley* (3), but it is to be observed that in that case the rural district council, though not, apparently, bound to do so, did, in fact, give notice of the application. Further, proceedings before a town planning authority may well be in the nature of judicial proceedings so that certiorari will lie, but, in my view, it does not follow that any particular procedure such as is adopted in courts of law must necessarily be adopted in those proceedings. It seems to me that one must look at the legislation which is in question and see whether under that legislation it is required that persons or any particular person should be notified and be heard. Under the scheme of this legislation I can see no ground for saying that any particular notice should be given to an owner or that the owner should be given an opportunity of being heard.

In my opinion, this planning permission was perfectly valid, but it has been argued that, if I am wrong in that and if the planning permission is invalid, it does not follow that the orders in question were ultra vires. It is said that it is sufficient if planning permission has been obtained at any moment prior to the actual acquisition of the land and that these orders do not amount to an acquisition of the land, but merely give authority for its acquisition. On behalf of the Crown reliance is placed on the decision of DEVLIN, J., in *Travis v. Minister of Local Government & Planning* (4), where he held that, assuming that the words in s. 43 (1) of the Act of 1947 empowering the board to "acquire any land for the purpose of disposing of it for development for which permission has been granted" referred to the time of acquisition and not to the purpose for which the board could acquire land, land was "acquired" within the meaning of the sub-section neither when the compulsory purchase order was made by the board nor when the confirmation order was made by the Minister, but only when it was actually acquired, in the ordinary sense of the word "acquire," after notice to treat, and, therefore, the applicant had failed to show that the compulsory purchase order was premature because planning permission had not been given before it was made. That decision was given between the hearing of *Fitzwilliam's* case (1) in the Court of Appeal and its decision in the House of Lords and it is argued on behalf of the applicant that DEVLIN, J.'s decision is inconsistent with the speeches in the House of Lords in that case. It is further said with considerable force that, although a meticulous reading of s. 43 (1) and (2) of the Act of 1947 might support DEVLIN, J.'s decision, no court should be astute to read those words meticulously having regard to the possible results which would follow, because, if DEVLIN, J.'s decision is right, there might be negotiations for a purchase by

agreement, there might be a compulsory purchase order, there might be a public inquiry, there might be a confirmation by the Minister, there might be a notice to treat and an arbitration, and, if at the end of that and immediately before the acquisition was going to be completed the planning authorities were to be approached for the first time and refused permission, the whole of the previous proceedings would have been a farce. It seems to me that there is nothing in the speeches in *Fitzwilliam's* case (1) which throws any light on *DEVLIN, J.'s* decision. The point was not present, as it seems to me, in any of their lordships' minds, and I think it would be wrong to take isolated words from speeches and seek to argue that they differ in some way from the decision arrived at by *DEVLIN, J.* That being so, I consider myself bound by *DEVLIN, J.'s* decision, with which I entirely agree. While appreciating the argument that, if it is right, in certain circumstances an absurd position might be created, it seems to me that the real safeguard is to be found in the powers to be exercised by the Minister. No land can be acquired by agreement without the Minister's approval and no land can be compulsorily acquired without the order being confirmed by the Minister, and, no doubt, as a matter of administration he would take good care that his approval was not given, or a confirmation order made, unless planning permission had been obtained or was on the point of being obtained.

The second point taken on behalf of the applicant was that the Central Land Board were here preferring one person to another. In effect it is said that a close scrutiny of the speeches in *Fitzwilliam's* case (1) in the House of Lords shows that the power given by s. 43 (1) and (2) of the Act of 1947 can only be used if development is threatened to be held up. It was urged that this power can only be exercised if, a single developer alone being available, he refuses to pay the price asked and the development charge and will not buy unless he can buy at the existing use value, but that, if there are one or more developers who are willing to pay the price asked, albeit above the existing use value, and in addition to pay the development charge, the powers given by the section cannot be exercised. It seems to me that that cannot be said to follow from the speeches in the House of Lords. The Court of Appeal had clearly said that the board might exercise their powers to prevent sales at more than the existing use value. If one pauses there, it is clear in this case that when, on Apr. 28, Mr. Terry offered to pay £1,750, which was in excess of the existing use value, and that offer was accepted, there was a real threat that, if the board did not exercise their powers, the land would be sold at more than the existing use value. As it seems to me, there is nothing in the speeches in the House of Lords which would lead one to suppose that they disapproved of the Court of Appeal's interpretation of the board's powers. For my part I get most assistance from the speech of LORD TUCKER, who says ([1952] 1 All E.R. 519):

"I think that unrestricted sales on a large scale at prices in excess of existing use value would render more difficult the proper ascertainment of the true existing use value which is a necessary element in calculating the development charge, and that, it being the function of the board to collect the charge to set it against the payments which they will have to make out of the £300,000,000 compensation fund, a policy which tends to facilitate and ensure a speedy payment of the charge by including it in the sale price is a policy the implementing of which is connected with their fiscal functions under the Act."

It seems to me that, if the argument on behalf of the applicant is right and the board cannot exercise their powers if there is a developer willing to pay, in effect, the development value plus the development charge, the functions of the board would become almost impossible because an existing use value, presumably, must bear some relation to existing facts, and, if a series of sales in excess of the current existing use value were permitted, a time would come when the existing use value would become equivalent to the development

value. It must be part of the board's functions to prevent sales for more than existing use value, and it seems to me that in the circumstances of this case there was a real reason to believe that the applicant, left to herself, would sell this land at more than its existing use value. Therefore, I see nothing ultra vires in the order made by the board or the order of confirmation by the Minister, and this motion must be refused.

Application refused.

Solicitors: *Stow & Co.* (for the applicant); *Treasury Solicitor* (for the respondents).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

B LEE v. LEE.

[COURT OF APPEAL (Somervell and Denning, L.JJ., and Roxburgh, J.), February 12, 1952.]

Husband and Wife—Possession of property—Husband restrained from selling matrimonial home—Right of wife to reside in house until provision of alternative accommodation—Married Women's Property Act, 1882 (c. 75), s. 17.

The parties were married in 1937 and thereafter they lived together in a house of which the husband owned the freehold. On Sept. 2, 1948, the husband deserted the wife and the three children of the marriage, leaving them in the matrimonial home. In 1951, on an application by the wife to the county court under s. 17 of the Married Women's Property Act, 1882, for an order restraining the husband from entering into any contract for the sale of the house, the county court judge directed that she and the children should be permitted to reside in the house until the husband provided suitable alternative accommodation for them and that he should "take no step by sale or assignment of any right title or interest which he now has in the said property or by any other act whatsoever create any right title or interest in any other person to evict his wife and children or any of them from the matrimonial home or in any way interfere with their residence therein."

HELD: in the exercise of his discretion under s. 17 the county court judge had jurisdiction to make the order.

AS TO PROCEEDINGS BETWEEN HUSBAND AND WIFE IN REGARD TO PROPERTY, see HALSBURY, Hailsham Edn., Vol. 16, p. 740, para. 1211; and FOR CASES, see DIGEST, Vol. 27, pp. 260, 261, Nos. 2296-2303.

Cases referred to:

- (1) *Thompson v. Earthy*, [1951] 2 All E.R. 235; [1951] 2 K.B. 596.
- (2) *Kelner v. Kelner*, [1939] 3 All E.R. 957; [1939] P. 411; 108 L.J.P. 138; Digest Supp.
- (3) *Stewart v. Stewart*, [1947] 2 All E.R. 813; [1948] 1 K.B. 507; [1948] L.J.R. 799; 2nd Digest Supp.
- (4) *Errington v. Errington*, [1952] 1 All E.R. 149.

APPEAL by the husband, Hubert Arthur Lee, from an order of His Honour JUDGE WILLES, made at Alfreton County Court on Oct. 24, 1951, on an application by the wife under s. 17 of the Married Women's Property Act, 1882.

On Nov. 10, 1937, the parties were married and thereafter they lived together in a house known as "Timberscombe" of which the husband owned the freehold. On Sept. 2, 1948, the husband left the matrimonial home. In October, 1948, proceedings were taken by the wife against her husband before justices, and an order was made by consent whereby the husband agreed to pay £4 a week for the maintenance of the wife and the three children of the marriage and further agreed to grant to the wife a lease for two years of "Timberscombe" at a rent

of 1s. a year, if demanded. In December, 1950, the husband sought to recover possession of "Timberscombe" from the wife by proceedings before the justices, but these were unsuccessful. In 1951 the husband was in financial difficulties and an overdraft of £1,500 owing to the bank was secured by a charge on the property. On Apr. 5, 1951, the wife applied to the county court under s. 17 of the Act of 1882 for an order that, inter alia, the husband be restrained from entering into any contract for the sale or conveyance of the property which might interfere with her enjoyment of it. The county court judge made an order that the husband should permit his wife and children to occupy "Timberscombe" as the matrimonial home until he provided suitable alternative accommodation for them, and that he should take no step by sale or assignment of any right, title, or interest which he had in the property, or by any other act create any right, title, or interest in any other person to evict his wife and children from the property or in any way interfere with their residence therein.

A. P. Fletcher for the husband.

Mitchison, Q.C., and *C. A. M. Blake* for the wife.

SOMERVELL, L.J.: This is an appeal from an order of His Honour JUDGE WILLES made under s. 17 of the Married Women's Property Act, 1882, by which he said:

"I direct and order Hubert Arthur Lee until further or other order varying this order is made by this court, to permit his wife . . . and her three children to reside in and occupy 'Timberscombe' as the matrimonial home of the [wife] and [the husband] and unless and until he shall first have provided reasonably suitable alternative accommodation as a matrimonial home for his wife and children. I order and direct that Hubert Arthur Lee shall take no step by sale or assignment of any right title or interest which he now has in the said property or by any other act whatsoever create any right title or interest in any other person to evict his wife and children or any of them from the matrimonial home or in any way interfere with their residence therein."

In *Thompson v. Earthy* (1) a deserted wife and her two children lived in the matrimonial home, which was the husband's property, in fulfilment of the husband's undertaking given to the justices that the wife should be permitted to live there rent free. In breach of that undertaking, the husband sold the house to a purchaser for value who claimed, and, as *ROXBURGH, J.*, held, was entitled to, possession. In consequence, the undertaking given by the husband to the justices was of no effect and the wife was ejected. That decision may be the reason why the learned judge in the present case made the order in the terms which I have stated.

Counsel for the husband contended that the learned judge had no jurisdiction to make the order which he did. It seems to me plain that he has. Counsel submitted that, although the words of s. 17 are discretionary, one ought not to regard that discretion as exercisable on a question of title. He agreed that sometimes there might be an obscurity or a dispute as to title. An illustration, suggested by one of my brethren, was that there may be wedding presents and it is uncertain which belong to the husband and which to the wife, and in such a case the court is free to cut the Gordian knot in a way which seems reasonably fair without going into long investigations. I am inclined to agree with counsel to this extent—and this is clearly what *SIR BOYD MERRIMAN, P.*, had in mind in *Kelner v. Kelner* (2), on which counsel for the husband relied—that, if the question is one of title only, it has, of course, to be decided according to law, but, if the question is whether A or B owns a piece of jewellery or whatever it may be, s. 17 confers on the court a wide discretion, although that does not mean that the question can be decided in some arbitrary manner and that the husband should be given some article, which is manifestly the wife's, because the wife

has behaved badly. If the question is one of title it must be decided so far as possible according to evidence regarding the ownership of the property. But that does not seem to me to be this case. The learned county court judge has accepted the position that the title is the husband's.

A Counsel, however, says that his proposition is wider than that which I have accepted and that under the section there is no jurisdiction to interfere with the exercise of proprietary rights, though he admits that the court can make an order dealing with possession which is a proprietary right and often the most important one. The jurisdiction to do that is plainly shown in *Stewart v. Stewart* (3), a decision of this court. In that case the county court judge had made an order the effect of which was that the wife had to vacate the premises, and the question was whether he had jurisdiction to do this. TUCKER, L.J., B (with whom BUCKNILL, L.J., and ROXBURGH, J., agreed), said ([1947] 2 All E.R. 814):

C "In the particular circumstances of the present case it was pressed on the learned judge that he should not make an order for possession except on the terms that it was not to take effect unless and until the husband had provided other accommodation elsewhere for the wife. That is an order which he might very well have made, but I find it impossible to say that, in refusing to make an order in that form, he was not exercising his discretion in a judicial manner."

D That is plain authority (and I think it has been accepted for a long time) that under s. 17 the court can protect the possession of the wife—in this case, the wife and children—and can make an order in the terms to which TUCKER, L.J. referred. If the court can do that, it follows that it must be able to make the consequential restriction on the husband's rights so that he cannot, as happened in *Thompson v. Earthy* (1), make the order a nullity of no effect by selling or transferring the property without any stipulation as to his wife's possession. E Therefore, I would be exceedingly unwilling to come to the conclusion that the learned county court judge could not do what he did in the present case, and, so far from finding anything in the statute to preclude him from doing what he has done, the words of the statute are in the widest possible form—the court can make such order with respect to the title to or possession of the property in dispute as it thinks fit.

F The learned judge made a careful and full review of the authorities and came to the conclusion that there was no case directly in point, though there were orders which went some way to support the conclusion to which he came. He said that if there was no authority he considered it his duty to make a precedent, and in the exercise of his discretion he made the order to which I have referred. In my opinion, there was jurisdiction for him to make that order, it was a proper order on the evidence before him, and this appeal must be dismissed.

G DENNING, L.J.: The judge made this order so as to prevent the husband from selling the house over his wife's head as the husband did in *Thompson v. Earthy* (1). If the husband sells the house over his wife's head and a purchaser buys it in good faith for value without notice of any right or interest in the wife, the purchaser can eject the wife. To forestall that danger in the present case the judge made an order restraining the husband from disposing of the house to H the prejudice of his wife. I think he had ample jurisdiction to make that order. The words of s. 17 of the Act of 1882 are quite wide enough for the purpose. I do not suggest that the judge could have made an order transferring the title in the house to the wife, but he certainly had jurisdiction to protect her in her occupation of it, even to the extent of preventing the husband from disposing of it. The order confirms and protects her special right as a deserted wife to stay there—a right which as has been repeatedly recognised in this court. It seems to me that, if a purchaser should buy with notice of that right, or, at any rate,

with notice of the order, he could not, in disregard of it, eject the wife: see *Errington v. Errington* (4). I agree, therefore, that the appeal should be dismissed.

ROXBURGH, J.: I also agree.

Appeal dismissed.

Solicitors: *Cunliffe & Airy*, agents for *Walker, Terry & Wilson*, Belper (for the husband); *Field, Roscoe & Co.*, agents for *Ellis, Fermor & Shephard*, Ripley (for the wife).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

LATIMER v. A. E. C., LTD.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.JJ.), April 30, May 1, 1952.]

Factory—Floor—Maintenance—Floor slippery from flood water and oil—Factories Act, 1937 (c. 67), s. 25 (1).

Safe System of Work—Factory flooded in exceptional storm—Water mixed with oil—Floor rendered dangerously slippery—No want of care by occupiers—Accident through workman slipping—Liability of occupiers.

Owing to a downpour of rain of an unprecedented character and through no want of reasonable care on the part of the occupiers, a factory was flooded and oil from a cooling mixture pumped to machines through channels in the floor became mixed with water. As the water receded, the floor, which was level and structurally perfect, was left in a wet and oily and slippery state, and could not be entirely cleared at once. In the course of his duty a workman slipped on a floor and was injured.

HELD: (i) the occupiers were not in breach of their duty to see that the floor was "properly maintained" under s. 25 (1) of the Factories Act, 1937, since "maintained", as defined in s. 152 (1), meant maintained in good repair and did not mean kept free from danger through slipperiness.

(ii) it would not have been reasonable for the occupiers to have closed the factory on account of the danger caused by a slippery floor, and, therefore, they had not been negligent in permitting the plaintiff to work in the factory and were not liable in damages at common law.

Decision of PILCHER, J. ([1952] 1 All E.R. 443), reversed on the second point.

FOR THE FACTORIES ACT, 1937, s. 25 (1), and s. 152 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 1017, 1116.

Cases referred to:

(1) *Davies v. De Havilland Aircraft Co., Ltd.*, [1950] 2 All E.R. 582; [1951] 1 K.B. 50; 2nd Digest Supp.

(2) *Galashiels Gas Co., Ltd. v. O'Donnell or Millar*, [1949] 1 All E.R. 319; [1949] A.C. 275; [1949] L.J.R. 540; 113 J.P. 144; 2nd Digest Supp.

APPEAL by the defendants from an order of PILCHER, J., dated Feb. 8, 1952, reported [1952] 1 All E.R. 443, awarding the plaintiff £550 damages for personal injuries sustained as a result of an accident while working in the defendants' factory.

The learned judge held that there had been no breach by the defendants of the duty created by s. 25 (1) of the Factories Act, 1937, properly to maintain the floors in the factory, but that the defendants had been negligent at common law in permitting the plaintiff to work in the factory when they knew it to be in a potentially dangerous condition.

Burton, Q.C., *Marven Everett, Q.C.*, and *Ripman* for the defendants.
Jukes for the plaintiff.

SINGLETON, L.J., stated the facts and continued: In the course of his judgment PILCHER, J., said ([1952] 1 All E.R. 445):

- A "In support of his argument counsel submitted that the situation which faced the defendants on the evening in question was no different from that which faces any employer who permits his servant to use a machine which is, to his knowledge, potentially dangerous owing to a defect which no care and skill on his part can remedy until, let it be supposed, a spare part not immediately available is procured and fitted. In such a case it is clear that the employer will be liable if he causes or permits the servant to use the machine and the servant is injured by an accident due to its known defective condition. It is difficult to see why the same situation should not obtain in regard to employers' premises if they are in a dangerous condition."
- B With all respect to the learned judge, I think there is a difference. If a machine is dangerous, it may be that it is the duty of the employer forthwith to say: "Do not use that machine until it has been put in order. It is not safe." On the other hand, if, through something for which the employers are not responsible, the floor of their factory has become slippery in parts and, as here, they are unable to remove all slipperiness from it before the night shift comes to work, the position is not precisely the same. I cannot see that it is the duty of the employers then to say: "No one must work in the factory until all the floor has had removed from it the character of slipperiness which it got through the flood." It must be a question of degree, and various matters have to be considered. PILCHER, J., went on to say (*ibid.*):
- C "As soon as the employer is made aware that his premises are potentially dangerous and that the dangerous condition cannot be immediately remedied by care and skill on his part, a proper regard for the safety of servants who would normally work in such dangerous premises would seem to require that some action should be taken by him. If the only course open to the employer consistent with due regard to his servants' safety is to shut his premises, then I am satisfied that he is not entitled to escape liability for a servant who is injured by the dangerous condition of the premises by saying: 'These premises were rendered dangerous through no fault of mine. I knew they were dangerous, but at the time you were injured the danger could not have been removed by any care and skill on my part.'"
- D I would agree that, if the employers' premises were rendered dangerous by fire and there was a risk of the roof falling or a risk of a wall collapsing on the workmen, it may well be the duty of the employer to say: "No man must work in this factory until steps have been taken to secure the portions which have been endangered by fire", and to make sure that the men do not run unnecessary risks, but I think the position is different when all that has happened to the premises is that the floor is slippery. Towards the end of his judgment PILCHER, J., said (*ibid.*, 446):
- E "I have only to consider whether I am satisfied that the defendants acted with due regard to the safety of the plaintiff when they permitted him to work in premises which they knew to be potentially dangerous through no fault of their own. I am not so satisfied, and I think that in all the circumstances of the case the defendants, in permitting the plaintiff to do his ordinary work in a part of the factory where the floor was slippery, and, therefore, dangerous, took the risk that he might sustain an injury and are thus liable for the injury which the plaintiff in fact sustained owing to the dangerous condition of the premises. No doubt, they were faced with a difficult situation, and I do not shrink from the conclusion that the defendants' duty in the particular circumstances, if they desired to escape liability for accidents due to the slippery condition of the floor, may have been to
- H

send away all men who were not prepared to volunteer for cleaning work—and when I use the word ‘volunteer’, I mean volunteer on such terms as would enable the defendants to rely, in the case of accident, on the defence of *volenti non fit injuria*. I, therefore, conclude that the defendants are liable to the plaintiff in respect of the accident which occurred and the consequent injuries which he sustained.”

It seems to me that the learned judge has put on the defendants a higher duty than employers owe to their workmen at common law. The duty of the employer is to act reasonably towards his men and to take care in the way that a prudent employer would to see that his workmen are not exposed to unnecessary risks, and that obligation extends to the building in which they work, to the plant, and in some cases at least it covers the providing of a proper system of work. On the facts of the present case, the defendants had done all they could to put the factory into a proper condition. The judge so found, but he also found that in the circumstances the employers were at fault because they had permitted the plaintiff to work on the premises on the night shift on Aug. 31.

Counsel for the plaintiff submitted that it was not necessary to say that men should not have been allowed to work in any part of the premises, but that it would have been sufficient to say that this particular part should not be used because the floor was slippery there. The difficulty I feel about the judge’s finding is that it was not pleaded and no question was asked which would go to support a conclusion that the employers were negligent in not closing their works altogether. If the position was such that consideration ought to have been given to a general closing down, it would have thrown out of work a great number of people on the night shift. There is no evidence to show how many people were employed at night, but the total number of employees at this factory was four thousand. The factory occupies fifteen acres. How many work at night we do not know, but if it had been said (say) at six o’clock on that evening: “There is going to be no night shift”, and if all those people who were ready to work that night had been thrown out of work, it would have raised some difficulties. No question was asked as to the nature of the work which was being done in this factory, or in this particular part of the factory—whether it was work of national importance, as it may have been. Not a single question was asked to show what it would have meant to close down this factory or some part of it. Indeed, the question of closing down the factory was not mentioned by anyone until the evidence had been given and completed.

In those circumstances, I do not think that the finding that the defendants were negligent and in breach of the duty they owed to the plaintiff by reason of the fact that they did not close down the premises can stand. There was no complaint by a shop steward or any workman, nor is there any evidence to show that any other workman slipped. If the test is, as I believe, what a reasonable employer would have done in those circumstances, I fail to see that there is any breach by the employers of the duty which they owed, and I fail to see, too, any evidence on which a finding that the employers were negligent in not closing the factory can be based.

Counsel for the plaintiff submitted that in any event the plaintiff should be held entitled to maintain this judgment on the ground that there was a breach of the statutory duty laid down or required by s. 25 (1) of the Factories Act, 1937. Section 25 (1) reads:

“All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained.”

The place at which the plaintiff slipped, said counsel, was part of the floor or a gangway, and he directed our attention to the definition of the word “maintained” which is contained in s. 152 (1) of the Act:

“‘Maintained’ means maintained in an efficient state, in efficient working order, and in good repair.”

Counsel for the plaintiff said that the floor was not properly maintained by reason of the fact that it was in some parts slippery. PILCHER, J., took an opposite view, and in his judgment he said ([1952] 1 All E.R. 444):

A "I am satisfied that this argument cannot succeed. The marginal note to s. 25 is: 'Construction and maintenance of floors, passages and stairs.' The words 'construction' and 'maintenance' are in apposition, and I am satisfied that in its context the natural meaning of the word 'maintained' is 'maintained in a good state of repair'. It is not suggested that the floor on which the plaintiff slipped was in any way uneven or out of repair. It is, moreover, to be observed that the definition of the word 'maintained' in s. 152 (1) of the Act is as follows: "'Maintained" means maintained in an efficient state, in efficient working order, and in good repair.' While the words 'in an efficient state' and 'in efficient working order' are more appropriate to machines than to floors, I am satisfied that the floor of the gangway in question, which was level and structurally perfect, had been properly 'maintained' within the meaning of this word in s. 25 (1), although at the material time its surface was wet and oily."

B That decision of the learned judge seems to me to be in accord with what was said by SOMERVELL, L.J., when sitting as an additional judge of the King's Bench Division, in *Davies v. De Havilland Aircraft Co., Ltd.* (1), where the learned lord justice said ([1950] 2 All E.R. 583):

D "Assuming that there was, as I have found, water that might be slippery at the time in question, or assuming that there was an unexplained patch of oil, I do not think that that amounts to a failure by the defendants to comply with the duty imposed on them by those words. The fact that for an uncertain period and in circumstances which no one can explain there was a patch of oil does not seem to me to amount to a failure to maintain. I hold that the facts do not amount to a breach of this requirement. Equally (and the evidence on this must be very carefully considered because it was not the plaintiff's case), if there was a slight depression in the concrete in which water collected when it rained so that the floor became slippery, I do not think that, on the evidence, that amounts to a breach of s. 25 (1). It would be impracticable to maintain passages and roads and pathways so that there was never a slippery place, especially after rain, on which a man might slip. Slipping is quite a common incident of life, and usually no harm is done. The victim usually suffers no permanent injury, but, unfortunately, the plaintiff received serious damage to his ankle."

F I agree with that and I do not think that the plaintiff can succeed under s. 25 (1). For these reasons, I am satisfied that the appeal of the defendants must succeed, and that judgment should be entered for the defendants.

G DENNING, L.J.: I agree. It seems to me that the learned judge has fallen into error by assuming that it was sufficient to constitute negligence that there was a foreseeable risk which the defendants could have avoided by some measure or other, however extreme. That is not the law. It is always necessary to consider what measures the defendants could have taken and to say whether they could reasonably be expected of them. Let me give a converse case. A man tries to stop a runaway horse. It is a known and serious risk, but no one would suggest that he could reasonably be expected to stand idly by. It is not negligence on his part to run the risk. So here the employers knew that the floor was slippery and that there was some risk in letting the men work on it, but, still, they could not reasonably be expected to shut down the whole works and send all the men home. In every case of foreseeable risk it is a matter of balancing the risk against the measures necessary to eliminate it. It is only negligence if, on balance, the defendants did something which they ought not to have done or

omitted to do something which they ought to have done. In the circumstances of this case it is clear that the defendants did everything they could reasonably be expected to do. It would be quite unreasonable to expect them to send all the men home. I agree, therefore, that there was no negligence at common law.

With regard to the Factories Act, 1937, I would only say that in considering s. 25 (1) it is necessary to distinguish between the floor itself and the things on it, be they solids or liquids. So far as the floor itself is concerned—I refer to soundness—the duty is absolute. Even if there is a latent defect which could not have been discovered by reasonable care, nevertheless there is a breach of s. 25 (1): see *Galashiels Gas Co., Ltd. v. O'Donnell or Millar* (2), but so far as things on the floor are concerned s. 25 (1) does not apply. The duty in regard to them is either at common law the duty of reasonable care, or in some circumstances, under s. 26 of the Act, a duty to do what is reasonably practicable. There is not much difference between s. 26 and the common law so far as master and servant are concerned, but there may be a good deal of difference so far as the question of invitor and invitee is concerned. In this case there was nothing wrong with the floor itself, and, therefore, there was not a breach of s. 26 (1).

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Carpenters* (for the defendants); *Rowley, Ashworth & Co.* (for the plaintiff).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

TARBOX v. ST. PANCRAS BOROUGH COUNCIL.

[COURT OF APPEAL (Somervell, Jenkins and Morris, L.JJ.), May 5, 1952.]

Practice—Particulars—Particulars given by reference to plan.

By his statement of claim the plaintiff alleged that, while he was walking on a pavement in the defendants' borough, a servant of the defendants swept some rubbish under his feet causing him to fall and suffer injury. The defendants applied to the master for particulars as to the place where the plaintiff alleged that he was walking, the position of the defendants' servant when sweeping the rubbish, and the position in which the plaintiff fell. The master directed that these particulars should be given by marking the positions on a plan.

HELD: the master, having decided that the particulars were necessary, had a discretion to order that they should be given in the form which was most convenient to the parties, and, therefore, the order should not be disturbed.

AS TO PARTICULARS, see *HALSBURY*, Hailsham Edn., Vol. 25, pp. 275-282, paras. 465-467; and FOR CASES, see *DIGEST*, Pleading, pp. 184-207, Nos. 1561-1741.

APPEAL by the plaintiff from an order of **DONOVAN, J.**, dated Apr. 7, 1952, affirming an order of Master **BAKER** on an application by the defendants for further and better particulars of the statement of claim.

By his statement of claim the plaintiff alleged that he was walking along the pavement in Kentish Town Road at or near its junction with Dewsbury Terrace in the defendants' borough, and a servant or agent of the defendants swept rubbish, including a tin lid, into the plaintiff's path and under his foot so that he slipped and fell. The defendants asked for particulars of the place where the plaintiff alleged he was walking, the position in which it was alleged that the defendants' servant or agent was when sweeping the rubbish, and the position in which it was alleged that the plaintiff fell. The master ordered that the

particulars should be given by indicating the positions on a scale plan agreed between the parties, or, failing agreement, on a plan prepared by the defendants and marked by the plaintiff.

Vester for the plaintiff.

Sir Shirley Worthington-Evans for the defendants.

SOMERVELL, L.J.: Counsel for the plaintiff submits there is no power to order particulars to be indicated on a plan. I do not agree with that argument. I think that the court, having come to the conclusion that certain particulars are necessary, must have a discretion to order that they should be given in the form which is obviously most convenient to both parties. In the course of the argument I instanced a claim relating to a right of way. It might be most complicated, and, indeed, very unhelpful to the court, if the exact course of the right of way could be specified only in words. It might be to everybody's convenience—and to enable the defendants to know the case which they had to meet—that there should be power to order that such particulars should be marked on a plan. It is a matter for the master, of course, to consider in what cases such a means of indication would be desirable. No doubt, if there was any ground for thinking that it was oppressive to the plaintiff compared with the normal course of expressing the particulars in words that would be taken into account. I have come to the conclusion that one cannot say that such an order cannot be made. It seems to me an eminently reasonable method in the circumstances of this case to ask the plaintiff to indicate to the best of his recollection—which is all that he can do—where he was and where the defendants' servant was and where he fell. For these reasons I think this appeal must be dismissed.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *Chesham & Co.* (for the plaintiff); *William Charles Crocker* (for the defendants).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

BENDALL v. McWHIRTER.

F [COURT OF APPEAL (Somervell, Denning and Romer, L.JJ.), April 2, 3, May 5,

Med. **FERRIS v. WEAVER.** [1952]
1 E.R. 233.

*ty available for distribution—Matrimonial home—Deserted
in occupation—Right of trustee to possession.*

Med. **HOLE v. CUZEN.** [1953]
1 E.R. 87.

a deserted wife to stay in the matrimonial home proceeds

out of an irrevocable personal licence which the husband is presumed in law to have conferred on her. Her occupation is comparable with that of a contractual licensee, save that her licence is not revocable except by an order of the court, and, as a contractual licensee who is in actual occupation of the land, she has an interest which is valid, if not at law, then in equity, against the successors in title of her husband, including his trustee in bankruptcy. The property of the bankrupt passes to the trustee in bankruptcy subject to all the equities and liabilities which affect it in the bankrupt's hands, and, therefore, the trustee takes the property subject to the clog or fetter that the wife cannot be ejected from the property.

Errington v. Errington ([1952] 1 All E.R. 149), applied.

Clore v. Theatrical Properties, Ltd., and Westby & Co., Ltd. ([1936] 3 All E.R. 483), doubted.

Semble, the trustee could make an application under s. 105 (1) of the Bankruptcy Act, 1914, for an order that the wife should give up possession,

or (per DENNING, L.J., SOMERVELL and ROMER, L.J.J., dubitante) he could compel the husband to allow an application for possession to be made in his name under s. 17 of the Married Women's Property Act, 1882.

AS TO PROPERTY OF BANKRUPT PASSING TO TRUSTEE, see HALSBURY, Hailsham Edn., Vol. 2, p. 209, para. 278; and FOR CASES, see DIGEST, Vol. 5, pp. 630-638, Nos. 5676-5738.

Cases referred to:

- (1) *Bramwell v. Bramwell*, [1942] 1 All E.R. 137; [1942] 1 K.B. 370; 111 L.J.K.B. 430; 2nd Digest Supp.
- (2) *Hutchinson v. Hutchinson*, [1947] 2 All E.R. 792; 2nd Digest Supp.
- (3) *Stewart v. Stewart*, [1947] 2 All E.R. 813; [1948] 1 K.B. 507; [1948] L.J.R. 799; 2nd Digest Supp.
- (4) *Lee v. Lee*, ante p. 1299.
- (5) *Old Gate Estates, Ltd. v. Alexander*, [1949] 2 All E.R. 822; [1950] 1 K.B. 311; 2nd Digest Supp.
- (6) *Middleton v. Baldock*, [1950] 1 All E.R. 708; [1950] 1 K.B. 657; 2nd Digest Supp.
- (7) *Bolton v. Prentice*, (1744), 1 Selwyn's N.P. 233; 2 Stra. 1214; 93 E.R. 1136; 27 Digest 199, 1695.
- (8) *Manby v. Scot*, (1663), 1 Keb. 482 (83 E.R. 1065); 1 Lev. 4 (83 E.R. 268); 1 Mod. Rep. 124 (86 E.R. 781); 1 Sid. 109 (82 E.R. 1000); 27 Digest 183, 1498.
- (9) *Robson v. Headland*, (1948), 64 T.L.R. 596; 2nd Digest Supp.
- (10) *Errington v. Errington*, [1952] 1 All E.R. 149.
- (11) *Cristel v. Cristel*, [1951] 2 All E.R. 574; [1951] 2 K.B. 725.
- (12) *Thompson v. Earthy*, [1951] 2 All E.R. 235; [1951] 2 K.B. 596; 115 J.P. 407.
- (13) *Re Wait*, [1927] 1 Ch. 606; 96 L.J.Ch. 179; 136 L.T. 552; 39 Digest 678, 2644.
- (14) *Webb v. Paternoster*, (1619), Poph. 151 (79 E.R. 1250); 2 Roll. Rep. 143 (81 E.R. 713); Godb. 282 (78 E.R. 165); Palm. 71 (81 E.R. 983); 30 Digest, Replacement, 540, 1744.
- (15) *Wood v. Lake*, (1751), Say. 3; 96 E.R. 783; 30 Digest, Replacement, 537, 1713.
- (16) *Taylor v. Waters*, (1816), 7 Taunt. 374; 129 E.R. 150; 30 Digest, Replacement, 530, 1630.
- (17) *Wallis v. Harrison*, (1838), 4 M. & W. 538; 8 L.J.Ex. 44; 150 E.R. 1543; *subsequent proceedings*, (1839), 5 M. & W. 142; 151 E.R. 61; 19 Digest 28, 130.
- (18) *Wood v. Leadbitter*, (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 153 E.R. 351; 30 Digest, Replacement, 542, 1771.
- (19) *Hurst v. Picture Theatres, Ltd.*, [1915] 1 K.B. 1; 83 L.J.K.B. 1837; 111 L.T. 972; 30 Digest, Replacement, 540, 1742.
- (20) *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.*, [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.
- (21) *Legg v. Evans*, (1840), 6 M. & W. 36; 9 L.J.Ex. 102; 4 J.P. 123; 151 E.R. 311; 21 Digest 480, 598.
- (22) *Tulk v. Moxhay*, (1848), 2 Ph. 774; *as reported in* 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 47 E.R. 1345; 30 Digest, Replacement, 424, 669.
- (23) *Moreland v. Richardson*, (1856), 22 Beav. 596 (52 E.R. 1238); 25 L.J.Ch. 883; *subsequent proceedings*, (1857), 24 Beav. 33 (53 E.R. 269); 26 L.J.Ch. 690; 21 J.P. 741; 35 Digest 402, 1436.
- (24) *Andrew v. Aitken*, (1882), 22 Ch.D. 218; 52 L.J.Ch. 294; 48 L.T. 148; 35 Digest 108, 131.

- (25) *Sharpe v. Durrant*, (1911), 55 Sol. Jo. 423; *affd.* [1911] W.N. 158; 19 Digest 95, 586.
- (26) *De Mattos v. Gibson*, (1858), 4 De G. & J. 276; 28 L.J.Ch. 165; 32 L.T.O.S. 268; 45 E.R. 108; 41 Digest 186, 265.
- (27) *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A.C. 108; 95 L.J.P.C. 71; 134 L.T. 227; 41 Digest 321, 1800.
- A (28) *London County Council v. Allen*, [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 40 Digest 302, 2602.
- (29) *Re Webb*, [1951] 2 All E.R. 131; [1951] 1 Ch. 808.
- (30) *King v. David Allen & Sons, Billposting, Ltd.*, [1916] 2 A.C. 54; 85 L.J.P.C. 229; 114 L.T. 762; 30 Digest, Replacement, 542, 1763.
- (31) *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354; 73 L.J.Ch. 191; 89 L.T. 628; 39 Digest 526, 1406.
- B (32) *Clore v. Theatrical Properties, Ltd. and Westby & Co., Ltd.*, [1936] 3 All E.R. 483; 30 Digest, Replacement, 535, 1703.
- (33) *Lewisham Borough Council v. Maloney*, [1947] 2 All E.R. 36; [1948] 1 K.B. 50; [1947] L.J.R. 991; 177 L.T. 175; 111 J.P. 454; 2nd Digest Supp.
- C (34) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 2nd Digest Supp.

APPEAL by the defendant from an order of His Honour JUDGE NORRIS made at West Bromwich County Court on Jan. 9, 1952, in an action for possession.

The plaintiff, who was the trustee in bankruptcy of the defendant's husband, claimed possession of premises known as No. 1, Buttery Road, Smethwick, and the sum of £1 a week, for use and occupation by the defendant of the premises from Jan. 19, 1951, to Jan. 9, 1952. Before April, 1950, the defendant and her husband lived in the house of which he was the freeholder subject to a mortgage. On Apr. 14, 1950, the husband deserted the defendant, saying: "You can have the house and furniture. I am not coming back". Thereafter the defendant remained in the house with her children. On Nov. 27, 1950, she obtained a maintenance order against her husband for the payment of £3 a week for herself and 30s. in respect of one of the children of the marriage. On Jan. 3, 1951, a receiving order was made against the husband, and on Jan. 19, 1951, he was adjudicated bankrupt and the plaintiff was appointed trustee in the bankruptcy. The defendant continued to reside in the house with two of her children, paying no rent and the plaintiff paying the rates. The plaintiff requested the defendant to give up possession of the house as he wished to sell it to pay off the mortgage and distribute the balance among the other creditors, but she refused. On Nov. 23, 1951, the plaintiff brought the present proceedings for possession. The county court judge held that the defendant's occupation was that of a licensee and that the licence had been determined when the property was vested in the plaintiff and he had demanded possession. He was further of the opinion that proceedings under s. 17 of the Married Women's Property Act, 1882, were not open to the plaintiff. He, accordingly, made an order for possession and mesne profits.

Muir Hunter for the defendant.

Heathcote-Williams, Q.C., and *Sunderland* for the plaintiff.

Cur. adv. vult.

H May 5. **SOMERVELL, L.J.**: I agree with the judgment which **ROMER, L.J.**, will deliver and the reasons given in that judgment for allowing the appeal, and I have nothing which I wish to add to it.

The following judgments were read.

DENNING, L.J.: This case raises important questions about the right of a deserted wife to stay in the matrimonial home. [His Lordship stated the facts and continued:] The first question is whether the wife has any right of

her own to stay in the house. Under the old common law as it existed until seventy years ago she had no rights at all apart from those of her husband. She was treated by the law more like a piece of his furniture than anything else. The husband could not sue her in ejectment or trespass, but neither could he sue a piece of furniture. He could bundle his furniture out into the street and so he could his wife. The law did not say him nay. It merely gave the wife authority to pledge his credit for necessities. If her husband turned her out, she had to go and find lodgings elsewhere, pledging his credit for the rent, that is, if she could find anyone to trust to his credit. She could not in those days get an order for maintenance against her husband. She had to find someone who would take her in out of pity or charity or on the husband's credit. She could not pledge her own credit for she could not make a contract. Even if the husband did not turn her out, nevertheless, when he ceased for any reason to be entitled to the house she would have to leave it, for she had no right of her own to stay there. Thus, if the husband became bankrupt his assignees in bankruptcy could turn her out just as they could his furniture.

All that has changed now. A wife is no longer her husband's chattel. She is beginning to be regarded by the law as a partner in all affairs which are their common concern. Thus, the husband can no longer turn her out of the matrimonial home. She has as much right as he to stay there even though the house does stand in his name. This has only been decided in the last ten years. It started in 1942 when GODDARD, L.J., said that the husband's only way of getting his wife out of the house was to make an application under s. 17 of the Married Women's Property Act, 1882: see *Bramwell v. Bramwell* (1) ([1942] 1 K.B. 374). That section gives the court a very wide discretion in the matter, and, accordingly, in 1947 when a husband claimed that he had an absolute right to turn his wife out it was held that he had no such right, but that it was a matter for the discretion of the court: see *Hutchinson v. Hutchinson* (2). Very shortly afterwards this court took the same view (*Stewart v. Stewart* (3)), and it is now settled law that a deserted wife has a right, as against her husband, to stay in the matrimonial home unless and until an order is made against her under s. 17. In support of this right JUDGE WILLES recently made an order allowing a wife to stay until the husband found alternative accommodation, and restrained the husband from selling the house over her head, and we affirmed that order: *Lee v. Lee* (4). Moreover, it has been held that the wife's right is effective, not only as against her husband, but also as against the landlord. Thus, where a husband, who was statutory tenant of the matrimonial home, deserted his wife and left the house, it was held that the landlord could not turn her out so long as she paid the rent and performed the conditions of the tenancy. This right as against the landlord is a very special right on her part. She has to assert the right in her husband's name, but the husband cannot prevent her from exercising it. Even if he gives her notice to go, or purports to surrender the tenancy or to submit to judgment, nevertheless, she is entitled to stay: see *Old Gate Estates, Ltd. v. Alexander* (5); *Middleton v. Baldock* (6). In the latter case, SIR RAYMOND EVERSHED, M.R., put it succinctly and simply in these words ([1950] 1 All E.R. 710):

"It seems to me that Mrs. Baldock, as the wife of Mr. Baldock, who had deserted her, beyond doubt was entitled to be in possession and to enjoy any right the tenant had under contract, statute, or otherwise, to live on the premises."

In short she has a right of her own, derived no doubt from her husband, but still a right of her own, to assert, on his behalf, the tenant-right in the premises, no matter what her husband may say or do about it.

What is the nature of this right of the deserted wife which the courts have thus evolved? It bears, I think, a very close resemblance to her right to pledge her husband's credit for necessities. Under the old common law when a husband

deserted his wife, or they separated owing to his misconduct, she had an irrevocable authority to pledge his credit for necessities: *Bolton v. Prentice* (7), quoted in the notes to *Manby v. Scot* (8) (2 Smith L.C. 13th ed. 469). One of the most obvious necessities of a wife is a roof over her head, and if we apply the old rule to modern conditions it seems only reasonable to hold that when the husband is the tenant of the matrimonial home the wife should have an irrevocable authority to continue the tenancy on his credit, and that when he is the owner of it she should have an irrevocable authority to stay there. This authority, like the old one, is based on an irrebuttable presumption of law. The husband cannot revoke it except by order of the court under s. 17 of the Act of 1882. In my opinion, therefore, the right of a deserted wife to stay in the matrimonial home proceeds out of an irrevocable authority which the husband is presumed in law to have conferred on her. This accounts for the fact that the husband cannot turn the wife out. It also accounts for the fact that, as against the landlord, the wife must assert her right in the husband's name. The authority which is thus conferred on her is an authority to stay in the house until the court orders her to go out. This authority flows from the status of marriage, coupled with the fact of separation owing to the husband's misconduct. It ceases when the marriage comes to an end by death or divorce: *Robson v. Headland* (9); but it does not cease when there is a judicial separation: *Hutchinson v. Hutchinson* (2). The authority is, of course, purely personal to her. She alone can exercise it. She cannot assign it. It does not give her any legal interest in the land. She may, perhaps, sub-let some of the rooms so as to help keep herself, but even then, she does so, not out of any legal interest of her own in the land, but on the presumed authority of her husband. Her possession is not always exclusive. If the husband has only been guilty of desertion and nothing else he is entitled to come back at any time asking to be forgiven, and she is then bound to receive him. She cannot then keep him out of his house. But if he has, in addition to desertion, been guilty of cruelty or adultery, she is not bound to take him back. She can keep him out of the house. Her possession may then be quite exclusive. But, whether her possession is exclusive or not, there can be no doubt that she is not a tenant of her husband. She has only a personal privilege with no legal interest in the land, and she is, therefore, only a licensee: see *Errington v. Errington* (10). Her occupation is comparable with that of a contractual licensee, the only difference being that a contractual licence is revocable in accordance with the terms of the contract, whereas her licence is not revocable except by an order of the court. Sometimes her occupation is put by the parties on a contractual footing. Thus, when they are making the necessary arrangements consequent on desertion, the husband often agrees to let the wife live in the house until he has found her other accommodation, and she in return agrees to accept a lesser amount of maintenance on that account. That is what happened in *Cristel v. Cristel* (11), *Thompson v. Earthy* (12), and the present case. When such arrangements are made the wife's occupation rests, not on a presumed authority of the husband, but on an express authority which is co-extensive with it. In any case, however, the position of the wife is that she is a licensee with a special right under which her husband cannot turn her out except by an order of the court.

Such being the nature of the wife's right, the next question is whether it is binding on the trustee in bankruptcy. It is not every right created by a man which binds his trustee in bankruptcy. Take a contract by him to sell goods. If the property in the goods has not passed to the buyer at the time of the receiving order the trustee is under no obligation to deliver the goods. The trustee takes the goods free of the contract. The buyer has only a right to prove for damages: see *Re Wait* (13) ([1927] 1 Ch. 637-640), per ATKIN, L.J. On the other hand, take a contract by which the man before the bankruptcy gave a lien on his goods to a repairer. The trustee in bankruptcy takes subject to the lien

just as he takes subject to a right to stop in transitu. Into which category does the wife's right come? Is it a clog or fetter on the land itself like a lien, or is it a mere personal claim like her claim to maintenance? There is no authority on this point. I have had the advantage of reading the judgment of ROMER, L.J., in which he holds that the trustee does take subject to the wife's right. I entirely agree with him, but for my own part I feel it necessary to go further and inquire what is the quality of the wife's right that it should lead to this result. I start with this. The wife's right is very analogous to a contractual licence to occupy land. It is, indeed, so analogous that I think no valid distinction can be made between them. If a contractual licence is not binding on the trustee in bankruptcy, but only gives rise to a right of proof, then I cannot think that the wife's right is binding on him, for it is of no higher quality, but if a contractual licence is binding on the trustee, like a lien, then I think the wife's right should also be binding on him. A B

We have recently held in this court that a contractual licence to occupy land is binding on the devisee of the licensor: see *Errington v. Errington* (10); and it seems to follow that it is also binding on his trustee in bankruptcy. Counsel for the plaintiff did not, indeed, contend the contrary. I put to him the case where a licensor grants the "front of the house" rights in a theatre to a licensee who goes into occupation of the rights and then the licensor goes bankrupt, and he conceded that the trustee in bankruptcy would be bound by the licence. Reason and justice both demand that this should be so, and I would not have felt it necessary to pursue the matter further but for the fact that the decision in *Errington v. Errington* (10) was questioned before us in another case. I have, therefore, felt it necessary to re-consider the matter. C

The objection that is made is that a contractual licence only gives rise to contractual obligations and not to any proprietary, rights or interests, and that the burden of it does not, therefore, run with the land. In answer to this objection let me start with the common law. In the year 1618 and for over two hundred years afterwards it was held that a contractual licence to use and occupy land, once it was acted on by entry into occupation, was binding, not only on the licensor, but also on his successors in title, and that it was not revocable except in accordance with the terms of the contract. If the licensor or his successor ejected the licensee or his goods in breach of the contract he was liable in assault or trespass, as the case might be: see *Webb v. Paternoster* (14), where a licence to stack hay was held binding on the successors of the licensor including his tenants; *Wood v. Lake* (15), where a parol licence to stack coals for seven years was held irrevocable except in accordance with the contract; *Taylor v. Waters* (16), where a licence to enjoy beneficial privileges in the opera house was held not to be revocable at will; and *Wallis v. Harrison* (17), where a licence to make and use a railway was held not binding on successors solely because it was still executory. Those cases were much considered in *Wood v. Leadbitter* (18), and the only criticism directed at them was that the licence should have been under seal. It was agreed (13 M. & W. 843, 847, 848) that the licence in *Wood v. Leadbitter* (18) and the other cases would have been good if they had been granted by deed. This is the very point at which the Judicature Acts come into play. Since the fusion of law and equity there is no necessity for a seal. Every contractual licence to use and occupy land, once acted on by entry into occupation, takes effect according to its tenor. It is not revocable at will. It is only revocable in accordance with the terms of the contract. If the licensor should attempt to eject the licensee in breach of the contract he is guilty of an assault: *Hurst v. Picture Theatres, Ltd.* (19); and if he should attempt to revoke the licence in breach of the contract the court of equity will grant an injunction to restrain him: *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.* (20) ([1947] 2 All E.R. 336) per VISCOUNT SIMON; (*ibid.*, 343) per LORD UTHWATT. This means that the law is restored to the position in which D E F G H

it was for two hundred years before *Wood v. Leadbitter* (18) came to disturb it. The law is now just as that accomplished lawyer, SIR VICARY GIBBS, C.J., stated it in 1816 in *Taylor v. Waters* (16), when, delivering the reserved judgment of the full Court of Common Pleas, he said (7 Taunt. 384):

“ . . . a beneficial licence to be exercised upon land may be granted without deed, and cannot be countermanded, at least after it has been acted upon; and . . . this is not such an interest in land as, by the statute of frauds, can only pass by writing.”

It is not, therefore, an interest in property, but, nevertheless, once the licensee has entered into occupation it is, as PARKE, B., put it in 1838 in *Wallis v. Harrison* (17) (4 M. & W. 544), “ a sort of interest, against the licensor and his assigns ”, by which he meant, as I understand it, that it was a clog or fetter, like a lien, which is not an interest in property, but only a personal right to retain possession: *Legg v. Evans* (21) (6 M. & W. 42); but nevertheless it is, of course, effective against the owner and his assigns. The truth is, I think, that the old common lawyers of the seventeenth and eighteenth centuries, without knowing it, applied to contractual licences some equitable principles which have since become well known. By dispensing with a seal when the licence had been acted on they anticipated the doctrine of part performance. By enforcing the licence against the successors of the licensor they anticipated the doctrine of restrictive covenants. Indeed, in modern times equity lawyers have reached the same result as the old common lawyers, but they have done it in their own way.

Let me now, therefore, turn to equity. Every contractual licence imports a negative covenant that the licensor will not interfere with the use and occupation of the licensee in breach of the contract. This negative covenant is binding on the successors in title of the licensor in the same way as a restrictive covenant is. It does not run with the land so as to give a cause of action in damages for breach of contract against the successor, but it is binding in equity on the conscience of any successor who takes with notice of it. He cannot, therefore, eject the licensee in disregard of it. It is an equity within the words of LORD COTTENHAM, L.C., in *Tulk v. Moxhay* (22) when he said (2 Ph. 778):

“ . . . if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.”

In that case a covenant to keep the garden of a London square in its then form was held binding on successors in title who took with notice of the covenant.

Suppose now that there was a covenant, not only to keep the square garden in its then form, but also a covenant to allow the residents of the square to use it. This second covenant is nothing more nor less than a contractual licence to use the garden. But surely both covenants would be held binding on the successors in title. There is no reason in principle to distinguish between them and there is direct authority in favour of it. Eight years after *Tulk v. Moxhay* (22) a case arose where the owners of a cemetery sold grave spaces to purchasers. These were only contractual licences to use the land for the purposes of burial, but SIR JOHN ROMILLY, M.R., held them to be binding on the successors in title of the licensors: see *Moreland v. Richardson* (23). So, also, a covenant to permit work to be done on land has been held binding on successors who take with notice because it imports a negative covenant not to interfere with the work: see *Andrew v. Aitken* (24) (22 Ch.D. 220) per FRY, J., and *Sharpe v. Durrant* (25) where WARRINGTON, J., said (55 Sol. Jo. 423):

“ . . . this is a case where a person, taking land with notice of an obligation entered into by the previous owner, will be bound in equity to give effect to that obligation.”

These authorities fully support the proposition put forward by SIR JOHN SALMOND in his book on TORTS, 10th ed., p. 246, that a contractual licence to enter on land

"if of such a nature as to be specifically enforceable . . . binds and runs with the land in equity so as to be enforceable not merely against the grantor, but also against all subsequent owners and occupiers of the land except purchasers for value without notice of any such equitable right."

Likewise when the owner of goods agrees to allow another person to use them, as when he lets them out on hire, the agreement is binding not only on the original owner, but also on his successors in title: *De Mattos v. Gibson* (26), and *Lord Strathcona S.S. Co. v. Dominion Coal Co.* (27). I know that some people have looked askance at the principles laid down in the *Strathcona* case (27), but there were, on the Board of the Privy Council, three of the most distinguished equity lawyers of the day, and I fail to see why we should not follow the principles there laid down, at any rate with regard to a contractual licence to use chattels, especially as they are so eminently just and reasonable.

It is, of course, necessary in all these cases that the party who seeks to enforce the contract against a successor in title should have a sufficient interest to warrant the intervention of equity. He must, as the Privy Council put it in the *Strathcona* case (27) ([1926] A.C. 121),

"have, and continue to have, an interest in the subject-matter of the contract."

This does not mean that he must have a legal estate to be protected. Possession or actual occupation of the land or chattel is sufficient. Thus, in the case of restrictive covenants made for the benefit of adjoining land possession of that adjoining land is sufficient: *London County Council v. Allen* (28) ([1914] 3 K.B. 672), per SCRUTTON, J. In the case of contractual licences made for the benefit of the occupier of the land actual occupation of that land is sufficient: see *Errington v. Errington* (10). When a contractual licence to put up advertisements on a wall has been acted on by putting up the advertisements, it is binding on the successors in title of the licensor, including his tenants: see *Re Webb* (29) per SIR RAYMOND EVERSEED, M.R. ([1951] 2 All E.R. 139), and JENKINS, L.J. (*ibid.*, 145). But a right to put up advertisements on a wall, not yet built, is not binding on the successors in title because that is not itself a licence but only a contract to procure that a licence will be granted in the future: *King v. David Allen & Sons, Billposting, Ltd.* (30). Likewise in the case of contractual licences to use chattels, entry into possession, once made, is sufficient even though there has been a temporary lack of possession: the *Strathcona* case (27); but an interest in price restriction is not sufficient: *Taddy & Co. v. Sterious & Co.* (31).

The only case which gives rise to any difficulty is *Clore v. Theatrical Properties, Ltd. & Westby & Co., Ltd.* (32), where the licensee of the "front of the house rights" in a theatre, who was in occupation of them, was held to be unable to enforce them against an assignee of the licensor. That case, however, proceeds on the assumption that the licensee had no right which equity could enforce against the licensor: see [1936] 3 All E.R. 490. That assumption is no longer true: see *Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.* (20) per LORD UTHWATT ([1947] 2 All E.R. 343); and the case may some day have to be re-considered accordingly.

In some contractual licences over land (not amounting to occupation) there may be some nice questions whether the licence is an equitable easement which must be registered to be binding on successors: see an illuminating note on "Equitable Easements" by MR. GEOFFREY CROSS in THE BELL YARD, No. 15, p. 18. But no such questions arise where the licensee is in possession or actual occupation of the land, because that itself is sufficient notice of his rights: see s. 14 of the Law of Property Act, 1925, s. 70 (1) (g) of the Land Registration Act, 1925, and *Lewisham Borough Council v. Maloney* (33). Statutory tenants (who have only a personal privilege) and requisitioning authorities (who have only possession) do not have to register their interests, nor does a contractual licensee

so long as he is in possession or actual occupation. His interest is, therefore, binding on a trustee in bankruptcy, even though the trustee does rank as a purchaser for value: see s. 43 of the Land Registration Act, 1925. I have thus shown, I hope, that equity has reached the same result as the old common lawyers. My conclusion, therefore, is that a contractual licensee, who is in actual occupation of land by virtue of the licence, has an interest which is valid, if not at law at any rate in equity, against the successors in title of the licensor, including therein his trustee in bankruptcy. It is not a legal interest in land, like a tenancy, but a clog or fetter like a lien. It is a personal right, but it is, nevertheless, binding on successors of the licensor, so long as the conditions of the licence are observed.

- A
- The third and last question is whether a deserted wife is in the same position as a contractual licensee. It has been suggested that the husband's right to apply under s. 17 of the Act of 1882 for possession is personal to the husband and does not extend to his successor. Hence it is said that the successor must be able to sue at law for possession because it is inconceivable that he should have no means of getting her out. That was the argument which prevailed with ROXBURGH, J., in *Thompson v. Earthy* (12), and with the county court judge in the present case. It seems to me, however, that one answer to it may be this: Although an application under s. 17 has to be made in the husband's name, nevertheless, a successor in title can compel the husband to allow his name to be used for the purpose. If the husband sells the house there is an implied assignment by the husband of his right to obtain possession, and equity has always compelled an assignor to allow an action to be brought in his name. So, if the husband becomes bankrupt, the trustee can compel the husband to allow his name to be used for an application under s. 17: see s. 22 (3) and s. 38 (b) of the Bankruptcy Act, 1914. Alternatively,
- B
- the trustee in bankruptcy can make an application under s. 105 (1) for an order that the wife do give up possession. In either case the court which deals with the application is enabled under the relevant section to do whatever is just. I must say, however, that, even if a successor cannot compel the husband to apply under s. 17, but the successor has himself to bring an action at law, nevertheless, I should have thought the court would have a discretion whether to
- C
- order possession, for that is the only way in which effect can be given to the wife's right as now established. Any other view would lead to great injustice. It would mean that a guilty husband could transfer the house into the name of his new mistress and then get her to evict his innocent lawful wife from the matrimonial home. No civilised community could tolerate such a cynical disregard of the married state. Equity demands that the successor in title should be in no better
- D
- position than the husband.
- E

- F
- The result of the whole case is that the wife's right to stay in the matrimonial home does not come to an end automatically on the husband's bankruptcy. The trustee in bankruptcy takes subject to equities. He takes, therefore, subject to her right, for it is an equity. The trustee must apply to the court for possession, and the judge who hears the case will take into account the various competing
- G
- interests. He will have regard to the fact that, so far as existing assets are concerned, the general body of creditors have a substantial priority over the wife because they can prove for the debts due to them, but she cannot prove for arrears of maintenance due to her. He will also remember that, so far as the bankrupt's personal earnings are concerned, the wife has a substantial priority over the creditors because the bankrupt has to support his wife and children
- H
- out of his earnings before any of it goes to the creditors. If she is allowed to stay in the matrimonial home she gets less maintenance, and the creditors get more out of his personal earnings. But if she is turned out of the matrimonial home she will be entitled to more maintenance out of his earnings and there will be less available for the creditors. In these circumstances the justice of the case may often be met by allowing the wife to stay in the house temporarily until she finds alternative accommodation, and the court can make appropriate orders to that end.

In the present action the trustee claims that in point of law as soon as the husband became bankrupt the wife became a trespasser and liable for mesne profits. I do not think the claim is well founded. The wife has an equitable right to stay which is binding on the trustee in bankruptcy. He has no absolute right to eject her. It is a matter for the discretion of the court. In my opinion, the appeal should succeed and judgment be entered for the wife.

ROMER, L.J.: The position of a deserted wife who is left by her husband in occupation of the matrimonial home has been considered by the courts lately on a number of occasions. In *Errington v. Errington* (10) DENNING, L.J., in referring to some of these authorities, said ([1952] 1 All E.R. 155):

" . . . there are numerous cases where a wife who has been deserted by her husband and left by him in the matrimonial home has been held to be, not a tenant of the husband owner . . . nor a bare licensee . . . but to be in a special position—a licensee with a special right—under which the husband cannot turn her out except by an order of the court."

I respectfully adopt this as a correct statement of the position of such a wife. She has no legal or equitable interest in the home which she continues to occupy and in that respect is in no better position than any other licensee. On the other hand, her husband, the licensor, cannot bring proceedings against her in ejectment, for the status of matrimony prevents it. He, accordingly, cannot effectively revoke her licence and in this respect the wife is in a more favourable position than that of an ordinary licensee.

The question is (and it is, I think, a difficult one) whether the special protection which a wife enjoys against ejectment at the instance of her husband avails her against similar action by the husband's trustee in bankruptcy. The plaintiff in the present case argues that it does not, and he says that the wife is trying to create in favour of herself a novel species of interest in property or a new kind of equity, such as the court refused to recognise in *Thompson v. Earthy* (12). It is common ground that when the debtor was adjudicated bankrupt the whole of his property (with certain irrelevant exceptions) vested in his trustee in bankruptcy and became divisible amongst his creditors: Bankruptcy Act, 1914, s. 18 (1) and s. 38. "Property" is defined by s. 167 of the Act, and, undoubtedly, included the husband's equity of redemption in the matrimonial home. It is also common ground that in general the trustee takes no better title to the property than the bankrupt had and he takes subject to the same equities as affected the property in the bankrupt's hands. DENNING, L.J., in his judgment has dealt with the latter principle and has expressed the view that the right which the deserted wife enjoyed at the date of her husband's bankruptcy constituted an enforceable equity which operated as a bar to the plaintiff's claim in these proceedings. The same result is arrived at, I think, by approaching the question from a somewhat different angle and I will confine my observations to that approach.

The debtor's right of dealing with the property was subject to the clog or fetter that the house had an occupant whom he could not, of his own volition, eject, and there was, accordingly, to this extent a restriction on his beneficial ownership of the property. If the trustee after the bankruptcy could sue the wife for possession it could only be on the footing that the property vested in him free from this restriction, and it would follow from this that he acquired a larger beneficial interest in the property than that which the debtor had previously enjoyed. It would also follow that a third person automatically lost a special feature attaching to a licence which the debtor had granted for value and was relegated to the position of an ordinary licensee, and that the deterioration of that person's position and the improvement of the trustee's would be commensurate in relation to each other.

Counsel for the plaintiff argued that these were the necessary and natural

results of the bankruptcy law. What is vested in the trustee, he said, was the freehold of the property, and (apart from the mortgagee) nobody but the debtor had any legal or equitable interest in that property. The wife's licence depended on her husband's ownership of the property and could not survive the vesting thereof in the trustee. This vesting carried with it (under s. 22 (2) of the Bankruptcy Act, 1914) the right to possession and the passing of that right was destructive of licences that had been granted by the debtor previously. In this connection counsel relied on a principle which has been recognised in *Brown v. Draper* (34) and other cases, namely, that a wife cannot claim the benefit of her husband's statutory tenancy after his interest as statutory tenant has been validly determined. That, of course, is true. Every subordinate interest must perish with the superior interest on which it is dependent. The argument, however, does not appear to me to be convincing. The superior interest in the present case was the ownership of the house and that has not been extinguished. It is still alive and is vested in the trustee. The real point, as I see it, is whether it became so vested subject to or free from a particular incident which was attached to it in the debtor's hands prior to the vesting. If it is now free from the bankrupt's disability to sue the wife for possession, the plaintiff's action must succeed.

This view, however, seems to me to involve a departure from the general rule, to which I have already referred, that a trustee takes no better title to property than the bankrupt had. This rule is fully, and (I think) accurately, stated in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 2, p. 209, as follows:

"The property of the bankrupt passes to the trustee in the same plight and condition in which it was in the bankrupt's hands, and is subject to all the equities and liabilities which affected it in the bankrupt's hands, and to all dispositions which have been validly made by the bankrupt, and to all rights which have been validly acquired by third persons at the commencement of the bankruptcy, unless the property which the trustee takes is released by some express provision of the bankruptcy law."

Examples of such provisions are those relating to fraudulent conveyances and preferences. A licence of the special character which the debtor in the present case created in favour of his wife appears to me to be, at all events, by analogy, prima facie within the general principle as above stated, and I can see no sufficient reason for excluding such a licence from it. In my opinion, accordingly, the trustee is no more entitled than was the debtor prior to his bankruptcy to revoke the wife's licence on his own authority and to sue her for possession of the property. It is said that if the wife's right to possession is binding on the trustee, then the title of the latter to the property is not only not better than that which the debtor had had, but is worse because he cannot, as the husband could have done, apply to the court for possession under s. 17 of the Married Women's Property Act, 1882, with the result that the wife can remain in the house without paying rent and without any fear of being dispossessed. As to this counsel for the defendant suggested that an application under s. 17 could still be made either by the husband on the compulsion of the trustee or by the trustee himself by virtue of s. 38 (b) of the Bankruptcy Act, 1914, the debtor himself being made a party to the application. I doubt this. Section 17 provides in effect that on the application of either a husband or wife the court may, in any question that arises between them, make orders as to the title to or possession of property. Theoretically the trustee might be able to compel the husband to apply: s. 22 (2) of the Bankruptcy Act, 1914, but apart from the unsatisfactory nature of such a procedure the application could scarcely be regarded as one made in a question between husband and wife, for the issue would in substance be between the husband's creditors, on the one hand, and the wife, on the other. This comment would be equally true of an application made by the trustee in bankruptcy, and,

further, such an application would not be by the husband even though he were made a party to it.

I confess, accordingly, that I entertain some doubt whether the jurisdiction of the court under s. 17 could be invoked. On the other hand, if the defendant were to persist in remaining in possession without payment of rent, or if no other arrangement agreeable both to her and to the trustee can be arrived at, I see no reason why the matter should not be resolved in the bankruptcy proceedings under s. 105 (1) of the Bankruptcy Act, 1914. It is well settled that under that provision the bankruptcy court has power to determine questions affecting persons who are not parties to the bankruptcy, and, in my opinion, it would be well within the powers of the court, on a motion by the trustee, to decide whether the defendant should be permitted to remain in occupation of what was the matrimonial home, and if so on what terms, or whether she should be required to deliver up possession. On such an application the court would doubtless take into account all the matters that would be relevant to the exercise of the discretion conferred by s. 17 of the Married Women's Property Act, 1882, and, in particular, the fact that the wife cannot prove in the bankruptcy for payments due under the maintenance order and that the magistrates in making that order almost certainly regarded the wife's right to occupy the house as relevant to the amount which they directed her husband to pay. If, as I believe, the matter could be dealt with in this way, the wife's position in relation to the property would be substantially the same as it was before her husband's bankruptcy and the trustee would, in effect, succeed to the position of the debtor.

For the reasons that I have tried to express I am unable to agree with the learned judge that the trustee was competent to sue the defendant for possession, and accordingly this appeal, in my judgment, should be allowed.

Appeal allowed.

Solicitors: *T. D. Jones & Co.*, agents for *Lyon Clark & Co.*, Smethwick (for the defendant); *Bentleys, Stokes & Lowless*, agents for *Turner, Bayley & Co.*, Dudley (for the plaintiff).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

UTTOXETER URBAN DISTRICT COUNCIL v. CLARKE AND OTHERS.

[CHANCERY DIVISION (Lloyd-Jacob, J.), April 24, 28, 29, 1952.]

Housing—Compulsory purchase order—Acquisition of dwelling-house as part of estate—Duty of acquiring authority to convert house for housing purposes—Housing Act, 1936 (c. 51), s. 79 (4).

Compulsory Purchase—Application to quash order—Expiration of time allowed for application—Acquisition of Land (Authorisation Procedure) Act, 1946 (c. 49), sched. I, para. 16.

In October, 1946, a local authority made a compulsory purchase order under the Housing Act, 1936, s. 73, in relation to the H. estate, the order being confirmed by the Minister after a local inquiry. The H. estate comprised a large dwelling-house and out-buildings, together with grounds of some seven and a half acres. After acquiring possession, the local authority permitted the S. county council to use part of the house and themselves used the rest of the premises for the provision of facilities for dental services and welfare work.

HELD: (i) section 79 (4) of the Act of 1936 was directed to the instance where a local authority acquired a house for conversion and not to a case in which the house was acquired as part of an estate to be used as a site for the erection of houses, and, therefore, it was not incumbent on the local authority by virtue of s. 79 (4) "forthwith . . . to secure the alteration,

enlargement, repair or improvement" needed to make the dwelling-house suitable for housing purposes.

(ii) no application having been made to the High Court within the period prescribed by the Acquisition of Land (Authorisation Procedure) Act, 1936, sched. I, para. 15, the validity of the compulsory purchase order, having regard to para. 16 of the said schedule, could not be questioned.

A FOR THE HOUSING ACT, 1936, s. 79 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 520.

ACTION.

B The Uttoxeter Urban District Council claimed an injunction restraining the defendants from remaining on or re-entering certain premises, namely, Heath House estate, consisting of Heath House together with some seven and a half acres of land and a dwelling-house and curtilage, known as No. 90, Cheadle Road, which the council had acquired by virtue of a compulsory purchase order made under Part V of the Housing Act, 1936, and confirmed by the Minister of Health. Only the first defendant, William Clarke, appeared. In 1935 the first defendant who then lived at No. 90, Cheadle Road, urged the council to purchase for housing purposes Heath House estate, which was being offered for sale. The council not being minded to buy the estate, the first defendant himself acquired it and endeavoured to obtain planning permission to develop it as a private housing estate. Heath House estate was almost surrounded by housing property owned by the council. After the first defendant had acquired the property, he several times gave the council an opportunity of purchasing the property from him. Later he converted Heath House into a private hotel, went to live there, and managed it with his family. In 1945 the council decided to acquire the property, and, as the negotiations with the first defendant failed, the council gave notice of its intention to acquire the estate compulsorily. In October, 1946, a compulsory purchase order was made, and, after a local inquiry at which the first defendant appeared, the Minister confirmed the order. The first defendant did not apply to the High Court under para. 15 of sched. I, to the Acquisition of Land (Authorisation Procedure) Act, 1946, and he took no part in the proceedings for the assessment of the value of the estate which was assessed at £8,000 which amount represented, according to the first defendant, only a fraction of its value. In April, 1947, notice to treat, and in May, 1950, notice of entry were given. The first defendant refused to quit the estate, and in July, 1950, he was evicted under a warrant issued by the sheriff under the Lands Clauses Consolidation Act, 1845, s. 91. Shortly afterwards the first defendant re-entered the land. On Aug. 8, 1950, DONOVAN, J., granted an interlocutory injunction which the first defendant obeyed. The council had not used the land for housing purposes, and Heath House was not converted to provide housing accommodation but was used for purposes of the Staffordshire County Council and to provide dental facilities. No. 90, Cheadle Road remained in the occupation of the tenant to whom the first defendant had let the property.

W. L. Roots for the plaintiffs, Uttoxeter Urban District Council.

The first defendant, William Clarke, appeared in person.

The other defendants, a daughter and son-in-law of the first defendant, did not appear and were not represented.

H LLOYD-JACOB, J.: The plaintiffs seek to protect a possessory title which they claim in a property known as Heath House, together with some seven and a half acres of land in which it stands, a dwelling-house, No. 90, Cheadle Road, in its immediate vicinity, and certain other buildings and appurtenances thereunto belonging, which possessory title they claim is properly founded on the Uttoxeter Urban District (Heath House Estate) Compulsory Purchase Order, 1946, made under the Housing Act, 1936, and the Acquisition of Land (Authorisation Procedure) Act, 1946, which was confirmed by the

Minister. [HIS LORDSHIP stated the facts and continued:] The compulsory purchase order purports to be an exercise by the council of rights arising under the Housing Act, 1936, Part V, in respect of the land and properties which are identified in the map attached to the order. The main burden of the first defendant's complaint is that the order is one which this court should not permit to be enforced because the purpose for which it was sought was not in fact intended to be attained by the purchase and has not been attained having regard to the way in which the council have made use of the property since they acquired possession of it. That view proceeds on a misapprehension of the Housing Act, 1936, and, therefore, it is desirable that I should make reference to the powers and duties which are cast on local authorities by Part V of that Act. It is to be noted that by s. 71 the local authority is charged with the duty of surveying the housing conditions in the district with a view to preparing and submitting to the Minister proposals for securing the satisfactory housing of persons within the area. By s. 73 the local authority is granted power (a) to acquire land, including any houses or buildings thereon, as a site for the erection of houses, and (b) to acquire houses or other buildings which are or, by conversion may be made, suitable for housing purposes and for other purposes set out in the section. By s. 79 it is provided that local authorities who have acquired any land for the purposes of this Part of the Act may do certain acts in connection with property so acquired. It is interesting to note that those specific provisions are expressed to be without prejudice to any powers that the local authority may have under the remainder of the Act. By s. 79 (4) it is provided that where a local authority acquire a house or other building which can be made suitable by conversion for housing purposes it shall forthwith proceed to secure by alteration, enlargement, repair, improvement or adaptation that it is so fitted.

The first defendant's submission is, as I understand it, that because Heath House itself is a building on the land compulsorily acquired there is an obligation resting on the council under s. 79 (4) forthwith to secure, by alteration, enlargement, repair, improvement or adaptation, that it should be converted into suitable dwellings. That submission, in my judgment, is erroneous. As I read the section, it is directed to the instance where the local authority acquires a house for conversion, and it is by no means obligatory in respect of houses which are acquired as part of an estate. Accordingly, I do not think it right to infer that the failure of the council to convert Heath House into suitable dwellings is in itself an indication that the avowed purpose of their acquisition, viz., that it was to be for the purposes of Part V of the Housing Act, 1936, was erroneous.

In the course of his submissions the first defendant developed an argument based on the undoubted right of a citizen of this country to be permitted to retain his own property except when deprived of it by due process of law. That is a principle which I trust this court will always use its best endeavours to secure, and there is nothing contrary to any of the foundations of our great right in the present proceedings unless it appears that the acquisition of this property compulsorily is not in accordance with the law of this country. It is, perhaps, desirable, seeing that the first defendant appeared in person, that I should indicate the proper approach to a matter of that sort. It is the fact that, with the appreciation of the importance of safeguarding the public interest, as time has gone on it has become necessary for private rights to be made subservient to the public interest, and the statute book contains a number of instances where private rights are open to question and in some cases to acquisition where they conflict with an overriding public interest. This compulsory purchase order is an instance of that general attitude. Whereas here the requirements for the housing of the persons in this urban district in truth justifies the acquisition of property so as to provide that housing, then persons who are fortunate enough

to own property suitable for that purpose may find themselves in a position to discharge their public duty and at the same time to receive compensation for their property by following the procedure laid down for the acquisition of housing estates.

A Counsel for the council made a submission based on the Acquisition of Land (Authorisation Procedure) Act, 1946, under which the Minister operated in the present case. By para. 15 of sched. I to that Act, provision is made for the steps to be taken by any person who regards himself aggrieved by a compulsory purchase order. It is provided that, if any person desires to question the validity of a compulsory purchase order or of any provision in it, he must make an application to the High Court, and it is provided that that must be within six weeks from the date on which either the making of the order or the notice of confirmation is first published, and in the present case there is no question that that period of time has long since expired. The Act further provides, in para. 16, that

B "Subject to the provisions of the last foregoing paragraph, a compulsory purchase order . . . shall not, either before or after it has been confirmed, . . . be questioned in any legal proceedings whatsoever, and shall become operative on the date on which notice is first published as mentioned in the last foregoing paragraph."

C In its wisdom, Parliament appears to have decided that the provision of a limited period within which the action of the authority and Minister can be questioned before the courts is a suitable procedure in cases such as the present, and if Her Majesty's lieges do not adopt the procedure laid down by Parliament they cannot seriously suggest that they are suffering any injustice if, having

D laid by and let the time run out, they then seek to develop an argument against the propriety of the order. I hold that, having regard to the terms of the Acquisition of Land (Authorisation Procedure) Act, 1946, it is not open in the present proceedings for this court to go behind the order as it was made and confirmed, but again, although I hold that view, it is desirable in a case where the defendant is appearing in person that I should indicate the opinion I have formed as a

E result of listening to the evidence and his submissions on it. Had it been open to me to go behind the form of this order and to investigate the propriety of the representations it contains as to the purpose for which this property was sought to be acquired, I should myself have no difficulty in coming to the conclusion that it was a perfectly genuine order. It appears that since they came into possession of the property, the council have not built houses on the land, nor

F have they converted the main house, and, indeed, the only conversion they appear to have made is to remove the possibility of living accommodation in certain of the outbuildings by constructing garages for ambulances and the like. It is submitted that that is abundant evidence that the suggestion that the property was acquired for the purposes of the Housing Act, 1936, is completely misconceived. I have already expressed my view as to the fallacy in the argument

G under the Housing Act, 1936, that the acquisition of an estate on which there is a house or other buildings necessarily requires the local authority to convert that house or building immediately into dwellings. Apart altogether from the fact that changing circumstances, acquisition of other properties in the neighbourhood, and the like, may well have caused alteration in the immediate needs of the local authority, I am satisfied that, had it been necessary, the council could

H have proved that their avowed purpose in the purchase of this property had been made out.

Injunction granted.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *F. S. Hawthorn & Son*, Uttoxeter (for the council).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

CHILTON v. CHILTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), April 23, 1952.]

Justices—Husband and wife—Maintenance order—Wilful neglect to maintain—Reasonable and honest belief of wife's adultery.

As a result of quarrels over the wife's relationship with another man, the husband turned the wife out of the matrimonial home. On the wife's summonses against the husband charging him with desertion and wilful neglect to provide her with reasonable maintenance,

HELD: the husband's bona fide belief, induced by the wife, that she had committed adultery was a good defence, not only to the charge of desertion, but also to the charge of wilful neglect to maintain.

Morris v. Edmonds (1897) (77 L.T. 56) and *Glenister v. Glenister* ([1945] 1 All E.R. 513), applied.

AS TO WILFUL NEGLECT TO MAINTAIN, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1340; and FOR CASES, see DIGEST, Vol. 27, pp. 558, 559, Nos. 6134-6150.

Cases referred to:

- (1) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 2nd Digest Supp.
- (2) *Everitt v. Everitt*, [1949] 1 All E.R. 908; [1949] P. 374; 113 J.P. 279; 2nd Digest Supp.
- (3) *Allen v. Allen*, [1951] 1 All E.R. 724; 115 J.P. 229.
- (4) *Haswell v. Haswell & Sanderson*, (1859), 1 Sw. & Tr. 502; 29 L.J.P. & M. 21; 1 L.T. 69; 23 J.P. 825; 164 E.R. 832; 27 Digest 373, 3609.
- (5) *Ousey v. Ousey & Atkinson*, (1874), L.R. 3 P. & D. 223; 43 L.J.P. & M. 35; 30 L.T. 911; *subsequent proceedings* (1875), 1 P.D. 56; 45 L.J.P. 33; 33 L.T. 789; 27 Digest 322, 3004.
- (6) *Morris v. Edmonds*, (1897), 77 L.T. 56; 37 Digest 358, 1609.
- (7) *Biggs v. Burridge*, (1924), 89 J.P. 75; 37 Digest 360, 1623.

APPEAL by the husband against a decision of Barrow-in-Furness, Lancashire, justices whereby they found him guilty of wilful neglect to provide reasonable maintenance for his wife. At the same time and on the same facts they dismissed a summons by the wife alleging that the husband had also been guilty of desertion on the ground that on that part of the case they were bound by the decision in *Glenister v. Glenister* (1) ([1945] 1 All E.R. 513).

John Latey for the husband.

A. R. Ellis for the wife.

LORD MERRIMAN, P.: This is an appeal by a husband against a decision of the justices for the Barrow-in-Furness petty sessional division of Lancashire given on Dec. 21, 1951, whereby they found him guilty of wilful neglect to provide reasonable maintenance for his wife. On that finding they made an order for 10s. a week, which, so far as amount is concerned, is not challenged. At the same time they dismissed the wife's charge, in respect of the same circumstances, that the husband had deserted her. The sole question in this case, therefore, is whether the finding of wilful neglect to provide reasonable maintenance can stand.

The case raises the question whether or not the principles on which *Glenister v. Glenister* (1) was decided apply, not only to a charge of desertion, but also to one of wilful neglect to maintain. Having regard to the helpful way in which this case has been presented to us on both sides, it is not necessary to go into an elaborate review of the facts. The husband resisted the summonses on the ground that his wife had committed adultery, though it is conceded that no formal charge had been made to that effect and she had been given no formal notice

of the charge. The case was fought on the basis that, whether, in fact, she had committed adultery or not, by her conduct she had induced a reasonable belief in the husband's mind that she had done so, and I propose to deal with the case on that basis. The justices have found that there was not sufficient evidence that the wife had committed adultery, and I see no reason whatever for interfering with that finding. On the other hand, it is agreed by both counsel that the case, at any rate so far as desertion was concerned, came within the *Glenister v. Glenister* (1) principle, namely, that she had induced a reasonable belief in the husband's mind that she had committed adultery. On that they found that the husband, who had, in effect, turned her out of the matrimonial home as the result of a quarrel over her supposed relationship with a certain man, was not guilty of desertion without reasonable cause, but at the same time they held that the conduct of the wife was not such as to absolve the husband from his liability to maintain her, and, therefore, that he was not justified in refusing to provide reasonable maintenance for her. Accordingly, they dismissed the one summons and found the other proved. It is also agreed that this case must be judged as things stood at the time when the summonses came before the justices and before they had found that there was not sufficient evidence of adultery having been committed. Both counsel, I think rightly, have pressed us to decide the question as a strict matter of law on the facts which I have outlined and not to be diverted from doing so by the possibility that the very finding itself may or may not render the question of the husband's liability to maintain his wife for the future purely academic.

Before I examine the law I must mention one other circumstance. I am satisfied that the justices were entitled to hold that as regards the charge of desertion this case was governed by *Glenister v. Glenister* (1), and to direct themselves accordingly. Without an elaborate examination of the evidence, I think it is sufficient to say that it is plain that to the knowledge of the husband and in defiance of his wishes the wife had been associating with the man in question and that when the last quarrel took place about this association she assumed a thoroughly defiant attitude. She threw what turned out eventually to be merely a pay-packet at him, saying: "There is the evidence you want—French letters". Not only so, but when he suggested a reconciliation she said that she intended to go away with this man, and she also admitted that she had confessed what she was pleased to call her "guilt" to his son, though she tried in the witness box to qualify that by saying that that only meant guilt in associating with him and not guilt in committing adultery. I think it is unnecessary to say more than that the evidence does clearly show this to be the class of case in which by her own conduct the wife deliberately induced in the husband's mind the belief in her guilt.

The question is whether, in spite of their correct decision about desertion the justices were entitled to hold on the same set of circumstances that the husband wilfully neglected to provide reasonable maintenance for his wife. It is true that so far as the Summary Jurisdiction (Married Women) statutory code is concerned, all the decisions on this point relate to the offence of desertion and none of them to wilful neglect to maintain, but I have had some difficulty in understanding why, in circumstances such as those prevailing in this case, there should be thought to be any logical distinction between the two. It is not, as was at one time suggested in argument, a question whether reasonable belief in the wife's having committed adultery absolves the husband for all time from maintaining his wife, but whether, during a period when the husband reasonably holds the belief in his wife's adultery which has been induced, and, as in this case, deliberately induced, by her own conduct, he can be charged with wilful neglect to maintain her.

I do not propose to review all the authorities. I think it is sufficient for our purposes to say that *Glenister v. Glenister* (1) has now been dealt with twice in the Court of Appeal, once—(I have to utter the caution)—by the author of the

original judgment presiding in the Court of Appeal in *Everitt v. Everitt* (2). In *Allen v. Allen* (3) HODSON, L.J., said ([1951] 1 All E.R. 728) :

" *Glenister v. Glenister* (1) was referred to by LORD MERRIMAN, P., sitting as President of a division of this court in *Everitt v. Everitt* (2), and he there emphasised what is, in my judgment, an essential feature of the defence which the husband sought to raise in the present case, namely, its temporary nature, because, although at one moment a person may be able to say that he or she reasonably believes in a state of facts, that reasonable belief may be dispelled at any moment. Nobody could give an exhaustive statement of the ways in which a belief could be dispelled. The question in issue in the present case is whether the husband's belief must be taken to have been dispelled when a judgment of a court of competent jurisdiction has been given in favour of the wife to the effect that the husband has failed to prove a charge of adultery against her."

That is the case as it stands now, but it was not the case as it stood before the justices gave their judgment. Then HODSON, L.J., refers to my judgment in *Everitt v. Everitt* (2) and quotes from it one passage ([1949] 1 All E.R. 913) which I shall not cite again.

In the judgment in *Glenister v. Glenister* (1) I am reported as having said ([1945] 1 All E.R. 517):

" That brings me to the only remaining point, which is the real crux of this case: Whether, short of proving adultery against the wife, the husband has nevertheless shown and ought to be held to have shown that he had reasonable cause for withdrawing from cohabitation in the sense that he was not a deserter . . . That the husband held that belief, and held it reasonably, I am prepared to hold in his favour. There remains the sole question whether that is enough. My own impression is that there is authority on the question of reasonable belief of adultery, but I cannot put my hand on it, and counsel have not been able to refer us to it, but the principle, I think, is really settled by two cases."

I then refer to *Haswell v. Haswell & Sanderson* (4) and *Ousey v. Ousey & Atkinson* (5) and I do not propose to refer to them again, but I am now able to say that I know what were the cases the names of which I was trying to recall. They were *Morris v. Edmonds* (6), and *Biggs v. Burridge* (7), the latter of which approves, but distinguishes, *Morris v. Edmonds* (6). I think it is only necessary to refer to *Morris v. Edmonds* (6), and I do so because, although it was decided under the Vagrancy Act, in substance it raises exactly the point which is said to be left undecided by *Glenister v. Glenister* (1) and all the other cases in which *Glenister v. Glenister* (1) has been followed. In *Morris v. Edmonds* (6) the head-note reads as follows:

" The respondent . . . was charged under s. 3 of the Vagrancy Act, 1824, for that he, being able to work and maintain himself and his wife and family, ' wilfully refused or neglected ' to do so. The magistrates found that he refused to maintain his wife because of the bona fide belief that she had committed adultery, and that he had offered under certain conditions to support his children. They dismissed the summons, holding that under these circumstances . . . the respondent, had not ' wilfully refused or neglected '. Held, that the magistrates were right."

The Vagrancy Act, in common with s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, imports the element of wilfulness. It might be well just to read one paragraph in the Case stated by the magistrates for the Queen's Bench Divisional Court (77 L.T. 56):

" Upon the facts hereinbefore stated we decided that this was a case of bona fide mutual separation by deed, and that the respondent had at the

time of separation made provision for his wife and her children, and had ceased to pay her in consequence of a bona fide belief that she had committed adultery, and that the respondent had not within the true meaning and intent of the Vagrancy Act wilfully refused or neglected to maintain his wife and children, and that he therefore was not guilty of the offence charged against him by the summons, which we therefore dismissed."

A It was argued that while the committal of adultery had been held to be a defence, there was no direct authority that bona fide belief of adultery amounted to a defence. The court consisted of COLLINS, J., and RIDLEY, J., and the judgment was delivered by COLLINS, J., who said (*ibid.*, 57):

B "I am of opinion that we ought not to interfere with the discretion of the magistrates. They heard and saw the parties, and came to a conclusion that this was bona fide. I was impressed at one time with the distinction of the fact of adultery, and the bona fide belief of adultery, but this is a proceeding not to enforce maintenance, but a penal proceeding for an offence, and so we must look and see if the respondent has 'wilfully' refused to maintain. The authorities quoted establish that under the circumstances of this case, the man cannot be described as an idle and disorderly person. I think the decision of the magistrates perfectly right, and this appeal must be dismissed."

C I agree that that is not directly in point because of such distinction as there is between the provisions of the Vagrancy Act and those of the Summary Jurisdiction (Married Women) Acts, but it seems to me to be a very strong indication, even if there were no other, to what our decision ought to be in regard to this charge of wilful neglect to provide reasonable maintenance. But for my part, I think that in the circumstances of this case it is impossible to draw any sensible distinction between the application of the principle in *Glenister v. Glenister* (1) and the cases which followed and approved it to the charge of desertion and the application of that principle to the charge of wilful neglect to maintain. I think, therefore, that, though the findings of fact on the justices' part are unimpeachable, they have misdirected themselves in the application of the law to those facts in respect of the summons for wilful neglect, and that the appeal must, therefore, be allowed.

D PEARCE, J.: I agree. The principle laid down in *Glenister v. Glenister* (1) is decisive of this case. In view of the circumstances which led the justices, quite rightly, to dismiss the summons for desertion, it was not possible for them properly to find that there had been wilful neglect to maintain. Unless there is some agreement, made expressly or by implication between the parties, the duty to cohabit and the duty to maintain are co-extensive, and, in my opinion, where circumstances have excused the husband from his duty to cohabit he cannot be held guilty of wilful neglect to maintain.

E F Appeal allowed.
Solicitors: Baylis, Pearce & Co. (for the husband); Bell, Brodrick & Gray (for the wife).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

PRIDE OF DERBY & DERBYSHIRE ANGLING
ASSOCIATION, LTD. AND ANOTHER v. BRITISH
CELANESE, LTD. AND OTHERS.

[CHANCERY DIVISION (Harman, J.), February 12, 13, 14, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, March 31, April 7, 1952.]

Nuisance—Pollution of river—Nuisance arising from acts of several persons—Action against three defendants—Actionable wrong committed by one defendant—Liability of remaining defendants.

Water and Watercourses—Pollution of river—Untreated sewage matter—Action by riparian owners against local authority—Rivers Pollution Prevention Act, 1876 (c. 75), s. 3—Derby Corporation Act, 1901 (c. cclxvii), s. 109 (1), s. 113.

Electricity Supply—Right to abstract water from river—Water returned in heated condition—Injury to fish—Rights of Earl of Harrington “as riparian owner . . . upon the river”—Derbyshire and Nottinghamshire Electric Power Act, 1929 (c. lxxxvi), s. 37 (1), s. 37 (2).

Injunction—Local authority unable to comply with injunction without financial grant.

The plaintiffs were severally entitled to rights in respect of the bed, banks and water of the rivers Derwent and Trent from below the confluence of the rivers to Borrowash Bridge on the river Derwent, about seven miles above the confluence. On the banks of the Derwent below Derby and above the plaintiffs' waters were works maintained by the defendants. Immediately after passing Derby the river was in a reasonably pure state and supported game fish, but before reaching Borrowash Bridge, owing to the activities of the defendants, it was polluted to such an extent that it was foul and black and contained little or no fish. The pollution was caused (a) by effluent consisting of sewage matter, insufficiently treated and discharged into the river from the sewage works of the second defendants, Derby Corporation, and (b) heated effluent, containing suspended organic matter, discharged into the river from the works of the first defendant, a company. The damage and danger resulting from the pollution were aggravated by the rise in the temperature of the water caused by large quantities of heated effluent which were discharged into the river from the generating station of the third defendants, the British Electricity Authority. The water which was discharged into the river from the works of the first defendant and the electricity authority had, in each case, been extracted from the river. In an action by the plaintiffs claiming, *inter alia*, (a) an injunction restraining each of the defendants from causing or permitting the pollution of the plaintiffs' waters, and (b) an injunction restraining the first defendant and the electricity authority from causing or permitting an alteration in the temperature of the plaintiffs' waters, the first defendant admitted liability, but the corporation and the electricity authority each denied liability and relied on their statutory rights and powers. The generating station had been set up and maintained under the powers conferred on the electricity authority's predecessor by the Derbyshire and Nottinghamshire Electric Power Acts, 1901 and 1929, and the electricity authority relied on (*inter alia*) s. 37 (1) of the Act of 1929.

HELD: (i) the plaintiffs, as riparian owners, were entitled to sue in respect of the injury done to their rights in the river; as their waters had been polluted by the combined effect of the activities of the defendants, they were entitled to bring an action against all the defendants; and, even if neither the corporation nor the electricity authority had individually committed an actionable wrong, they were not relieved of liability notwithstanding that the first defendant had admitted liability and could be sued alone.

Thorpe v. Brumfitt (1873) (8 Ch. App. 650), applied.

(ii) as the proviso to s. 113 of the Derby Corporation Act, 1901, expressly stated that the corporation were not authorised to construct any works or do any other thing in contravention of the Rivers Pollution Prevention Act, 1876, and as it was an offence under s. 3 of the Act of 1876 to cause any solid or liquid sewage matter to fall or flow into any stream, the corporation were not authorised by the Act of 1901 to send untreated sewage matter into the river, and, in so far as their action in doing so was a nuisance, it was forbidden by s. 109 (1) of the Act of 1901; the application of s. 109 (1) was not limited to the inhabitants of Spondon, notwithstanding that the marginal note to the section was "For protection of parish of Spondon"; as the plaintiffs' claim against the corporation was founded on misfeasance and not on non-feasance, they had established a good cause of action against the corporation, and the provisions of the Public Health Act, 1875, s. 299, did not apply to them; the provision in the proviso to s. 113 of the Act of 1901 that compensation by arbitration was the only remedy did not apply to the damage suffered by the plaintiffs, as it was expressed to apply only to damage sustained by reason of the exercise of the powers of that section, viz., the power to divert streams and deal with waters so intercepted.

(iii) on the true construction of s. 37 (1) of the Derbyshire and Nottinghamshire Electric Power Act, 1929, the electricity authority were authorised to abstract water from the river only so long as they complied with the proviso to the sub-section, whereby they were directed to return the water in such a condition as not to cause injury to fish, and, as they had failed to comply with the proviso and the plaintiffs had suffered damage through their failure to do so, the plaintiffs had established a good cause of action against them.

(iv) the reference to the rights of the Earl of Harrington "as riparian owner . . . upon the river", in s. 37 (2) of the Act of 1929, was not limited to the earl's riparian rights in the reach with which s. 37 dealt, but protected any riparian rights that he might have on the river.

(v) the fact that Derby Corporation could not remedy the wrong suffered by the plaintiffs at their hands without financial assistance which they could only obtain on the authority of the Minister of Health, and that, therefore, compliance with the injunction depended on matters outside their control, was no reason for not granting an injunction against them, nor was an award of damages alone proper compensation for damage of the nature caused.

Damage—Apportionment—Inquiry as to damages—Apportionment of damage by court prior to inquiry.

The court, having ordered an inquiry as to damages in respect of nuisance and trespass, was asked by the defendants to apportion the damage between them. The defendants submitted that they were not joint tortfeasors, but were severally liable to the plaintiffs for a tort.

HELD: although it might well be convenient to the plaintiffs on the inquiry that each of the defendants should be regarded as wholly responsible, that was not sufficient ground for not apportioning the damages, and it was proper that they should be apportioned.

Croston v. Vaughan ([1937] 4 All E.R. 249), applied.

AS TO REMEDIES FOR POLLUTION, see HALSBURY, Hailsham Edn., Vol. 33, pp. 609-612, paras. 1072-1078; and FOR CASES, see DIGEST, Vol. 44, pp. 45-50, Nos. 321-355.

Cases referred to:

- (1) *Young (John) & Co. v. Bankier Distillery Co.*, [1893] A.C. 691; 69 L.T. 838; 58 J.P. 100; 44 Digest 13, 54.

- (2) *Pennington v. Brinsop Hall Coal Co.*, (1877), 5 Ch.D. 769; 46 L.J.Ch. 773; 37 L.T. 149; *sub nom. Fennington v. Brinsop Hall Coal Co.*, 41 J.P. 758; 44 Digest 57, 410.
- (3) *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343; 105 L.J.Ch. 279; 154 L.T. 531; Digest Supp.
- (4) *Fitzgerald v. Firbank*, [1897] 2 Ch. 96; 66 L.J.Ch. 529; 76 L.T. 584; 25 Digest 4, 4.
- (5) *Smith v. Kemp*, (1693), Carth. 285 (90 E.R. 769); Holt, K.B. 322 (90 E.R. 1078); 2 Salk. 637 (91 E.R. 537); 4 Mod. Rep. 186 (87 E.R. 340); Skin. 342 (90 E.R. 152); 25 Digest 33, 318.
- (6) *Blair & Sumner v. Deakin, Eden & Thwaites v. Deakin*, (1887), 57 L.T. 522; 52 J.P. 327; 44 Digest 38, 271.
- (7) *Thorpe v. Brumfitt*, (1873), 8 Ch.App. 650; 37 J.P. 742; 36 Digest 215, 576.
- (8) *Pasmore v. Oswaldtwistle Urban Council*, [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 38 Digest 154, 38.
- (9) *Glossop v. Heston & Isleworth Local Board*, (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 38 Digest 42, 249.
- (10) *A.-G. v. Dorking Guardians*, (1882), 20 Ch.D. 595; 51 L.J.Ch. 585; 46 L.T. 573; 38 Digest 54, 310.
- (11) *Robinson v. Workington Corpn.*, [1897] 1 Q.B. 619; 66 L.J.Q.B. 388; 75 L.T. 674; 61 J.P. 164; 38 Digest 55, 318.
- (12) *Hesketh v. Birmingham Corpn.*, [1924] 1 K.B. 260; 93 L.J.K.B. 461; 130 L.T. 476; 88 J.P. 77; 38 Digest 48, 280.
- (13) *Jones v. Llanrwst Urban Council*, [1911] 1 Ch. 393; 80 L.J.Ch. 145; 103 L.T. 751; 75 J.P. 68; 38 Digest 45, 263.
- (14) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest 187, 311.
- (15) *Haigh v. Deudraeth Rural District Council*, [1945] 2 All E.R. 661; 174 L.T. 243; 110 J.P. 97; 2nd Digest Supp.
- (16) *Harrington (Earl) v. Derby Corpn.*, [1905] 1 Ch. 205; 74 L.J.Ch. 219; 92 L.T. 153; 69 J.P. 62; 44 Digest 58, 418.
- (17) *Manchester Corpn. v. Farnworth*, [1930] A.C. 171; 99 L.J.K.B. 83; 94 J.P. 62; *sub nom. Farnworth v. Manchester Corpn.*, 142 L.T. 145; Digest Supp.
- (18) *Croston v. Vaughan*, [1937] 4 All E.R. 249; [1938] 1 K.B. 540; 107 L.J.K.B. 182; 158 L.T. 221; 102 J.P. 11; Digest Supp.

ACTION for, inter alia, (i) an injunction restraining each of the defendants from causing or permitting any effluent to flow or pass from the premises of such defendant at Spondon, in the county of Derby, into the river Derwent so as to pollute (either by itself or in combination with any effluent discharged into such river by any of the other defendants or any other persons) the waters of (a) the river Derwent where they flowed past or over the lands below Borrowash Bridge and above the confluence of that river with the river Trent, where the first plaintiff was owner of the bed thereof or of a several fishery therein, and the second plaintiff was owner of the banks or bank thereof, or (b) of the river Trent immediately below its confluence with the river Derwent, where the first plaintiff was owner of a several fishery therein, or entitled as tenant to a right of fishing, and the second plaintiff was owner of the banks or bank thereof; (ii) an injunction restraining the first defendant, British Celanese, Ltd., or the third defendants, British Electricity Authority (East Midlands Division), from causing or permitting any effluent to flow or pass from their respective premises at Spondon into the river Derwent so as perceptibly to alter (either by itself or in combination with any other effluents discharged into such river by any of the other defendants or any other person) the temperature of the waters of the river where they flowed past or over any of the plaintiffs' premises; (iii) a mandatory injunction against

the second defendants, Derby Corporation, ordering them to dismantle and remove the outfall for crude sewage into the river Derwent maintained by them; (iv) damages in trespass and nuisance against all the defendants.

At the date of the issue of the writ, another effluent was discharged into the river by the fourth defendant, Midland Tar Distilleries, Ltd., but the fourth defendant ceased the discharge and proceedings against it were stayed under an order, dated Nov. 4, 1951. At the trial, the claim to a mandatory injunction against the corporation was abandoned.

Each of the defendants maintained works on or near the banks of the river Derwent near Spondon, up-stream of the plaintiffs' waters and below Derby. After leaving Derby and immediately below Raynesway Bridge, the river took three loops to the north. On the north bank of the first loop, the corporation had constructed sewage works under powers conferred on them by the Derby Corporation Act, 1901. The works had been extended under the Derby Corporation Act, 1930, but they were now inadequate, and sewage matter which was insufficiently treated was discharged into the river. In particular, in times of sudden storm or flood, untreated sewage passed direct into the river at two storm water outfalls (called the A outfall and the C outfall). On the second loop of the river were the first defendant's works. About fifty-four million gallons of water were taken daily into the first defendant's lagoons and some of this water was returned to the river in a heated and extremely foul condition. On the third loop (and nearest to the plaintiffs' waters) were an electric generating station and works, which were constructed under the Derbyshire and Nottinghamshire Electric Power Acts, 1901 and 1929, and were now vested in and maintained by the third defendants, British Electricity Authority, under the Electricity Act, 1947. To cool their condensers, the electricity authority took about 120 million gallons of water daily from the river, and, as the water was already foul when it reached the generating station, a small quantity of chlorine was infused into it at the intake to neutralise the damage which it would otherwise do to the machinery. After use, the greater part of this water was returned to the river at a greatly increased temperature.

Immediately after leaving Derby the river was in a reasonably clean condition, but by the time it reached the plaintiffs' waters, it was heated and extremely foul and could not sustain fish life. Shortly before the hearing of the action, the first defendant admitted that its activities polluted the stream to the detriment of the plaintiffs and submitted to some form of relief by way of injunction. The corporation and the electricity authority each denied liability and each contended that their own activities were not sufficient to cause a nuisance. The corporation further contended, *inter alia*, that, if a nuisance arose from their works, they were absolved as they were under a statutory duty to do the things which created a nuisance. The electricity authority contended, *inter alia*, that it was empowered by s. 37 (1) of the Derbyshire and Nottinghamshire Electric Power Act, 1929, to abstract water from the river and use it in the way in which it did.

Russell, Q.C., and *Newsom* for the plaintiffs, *Pride of Derby and Derbyshire Angling Association, Ltd.*, and the *Earl of Harrington*.

Milner Holland, Q.C., and *Teague* for the first defendant, *British Celanese, Ltd.*

Sir Andrew Clark, Q.C., and *Hesketh* for the second defendants, *Derby Corporation*.

Salt, Q.C., *H. I. Willis* and *S. I. Levy* for the third defendants, *British Electricity Authority*.

Cur. adv. vult.

March 31. **HARMAN, J.**, read the following judgment. The plaintiff association is the owner or occupier of a fishery on the rivers Trent and Derwent at a point round about their confluence and running up the latter river some

six miles. The association also owns the south bank of the river Derwent at two points where it has fishing rights. The second plaintiff is riparian owner of a considerable stretch of both rivers, the part here material consisting of about seven miles of water beginning slightly below their confluence and running up the Derwent to a bridge known as Borrowash Bridge. The plaintiffs claim relief by way of injunction against each of the defendants who, as they allege, by their several activities (carried on in close proximity to one another above Borrowash Bridge) pollute the plaintiffs' waters and the banks of the rivers. As against the first defendant, British Celanese, Ltd., and the third defendants, British Electricity Authority (hereafter referred to as the power company), there is an additional claim based on the allegation that their respective activities raise the temperature of the river. There are also claims for damages laid both in trespass and in nuisance.

[HIS LORDSHIP stated the facts and found (a) that the Derby Corporation's effluent at the point of discharge was a polluting effluent the discharge of which could not be justified; that, in the polluted state of the river at all places below the entry of the corporation's effluent, it was not possible for the ill-effects to wear off; and that the corporation had added substantially to the state of things of which the plaintiffs complained; and (b) that the raising of the temperature of the water by the power company was harmful to fish, and that the activities of the electricity authority, in the state of the river, contributed substantially to the harm which was being done to the plaintiffs. HIS LORDSHIP continued:] If these be the facts, what is the law applicable? I find this well stated in COULSON AND FORBES ON WATERS, 2nd ed., p. 159 [5th ed., p. 172], in these words:

"A riparian proprietor on a natural stream has a right to the flow of the stream through or by his land in its natural state as an incident to the land through or by which it flows, and if the water be polluted, so as to occasion damage in law, though not in fact, it gives him a good cause of action, unless a right to pollute the stream has been acquired by the person causing the pollution, by long enjoyment or grant. A right to pollute a stream can only be acquired by a continuance of a perceptible amount of pollution for the full period of twenty years. A riparian proprietor can therefore maintain a suit to restrain the fouling of the water without showing that the fouling is actually injurious to him, and the fact that the stream is also fouled by others is no defence. The rights of a riparian proprietor are, moreover, not restricted to the present modes of enjoyment of the water, and a new mode of enjoyment gives a right at once to sue for an injury done in respect of such new uses."

The law is stated in much the same way in *John Young & Co. v. Bankier Distillery Co.* (1), where the headnote reads as follows:

"Every riparian proprietor is entitled to have the natural water of the stream transmitted to him, without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the court."

LORD MACNAGHTEN said ([1893] A.C. 698):

"The law relating to the rights of riparian proprietors is well settled. A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and

without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the court."

A It was not disputed that the temperature of water is part of the "quality" of which LORD MACNAGHTEN speaks. Moreover, the riparian owner is not restricted in his rights by the present mode of enjoyment of the water and may hereafter put it to a new use which will give him the right to sue in respect of injury done to it: see the observations of FRY, J. (5 Ch.D. 773) in *Pennington v. Brinsop Hall Coal Co.* (2). Each of the plaintiffs is a riparian owner and has, as such, these rights. The plaintiff association is, moreover, the owner or occupier of a several fishery and, as such, has a right to sue for its disturbance which is a legal right.

B In *Nicholls v. Ely Beet Sugar Factory, Ltd.* (3), LORD WRIGHT, M.R., said ([1936] Ch. 347):

C " . . . there cannot be in the strict sense of the term a trespass to the incorporeal hereditament, but there may be an action in the nature of trespass. That class of case is dealt with in *Fitzgerald v. Firbank* (4), where it was held 'that the grant did not give a mere licence to fish, but a right to fish and to carry away the fish caught; that this was a profit a prendre, and was an incorporeal hereditament; and that the plaintiffs had a right of action against anyone who wrongfully did any act by which the enjoyment of the rights given to them by the deed was prejudicially affected.'

D LINDLEY, L.J., says ([1897] 2 Ch. 101): 'It was laid down in *Smith v. Kemp* (5) and is repeated in COMYN'S DIGEST, 5th ed., vol. v., p. 362, "Piscary": "If a grant be de liberâ piscariâ, the grantee shall have the property of the fish there, and shall maintain trespass for fishing there." '—that was the same as the case last cited. 'You cannot draw any distinction'—the lord justice proceeds—'with reference to the right of taking away

E the fish between one kind of right of fishing and another. If a person chooses to pay for the amusement of catching fish and leaving them in the water, of course he can do so.' Then the lord justice goes on to find what the plaintiffs' rights are in the fishery and he adds: 'The defendant has no right to foul the river to the damage of anybody who has rights in that river. He is a mere wrongdoer, though if the plaintiffs had no rights in the river of course they would have no right legally to complain. This is a somewhat unusual case, and I am not aware of any precedent for what I may describe as an action of nuisance by the owner of a sole and exclusive right of fishery. But once grant that the owner of such a right can sue in trespass for one kind of infringement of it, I cannot see why he might not maintain an action on the case for nuisance at common law for such an interference

G with his right as is proved in this case.' That therefore defines the right, and it also defines the cause of action which follows from an infringement of that right. It is not, I think, material to decide whether the proper description of that cause of action is trespass, or trespass on the case or nuisance, forms of action which are now abolished. If it were described as 'nuisance' the word 'nuisance' would be used in that connection as meaning a private nuisance, one which involved an interference with a private right, so that, as I shall explain in a moment, an action would lie for that interference."

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If, therefore, a single defendant had caused the state of things which I have found, there would be no common law answer to the plaintiffs' claim, but the difficulty in this case has arisen from the fact that there were four and still are three defendants. One of them admits that he has committed an actionable wrong, but the other two allege that, having regard to that state of things, their

contribution, if it exists, is harmless and, therefore, not actionable. This point is, in my judgment, answered by *Blair & Sumner v. Deakin, Eden & Thwaites v. Deakin* (6), a pollution case, where KAY, J., said (57 L.T. 525):

" . . . now, is it the law that, supposing it is impossible to say that any one of those persons [i.e., manufacturers higher up the stream] pours into this stream foul matter enough by itself to create a nuisance, but that what they all pour in together does create a nuisance, that the plaintiffs cannot sue any one of them? If that were so I suppose a plaintiff who lost that which is his natural right—namely, to have the water of the stream pass in its original pure condition—might lose that right entirely by the combined action of a number of manufacturers above him. They might all laugh at him and say, 'You cannot sue any one of us because you cannot prove that what each one of us does would of itself be enough to cause you damage.' All I can observe is that, in my opinion, it would be a most unjust law if there were such a law. Were the case absolutely new, and my individual opinion had to be given upon it, I still should say distinctly that that was not the law. A man is not bound to sue anybody until he finds that he is being injured. A riparian owner has, as I have already remarked, a natural right to the use of the water which passes him in the stream in its original pure condition as nature would send it to him. If he finds that it is no longer in such a condition; that it is impossible to use it for domestic purposes or for manufacturing purposes, and that it becomes a filthy sewer like this stream; and further, if he finds that that was produced by the combined acts of a number of riparian proprietors above him, is he without remedy? Has he no remedy because each one of them can say: 'It was not my doing. I only contributed a part, and the part I did contribute was not enough to do you damage'?"

After referring to other cases and, in particular, to *Thorpe v. Brumfitt* (7), KAY, J., came to the conclusion that, even though there were no actionable right against any one, there might be, nevertheless, an action against them all.

Deakin's case (6) really did no more than follow *Thorpe v. Brumfitt* (7). That was a right of way case, where JAMES, L.J., said (8 Ch. App. 656):

"The plaintiff cannot complain, unless he can prove an obstruction which injures him. The case is not like one of trespass, which gives a right of action though no damage be proved. In the present case, I cannot come to any other conclusion than that arrived at by the Master of the Rolls, that the right of access to the inn-yard has been interfered with in a way most prejudicial to the plaintiff. Nothing can be much more injurious to the owner of an inn than that the way to his yard should be constantly obstructed by the loading and unloading of heavy waggons. If a person who was going to put up his horses at the inn was stopped by the loading or unloading of waggons, he would probably at once go to another inn. Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant."

Counsel for the corporation sought to distinguish these cases, saying that they merely decided that, where a number of defendants, none of whom

individually commits an actionable wrong, produce a wrong by the aggregate of their actions, they may all be sued, and that this does not apply to a case where one defendant admittedly could be sued alone. I do not accept this submission. I cannot believe that the law, while holding all of a number of defendants liable if none of them individually commits an actionable wrong, will relieve all the rest if the wrong of one of them is big enough to be by itself actionable. Indeed, I think that *Thorpe v. Brumfitt* (7) is an answer to this proposition.

This, however, is not an end of the case, for both the corporation and the power company are statutory bodies having statutory rights and powers on which each of them relies as a defence. I must deal with them individually, and first with the corporation. The existing sewage system was installed in pursuance of the Derby Corporation Act, 1901 (c. cclxvii). This Act recites (inter alia) that it is expedient that the corporation be empowered to construct the sewerage and sewage disposal works thereafter described, and that there should be one scheme for the treatment and disposal of the sewage of the area and that obligations and powers in that behalf should be conferred and imposed. Part V of the Act, headed: "Sewerage and sewage disposal works", begins at s. 105, which authorises the corporation to appropriate and utilise for the treatment and disposal of sewage the lands described in sched. V to the Act which are the site of the corporation's property as shown on the sketch plan which was used by both sides at the trial. Section 106 provides that, subject to the provisions of the Act, the corporation may make, in accordance with the deposited plans, the sewerage works described in the section with all ancillary works. Section 109 (1) is in the following terms:

"The sewage disposal works constructed on the lands acquired under the powers of this Act shall at all times hereafter be conducted so that the same shall not be a nuisance and in particular the corporation shall not allow any noxious or offensive effluvia to escape therefrom or do or permit or suffer any other act which shall be a nuisance or injurious to the health or reasonable comfort of the inhabitants of Spondon and this Act shall not exempt or be deemed to exempt the corporation from any liability for any nuisance arising from such sewage disposal works or from any proceedings which might but for this Act be taken against them under the provisions of the Public Health Acts or otherwise and the county council may take any proceedings they may think fit for the purpose of enforcing or giving effect to these provisions."

The marginal note to this section is: "For protection of parish of Spondon", but this sidenote, as I understand it, cannot control the meaning of the section, at any rate in the absence of some ambiguity. Section 113 is as follows:

"The corporation may divert all brooks streams and waters which can or may be intercepted or taken by the sewers authorised by this Part of this Act and the corporation may by means of such sewers discharge or permit to flow into the River Derwent the waters so intercepted or taken together with any effluent and other waters passing over or through or discharged from the sewage disposal works of the corporation: Provided that nothing in this Part of this Act contained shall authorise the corporation to construct any works or do any other thing in contravention of the Rivers Pollution Prevention Act, 1876, or s. 17 of the Public Health Act, 1875: Provided also that the corporation shall pay compensation to any person for any damage sustained by reason of the exercise of the powers of this section the amount of such compensation failing agreement to be settled by arbitration under the Arbitration Act, 1889."

Section 115 (15) deals with the obligations of local authorities having branch sewers which they are to connect with the main sewers of the corporation constructed under the Act, and the sub-section has the following proviso:

"Provided that the corporation shall keep the local authorities respectively indemnified against any breach of the Rivers Pollution Prevention Acts, 1876 and 1893, or the general law which may be committed by the corporation in reference to the treatment and disposal by the corporation of the sewage of the local authorities respectively and not arising through any neglect or default on the part of the local authorities respectively."

Section 117 is in these terms:

"It shall be the duty of the corporation within six months after the passing of this Act to proceed to carry out and execute the sewerage and the sewage disposal works authorised by this Part of this Act and in the event of the corporation not proceeding with such works within such period as aforesaid or not proceeding with the same with due diligence the requirements of this section may be enforced in manner provided by s. 299 of the Public Health Act, 1875."

The extension of the corporation's sewage works in 1930/35 was, according to their counsel, though here the borough engineer differed from him, constructed in pursuance of powers given by the Derby Corporation Act, 1930 (c. lxvi). Section 8 of this Act, which is in Part III, headed "River improvements and street works", after authorising the construction in accordance with the Act of a number of works for protecting the town against floods, includes work No. 13, which is in the following terms:

"A sewer or sewers commencing in an existing overflow chamber of the corporation at a point nine yards or thereabouts measured in an easterly direction from the commencement of Work No. 12 above described and terminating at the westerly bank of the river."

The same section authorises as work No. 9 the diversion of the stream resulting in the C outfall. On this the corporation's counsel argued as follows: (a) having regard to s. 117 of the Act of 1901, it is mandatory on the corporation, and not merely permissive, to carry out the various works authorised by Part V, i.e., the various works enumerated in s. 106 and by that section to be made and maintained in accordance with the deposited plans and none others; (b) if the works were made in accordance with the plans and a nuisance arose from them, the corporation are absolved because they were bound by statute to do the things which created the nuisance; (c) section 109 (1), which forbids the creation of a nuisance, applies only to a nuisance affecting the inhabitants of the parish of Spondon, which the plaintiffs are not; (d) section 113 expressly allows the corporation to discharge into the river any effluent discharged from the sewage disposal works of the corporation, and the only remedy of a person injured is to obtain compensation under the proviso to that section.

It appears to be true, on a comparison of the wording of s. 106 of the Act of 1901 with the deposited plans, that work No. 1 was to be a sewer terminating in the river Derwent. As constructed, this sewer entered an inspection chamber from which the pipe crossed the river at the weir below point A on the sketch plan. From the chamber a short pipe twenty-two yards long went to the river and formed the A outfall. This work was re-constructed after or under the Act of 1930, a second sewer entering the inspection chamber and being carried across the weir. Work No. 13, authorised by s. 8 of the Act of 1930, is described as

"A sewer . . . commencing in an existing overflow chamber of the corporation . . . and terminating at the westerly bank of the river."

It is this short sewer which, at times of flood, casts untreated sewage into the river, and it is said that this must have been the intention when the sewer was authorised by Parliament, because a system which provides for overflows of this sort in times of storm necessarily involves this result. I do not accept this

argument. I do not see why some form of filter or settlement tank cannot be provided. Indeed, the borough engineer said it could, but that he preferred to have it on the other side of the river. In any event, in so far as it is a nuisance, I am of opinion that s. 109 (1) of the Act of 1901 forbids it, and that the application of the sub-section is not limited to the inhabitants of Spondon, as alleged. Moreover, s. 113 provides expressly that nothing is to authorise the corporation to construct any works in contravention of the Rivers Pollution Prevention Act, 1876, or of s. 17 of the Public Health Act, 1875. Section 3 of the Act of 1876 makes it an offence to cause

“ . . . to fall or flow . . . into any stream any solid or liquid sewage matter . . . ”

Now, admittedly, outfall A does that very thing, and it is, therefore, not authorised by the Act of 1901. Section 17 of the Public Health Act, 1875, is in a negative form, and has always been interpreted as a proviso, but it clearly does not absolve a local authority who send sewage into a natural stream unless the effluent does not deteriorate the purity or quality of the water. This the corporation's main effluent, in my judgment, does, and, therefore, the Act does not excuse them. The fact that, by the proviso to s. 115 (15) of the Act of 1901, the corporation must indemnify minor local authorities whose works they take over against breaches of the general law seems to show that the acts of the corporation may be a breach of that law, and that they are not in all events protected. As regards the untreated sewage occasionally carried at outfall C into the river by the stream diverted under the Act of 1930, there is nothing in this Act which authorises any sewage at all to be put into that stream. The borough engineer told me that one storm overflow did in fact go into the stream before its diversion, and that others have been put in since. In my judgment, none of these is justified, either under the Act of 1901 or under the Act of 1930.

As to the point taken under the proviso to s. 113 of the Act of 1901 that compensation by arbitration is the only remedy, it is to be observed that this proviso does not cover the whole of Part V, like the proviso that immediately precedes it, but is limited to “ the exercise of the powers of this section ”. In my judgment, the only power conferred by the section is a power to divert streams and deal with waters so intercepted: the reference to effluent discharged from the sewage works does not seem to confer a new power respecting it: the power to turn the effluent into the Derwent is inherent in the direction to construct the works specified in s. 106.

A further point which was taken on the corporation's behalf was that this action is misconceived, the only remedy of the plaintiffs being to proceed by using the machinery of the Public Health Act, 1875, s. 299, and obtaining an order from the appropriate Ministry on the corporation to provide a proper system of sewage: see *Pasmore v. Oswaldtwistle Urban Council* (8). This point rests first on *Glossop v. Heston & Isleworth Local Board* (9), where the headnote reads:

“ A local board, under the Public Health Act, 1875, causing a nuisance by any act which, independently of the statute, would have given a cause of action to any person, may be made liable in damages, or be restrained by injunction, unless they can show a justification under the powers of the statute. But if a local board do no act themselves to cause a nuisance, but neglect to perform their duty of providing a satisfactory and healthy system of drainage, it is no ground of action by an individual for damages or an injunction, but the remedy is by prerogative writ of mandamus; and semble, this jurisdiction, notwithstanding s. 25 of the Judicature Act, 1873, ought not to be exercised except by the Queen's Bench Division.”

The defendants were a local board constituted in November, 1875, under the Public Health Act, 1875. The plaintiff complained that for some time before and

since the defendants became the sanitary authority, sewage was allowed to fall into a stream passing near his residence so as to pollute it and cause a nuisance to him. He complained to the defendants in May, 1876, and, nothing having been done, he brought an action against them in July, 1876, for damages and an injunction.

In his judgment, JAMES, L.J., said (12 Ch.D. 109):

"I am of opinion that, whatever may have led to it, this action was commenced by the plaintiff through a misapprehension as to what the legal rights and liabilities were—his legal rights against the board, and the liabilities of that board towards him. It is quite manifest, from the form of the claim and the evidence, that the action was not based upon any act whatever done by the defendants. It is based entirely upon their alleged neglect to perform the parliamentary duty cast upon them as the sanitary authority of a particular district. It is said that this is a very serious matter to the plaintiff and to the public generally. It appears to me that if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any local authority upon which duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not in a similar manner be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would be very much improved."

The *Isleworth* case (9), therefore, depended on the fact that the local board had done nothing themselves to cause the nuisance, but had merely inherited from predecessors sewers which brought it about. This, therefore, was an illustration of the well-known doctrine that a local authority will not be liable for mere non-feasance as opposed to misfeasance.

The next case relied on was *A.-G. v. Dorking Guardians* (10), where the head-note is:

"A sanitary authority in whom the sewers are vested have only a limited ownership in them; they are not in the same position as to responsibility for fouling a stream as a private individual, because they cannot stop the sewers on account of the damage to the inhabitants of the neighbourhood. And although, perhaps, the sanitary authority might obtain an injunction to restrain persons from using the sewers who had no right to do so, a landowner complaining of the nuisance cannot bring an action against them for not doing so; because an action cannot be maintained either at law or in equity to compel a person to bring an action for the purpose of restraining a nuisance which he cannot himself prevent. Where a sanitary authority have not themselves constructed sewers which are a nuisance, but only permitted them to be used as formerly by the inhabitants, they are not doing an act which can be restrained under the Public Health Acts or the Rivers Pollution Act, 1876. But if they are neglecting their duty in providing a sufficient sanitary scheme for the neighbourhood the remedy of an aggrieved landowner is by mandamus."

This, therefore, was again a case where the sewers had not been constructed by the local authority themselves. It was said, however, that the matter was carried further by *Robinson v. Workington Corpn.* (11). Here, however, the claim was admittedly founded on non-feasance, namely, the fact that the defendants had not constructed a sewer, in the place of the existing one, of sufficient dimensions to carry off the sewage in the district in which the plaintiff resided. It was decided that, as the obligation of the defendants to do anything in the matter arose out of the statute, namely, the Public Health Act, 1875, default on their part could only be dealt with by the statutory remedy under the Act. Lastly, *Hesketh v. Birmingham Corpn.* (12) was cited. In that case the defendant corporation had made the outlets into a stream which eventually

caused the flooding of which the plaintiff complained. His complaint was that they had not enlarged the capacity of the stream. It was not a case about foul sewage, and no breach of s. 17 of the Public Health Act, 1875, was alleged. The court held that the neglect to enlarge the stream was a mere non-feasance and not actionable.

None of these cases, as it seems to me, covers a case where the defendants have themselves created the sewers which caused the nuisance, for this must be a misfeasance. The plaintiffs' claim here is not that the corporation have neglected to provide further sewers, although it may be that the remedy for that of which they complain will be the construction of further sewers. They are not ratepayers of Derby who complain of the insufficiency of the drainage of the city. Their complaint is the converse, namely, that the city is so drained that their property outside it is damaged. More in point, as it seems to me, is the decision of PARKER, J., in *Jones v. Llanrust Urban Council* (13), where the headnote is:

"A riparian owner on the banks of a natural stream, whether he is or is not the owner of any part of the bed of the stream, is entitled to the flow of the water, past his land, in its natural state of purity, undeteriorated by noxious matter discharged into it by others. Any one so fouling the water infringes a right of property of the riparian owner, who can maintain an action against the infringer without proving actual damage, and obtain an injunction to prevent the continuance of the injury. Any one who turns faecal matter, or allows faecal matter collected by him or under his control to escape, into a river in such a manner or under such conditions that it is carried, whether by current or wind, on to his neighbour's land is, on the principle of *Rylands v. Fletcher* (14) (1868) (L.R. 3 H.L. 330), guilty of a trespass. Where the faecal matter so causing injury is discharged from a sewer, on the principle of *Rylands v. Fletcher* (14) the duty at common law of the owner of the sewer, whether he made it or not, is to prevent the sewage therein from escaping to the injury of others, and mere neglect of this duty gives a good cause of action to any person injured by such neglect. A private individual is entitled to an injunction to restrain a local authority from allowing sewage to escape from its sewer to his injury, notwithstanding the statutory right of the inhabitants of the authority's district to send their sewage into its sewers."

It is true that, in that case, PARKER, J., was at pains to distinguish the *Isleworth* case (9) and the *Dorking* case (10) on the ground that the defendants before him inherited their system, not under the Public Health Act, 1875, but under the Local Government Act, 1894. He decided the case, I think, on the principle of *Rylands v. Fletcher* (14), and this was recently referred to by VAISEY, J., in *Haigh v. Deudraeth Rural District Council* (15). The principle of *Rylands v. Fletcher* (14) is relevant here, for it seems to me that, if the corporation collect on their lands poisonous and harmful substances such as these, they must, in the absence of express statutory protection, be liable for their escape on to the land of another.

In my judgment, the line of cases headed by the *Isleworth* case (9) does not help the corporation, because this is a case, not of non-feasance, but of misfeasance, seeing that the Derby Corporation Acts, 1901 and 1930, which authorise the construction and maintenance of the offending works, do so only on the footing that no nuisance be created and that the Rivers Pollution Prevention Act, 1876, and s. 17 of the Public Health Act, 1875, be observed. If the corporation send effluent into the river in defiance of those Acts, being a nuisance, they are committing a wrong, and not merely permitting one. *Earl of Harrington v. Derby Corpn.* (16), a former case between these same parties, is also relevant here. It is to be observed that BUCKLEY, J., cited ([1905] 1 Ch. 223), the *Isleworth* case (9) and the *Dorking* case (10), and agreed that they applied to old

sewers into which householders of Derby had discharged their sewage and to the sewers which Derby Corporation had inherited from their predecessors. But the learned judge had no doubt that the corporation could be made liable to Lord Harrington in respect of sewers laid by the corporation themselves and in respect of additional sewage arising from the conversion to water closets of privies under their direction, and he gave damages, accordingly, under these heads. This seems quite inconsistent with the corporation's present submissions.

The power company also relies on statutory defences. The British Electricity Authority is the creation of the Electricity Act, 1947, by s. 1 (1) of which it was established, with a duty as from the vesting date, namely, April 11, 1948, of developing and maintaining an efficient, co-ordinated and economical system of electricity supply for all parts of Great Britain, and for that purpose, among other things, to generate supplies of electricity. The Central Authority, as they are called in the Act, took over the undertakings of a large number of authorised suppliers of electricity, including the Derbyshire and Nottinghamshire Electric Power Company, which was their predecessor on the site in question, and, by proviso (i) to s. 14 (2) of the Act, all property, rights, liabilities and obligations appertaining to generating stations which immediately before the vesting date were vested in authorised undertakers, such as the Derbyshire and Nottinghamshire Power Company, vested on that date in the Central Authority. By s. 57 (2) of the Act of 1947, the schedule to the Electric Lighting (Clauses) Act, 1899, was incorporated in the Act subject to modifications mentioned in Part III of sched. IV to the Act of 1947, by virtue of which s. 81 of the schedule to the Act of 1899 was not to apply to the Central Authority [see s. 2 of the schedule to the Act of 1899, as substituted by sched. IV to the Act of 1947]. Section 81 of the schedule to the Act of 1899 [as amended by the Act of 1947] is:

"Nothing in this schedule or any local enactment shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused or permitted by them."

The effect of its exclusion is to entitle the Central Authority to plead the defence of statutory authority even though a nuisance is being created, but this does not absolve them in all circumstances from causing a nuisance.

As the Central Authority inherits the liabilities of the Derbyshire and Nottinghamshire Electric Power Company, it is necessary to look at the statutory powers of that concern. The first Act is the Derbyshire and Nottinghamshire Electric Power Act, 1901 (c. cxxi), which incorporated the company and empowered it to construct, maintain and work electric generating stations, and supply electrical energy or power, with ancillary powers, and to acquire certain lands. The area of supply did not include the city of Derby at this time. By the Derbyshire and Nottinghamshire Electric Power Act, 1902 (c. xvii), the company's power to construct generating stations was enlarged. The Derbyshire and Nottinghamshire Electric Power Act, 1929 (c. lxxxvi), s. 36, expressly authorised the maintenance and carrying on of the generating station and works the subject of the present complaint. Section 37 of the Act, which is the chief prop of the power company in the action, says:

"(1) The company may abstract water from the River Derwent and may utilise the same for condensing and other purposes of the generating station situate upon the lands described in sched. I to this Act: Provided that all water so abstracted except that unavoidably lost by evaporation shall be returned to the river above Borrowash Weir in such a condition as not to cause injury to fish. (2) Nothing in this section or in the section of this Act of which the marginal note is 'Maintenance and use of generating station' [s. 36] shall authorise the company to abstract water from or return water to the River Derwent in any manner contrary to or inconsistent with the provisions of the deed set forth in sched. II to this

Act or in any manner prejudice diminish alter or take away any of the rights privileges powers or authorities vested in or enjoyed by Charles Joseph Leicester Earl of Harrington or his heirs or successors in estate or any person in trust for him or them as owner or owners of Borrowash Mill and the weirs and sluices referred to in the said deed or as riparian owner or owners upon the river except so far as may be provided by the said deed."

A Section 39 of this Act gives the company power to acquire by agreement further lands up to two hundred acres

" . . . for the purposes of their works and undertaking but the company shall not create or permit a nuisance on any such lands."

B It is under this last section that the company acquired the land on the right bank of the river on which the cooling towers are now situate.

The statutory defences of the power company, therefore, are (i) that having regard to the exclusion of s. 81 of the schedule to the Electric Lighting (Clauses) Act, 1899 [by s. 3 of the Derbyshire Electric Power Act of 1901], it is not liable at the suit of a member of the public even though it creates a nuisance; (ii) that, by virtue of s. 37 (1) of the Act of 1929, it is specifically empowered to abstract water from the river and use it in the way in which it does. Junior counsel for the power company boldly asserted that common law liability need not be considered at all, but that the only available action was one for breach of a statutory duty, and that the present claim is, therefore, misconceived.

C As for the first defence, counsel relied on the well-known passage in VISCOUNT DUNEDIN's speech ([1930] A.C. 183) in *Manchester Corp'n. v. Farnworth* (17):

D "That brings me to say a word or two on what I conceive to be the well settled law on such matters. The cases are numerous . . ."

After mentioning a number of them, he continued (*ibid.*):

E "I mention these to show that I have carefully considered the question but I think it would be of no real service to analyse exactly what was decided in each actual case. I believe their whole effect may be expressed in a very few sentences. When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense."

F Is, then, the nuisance the inevitable result of that which Parliament has authorised? It is said that it is, having regard to the fact that each increase in the generating capacity of the station was authorised by the Electricity Commissioners. This, however, is very far from showing that the result, viz., the excessive heating of the water, is inevitable. Mr. Woods, a witness for the power company, admitted that the station could be run, as many stations are, on what he called a closed circuit, without pouring any heated water into the river, and it is clear enough that, short of this, other expedients such as the cooling towers already in existence could be found, by means of which the water could be reduced to a tolerable temperature before it was returned to the river.

H The second defence is more relied on. In my judgment, the right of the power company to abstract the water of the river for its purposes is not an absolute right which exists whether or no the water is returned as the proviso directs. Counsel for the power company argued that the only action for which the power company was liable was for a breach of its statutory duty in returning water

to the river in a condition injurious to fish, contrary to the proviso to s. 37 (1) of the Act of 1929. I am of opinion that, on its true construction, s. 37 (1) authorises the power company to abstract the river water only so long as it complies with the proviso. If the proviso be not complied with, then the right goes with it. If this be so, the question is whether the condition of the water as it returns to the river after use by the power company is such as to be injurious to fish, i.e., to fish life in the abstract, and not merely to fish in the plaintiffs' waters. To this there can be only one answer. Water heated to a temperature of over a hundred degrees Fahrenheit must be highly injurious to any fish native to English waters. It was further argued on the plaintiffs' behalf that the quantity of chlorine found in the effluent itself was injurious to fish, and that the proviso does not mean that the river, after the effluent has mingled with it, shall not be injurious, but that the effluent itself shall not be injurious. In my judgment, the right answer is the latter, and, if so, there is evidence that on some occasions a quantity of free chlorine is emitted, which may cause injury to fish, but I regard this as a subsidiary matter.

Section 37 of the Act of 1929, however, does not stop there, for s. 37 (2) specifically provides that the power to maintain the station given by s. 36 is not to authorise the power company to "prejudice diminish alter or take away" the rights of the Earl of Harrington or his sequels in title "as riparian owner or owners upon the river". Section 37 (2) is mainly concerned with the reach of the river immediately below the power station and above Borrowash Bridge, and at first sight it seemed to me that the apparently general words at the end of the sub-section ought to be limited to the Earl's rights as riparian owner in the reach with which the section deals. If so, this sub-section has no application, for the riparian rights which the Earl, the second plaintiff, is here seeking to protect are below Borrowash Bridge. On consideration, however, I conclude that I am not justified in limiting the words as suggested, and that they protect the riparian rights of the Earl anywhere he has them on the river. If this be right, the statutory power given by s. 36 to maintain the station cannot avail the power company, and it is relegated to its common law position. In the upshot, therefore, I hold that the plaintiffs have established a good cause of action against both the corporation and the power company, as they admittedly have against the first defendant.

Judgment for the plaintiffs.

April 7. **HARMAN, J.:** It now falls to me to determine the form of order which should be the outcome of the judgment I delivered on Mar. 31. First, the question arises whether there should be any injunction in the circumstances or whether the plaintiffs should content themselves with some less relief? Prima facie, a plaintiff, whose rights have been invaded in the way in which I have held these rights to be invaded, is entitled to relief from this court by way of injunction. It is not denied by the first defendant, or by the third defendant, that some form of injunction is appropriate, but Derby Corporation, the second defendants, say that as against them no injunction should go. The corporation put in the forefront of their claim their position as local authority statutory undertakers, and say that they can only obtain a loan on the authority of the Ministry of Health and that that will involve an inquiry under the Local Government Act, 1933, and whether or not they will be able to do anything depends, therefore, on matters outside their control, and they say they ought not to be affected by an injunction, because the court should not grant an injunction in a case where it may or may not be possible to carry it out. It seems to me that that plea, if it were good, would make it impossible ever to grant an injunction against a local authority in this position. It is well known that many such injunctions have been granted. It is well known too, I think, that a local authority with the pressure of such an injunction on it is in a strong position to say that it is a deserving candidate for the necessary financial help

which it may be only the Ministry of Health can now give. I see no reason on that ground for the suggestion that one should leave the corporation to invoke the Public Health Act, 1936, s. 322. That is a matter I have already decided adversely to the corporation, because they submitted to me that the only remedy of the plaintiffs was a remedy through the statutory measures, and that submission I rejected. It was then suggested that the injury to the plaintiffs might be compensated properly in damages, and that, once the effluent of British Celanese, Ltd., the first defendant, was removed, an injunction would be quite unnecessary. I am quite unconvinced that that is so as a matter of fact. I do not think this is the kind of damage which can ever be compensated by an award of damages, but the contribution of the corporation is a substantial one, and I think an injunction must follow. Consequently I propose to grant an injunction against all the defendants.

I think the most convenient form is to grant an injunction against each of the three defendants restraining them from causing or permitting (whether by their agents or otherwise) any effluent to flow or pass from their respective premises in the county of Derby into the river Derwent, so as to alter (either by itself or in combination with any effluent discharged into the river by any of the other defendants or any other person) to the injury of the plaintiffs the quality of the waters of the river Derwent or of the river Trent where they flow past or over the plaintiffs' premises, and to add to that an injunction not to cause or permit the effluent to flow into the river so as to interfere with the enjoyment by the plaintiffs or either of them or their sequels in title or those claiming through or under them the right of fishing in the plaintiffs' waters as mentioned and defined in the statement of claim. I think those two injunctions will cover all that the plaintiffs ought to have.

I think it is right that pressure ought to be brought to bear on wrongdoers in the position of the defendants, and, therefore, I shall suspend the injunction for two years only, and at the end of that time, if a further suspension be wanted, there will have to be proceedings either before me or some other judge in this Division. Of course, that involves that during those two years some of the damage of which the plaintiffs complain will be continuing, because the effluent to a greater or less degree will continue to come down the stream. Therefore, the defendants will be put under an undertaking, which will be a term of the suspension of the injunction, to indemnify the plaintiffs in the terms used by FRY, J., in *Pennington v. Brinsop Hall Coal Co.* (2). They must undertake to indemnify the plaintiffs to such an extent and in such manner as the court may direct, against all damage arising out of the suspension of the injunction, and the damage for which the defendants may be held liable on the inquiry which will afterwards be directed, and the defendants will also be put on terms to report in writing to the plaintiffs by Mar. 31, 1953, as to their activities in the pursuit of their compliance with the injunctions granted. Those reports must not be made a cause of oppression by the plaintiffs, but will enable them to know and satisfy themselves that something at least is being done to help.

This action was not only an action for an injunction, but was also an action for damages in trespass and nuisance, and it is convenient, I think, to put the damages under both trespass and nuisance as one inquiry. I propose to say that the inquiry shall be taken by the judge in person. There arises a point which is, so far as I know, novel, and that is that each of the defendants applies to me here and now to apportion the damage between them. There is a power under the Law Reform (Married Women and Tortfeasors) Act, 1935, to make an order of this sort. In s. 6 (2) there are these words:

"In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage . . ."

As between tortfeasors who are liable having regard to s. 6 (1) (c) of the Act it is provided that,

“any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise . . .”

The defendants say that they are not joint tortfeasors, but they are severally liable to the plaintiffs for a tort, the fouling of the plaintiffs' premises and the obstruction of their fishing. That is one tort to which all the defendants have contributed something. However, it is not a case of defendants acting in concert or being joint tortfeasors, and their respective contributions are, to some extent, of a very different kind, but they all add up to the one thing in the end. On the one hand, it is said that the plaintiffs ought to have the advantage of a judgment for the whole sum against all. On the other hand, it is said by the defendants that each of them should have the advantage of knowing what is the extent of his liabilities. I have been referred to *Croston v. Vaughan* (18), where PORTER, J., held himself entitled in a motor car case to apportion the damage to two defendants, each of whom he had held to be in part responsible for the damage which accrued to the plaintiff. The plaintiff was a passenger in a car and sued the driver of that car and two other drivers of motor cars, because she was injured in an accident in which they were involved. PORTER, J., found that the driver of the car in which the passenger was riding was partly to blame, but one of the other drivers was more to blame, and having, in the first instance, given judgment for a lump sum against both those defendants, he was asked to make an apportionment under s. 6 of the Act of 1935. That he did and awarded the damages as to two-thirds and one-third. That, I think, must have involved the withdrawal of the judgment against the defendants jointly and have become a judgment against each of them severally for those several sums. The Court of Appeal held that that was a course which was within the judge's jurisdiction. If this was a case in which I could award damages now, I could be asked clearly to apportion those damages, but it is said that because there is an inquiry to come, and because it may be convenient for the plaintiffs to have all the defendants responsible on that inquiry, I ought not now to apportion the damages. I think that I have jurisdiction to do so, and that it would be proper that I should. The defendants, having agreed between themselves in what proportion they should pay the damages, I propose to incorporate in the order, not a declaration, because I cannot make declarations by consent, but an order that the damages, when certified as the result of the inquiry, “are paid by the several defendants in the proportions following”, and then they will be set out. The advantage to the defendants, of course, is that on the inquiry each defendant will then consider what, if anything, he has to pay into court according to his estimate of the sum total of the whole damage, and will not have to pay into court the total amount.

Order accordingly.

Solicitors: *Marchant, Gerrish & Newington* (for the plaintiffs); *Linklaters & Paines* (for the first defendant); *Sharpe, Pritchard & Co.*, agents for *E. H. Nichols*, town clerk, Derby (for the second defendants); *R. A. Finn* (for the third defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

NOTE.

SLATER v. SLATER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), April 29, 30, May 1, 1952.]

A *Divorce—Pleading—Answer—Sufficiency of bare denial—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 17 (1).*

PETITION by husband for dissolution of marriage on the ground of the wife's desertion.

B The wife's answer in its original form merely denied the alleged desertion. At the conclusion of the evidence leave was granted to amend the answer so as to set up the real defence to the petition as apparent from the evidence, namely, that there had been a mutual agreement to separate, that this agreement had been repudiated by the husband, that this repudiation was accepted by the wife who then expressed a wish to resume cohabitation, and that in those circumstances the husband was the deserting party.

H. H. V. Forbes for the husband.

C *L. Brooks* for the wife.

D **WILLMER, J.**, in the course of his judgment, said: I think this is a case in which it is appropriate to refer to the form of the answer that was originally put in to this petition. Rule 17 of the Matrimonial Causes Rules, 1950, requires that every answer containing more than a simple denial of the facts stated in the petition should set out with sufficient particularity the facts relied on, but not the evidence by which they are to be proved. It seems to me that an answer which contains nothing but a bare denial in a case of this character offends against both the letter and the spirit of that rule. A bare denial, if it means anything at all, amounts to a denial that the separation ever took place in the way or at the time the petitioner alleges. In the present case that has never been the wife's contention.

E I am tempted to raise the question whether a bare denial is ever an appropriate or sufficient answer in a desertion case. It may very well be that where the charge is adultery or cruelty a bare denial is an appropriate answer, but in answer to a charge of desertion the respondent may be going to say any one of a number of things. He may be going to say that there was no separation; or that, although there was a separation, it was a separation by consent; or that the petitioner gave him good cause for leaving her; or that the petitioner's conduct was such as to drive him out; or that it was true that he had deserted the petitioner without cause, but that he had put himself right by making bona fide efforts to return. Each and all of those answers would afford a perfect defence to a charge of desertion, and I should have thought that, if the respondent is going to set up one of those cases, both the spirit and the letter of the rule require that it should be pleaded with full particulars. I may, perhaps, add these two observations. From his own client's point of view, the pleader who puts on paper the facts which his client is going to allege gives much greater conviction to the evidence when it is eventually given. On the other side, it seems to me that the petitioner is entitled to be told what the real case of the respondent is, not only as a matter of natural justice, but also for another and special reason of which I think this case furnishes a good example. Had the petitioner here known what the real defence of the respondent was going to be, it may well be that the petitioner would have desired to plead to those allegations by way of reply, but where a bare denial is put in there is no right of reply and the petitioner has been deprived of that opportunity.

H Solicitors: *Neil Maclean & Co.* (for the husband); *J. S. Stevens* (for the wife).

A.T.H.

ALLIED IRONFOUNDERS, LTD. v. JOHN SMEDLEY, LTD., AND OTHERS.

[QUEEN'S BENCH DIVISION (Devlin, J.), May 5, 1952.]

Landlord and Tenant—New lease—Sub-tenancy—Time for giving notice and making claim—Expiration of head lease by effluxion of time—Sub-lease terminable by notice—Notice given to operate expiration of after head lease—Landlord and Tenant Act, 1927 (c. 36), s. 5 (1) (2). A

Lessees of business premises granted a sub-lease of part of them for two and a half years and thereafter until determined by either party by giving six calendar months' notice in writing to expire on Dec. 25, 1948, or any subsequent quarter day. The sub-lease contained no reference to the fact that the head lease expired on Mar. 25, 1952. On Mar. 24, 1952, the lessees gave the sub-tenants notice to quit on Sept. 29, 1952. The lessors brought an action for possession of the premises against the lessees and the sub-tenants, and on Apr. 23, 1952, the sub-tenants served notice on the lessees claiming the grant of a new lease in lieu of compensation for goodwill under s. 5 (1) and (11) of the Landlord and Tenant Act, 1927. B

HELD : the sub-tenancy was terminated by the expiration of the head lease on Mar. 25, 1952, and not by the operation of the notice of Mar. 24, and, therefore, the sub-tenancy was not "terminated by notice" within s. 4 (1) or s. 5 (2) of the Landlord and Tenant Act, 1927, with the result that the notice requiring a new lease under s. 5 (1) and an application for a new lease under s. 5 (2) (if made) were out of time. C

AS TO TENANT'S RIGHT TO A NEW LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 297-299, para. 340; FOR THE LANDLORD AND TENANT ACT, 1927, s. 5 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 892; and FOR CASES, see 2nd DIGEST Supp. D

PRELIMINARY ISSUE in an action for possession.

By a lease dated Apr. 25, 1932, the landlords, plaintiffs in the action, let premises in 28 Brook Street, and 2 Haunch of Venison Yard, London, W.1, to the first defendants, John Smedley, Ltd., for twenty years terminating on Mar. 25, 1952. By a sub-lease dated June 3, 1946, the first defendants let part of the premises to the third defendants, J. & S. Bickley, Ltd., for two and a half years from Dec. 25, 1945, and thereafter until determined by either party by giving six calendar months' notice in writing to expire on Dec. 25, 1948, or on any subsequent quarter day in any year. There was no reference in the recital or in the operative part of the sub-lease to the termination of the head lease on Mar. 25, 1952. The sub-lease continued after the end of its fixed term. The landlords, requiring the premises for their own occupation, did not extend the head lease. The first defendants did not give six months' notice to determine the sub-lease on Mar. 25, 1952, but on Mar. 24, 1952, they gave notice to determine it on Sept. 29, 1952. On Mar. 27 the landlords issued a writ for possession against the first and second defendants (the latter being sub-tenants of another part of the premises with which this report is not concerned), and they both gave possession. On Apr. 23, 1952, the third defendants, who had also been joined as parties, served on the first defendants a notice claiming a new lease under the Landlord and Tenant Act, 1927, s. 5 (1) and (11) in lieu of claiming compensation for goodwill under s. 4 (1). On the hearing of a summons for judgment under R.S.C., Ord. 14, DEVLIN, J., gave leave to defend and made an order that the point raised on the defence should be tried as a preliminary point of law. The landlords contended that the tribunal provided by s. 21 (1) of the Act of 1927 had no jurisdiction to grant a lease to the third defendants. E F G H

Heathcote-Williams, Q.C., and *N. R. King* for the landlords.

N. C. Bridge for the third defendants.

DEVLIN, J., stated the facts and continued: Section 5 of the Landlord and Tenant Act, 1927, provides:

A “(1) Where the tenant alleges that, though he would be entitled to compensation under the last foregoing section, the sum which could be awarded to him under that section would not compensate him for the loss of goodwill he will suffer if he removes to and carries on his trade or business in other premises, he may in lieu of claiming such compensation, at any time within the period allowed for making a claim under the said section, serve on the landlord notice requiring a new lease of the premises at which the trade or business is carried on to be granted to him. (2) Where B such a notice is so served, the tribunal, on application being made for the purpose either by the landlord or by the tenant not less than nine months before the termination of the tenancy, or, where the tenancy is terminated by notice, within two months after the service of the notice, may, if it considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy . . . ”

C The first defendants' lease from the landlords and the third defendants' tenancy from the first defendants, have both come to an end, but there is a provision in s. 5 (1), enabling the tribunal to make an order binding on the landlords:

D “Where the term for which, in the opinion of the tribunal, a new lease should be ordered to be granted would extend beyond the termination of the lease held by the immediate landlord, the power of the tribunal under this section to order the grant of a new lease shall include power to order the grant of such lease and reversionary leases that the combined effect thereof will be equivalent to the grant of a new lease for such term as aforesaid.”

E Counsel for the landlords contends that the conditions precedent to the exercise of the tribunal's jurisdiction under s. 5 (1) and (2) have not been and cannot now be fulfilled, that there is no power to waive or modify them, and that any claim brought before the tribunal must as a matter of law necessarily fail. He claims that the notice required by s. 5 (1) has not been given within the statutory time, and it is conceded that neither the tribunal nor anyone else has power to extend that time. The conditions specified in s. 5 (1) and (2) are conditions precedent to the jurisdiction of the tribunal. The F first is that the notice referred to must be served within the statutory time, and the second is that an application must be made by the tenant not less than nine months before the termination of the tenancy, or, where the tenancy is terminated by notice, within two months after the service of the notice. Two months from the date of the notice to quit—Mar. 24, 1952—have not yet expired. Accordingly, if the sub-lease is a tenancy which was terminated by notice, application can still be made. Otherwise the application had to be made not G less than nine months before the termination of the tenancy, and that time has long since gone by. Under s. 5 (1) of the Act of 1927 the notice must be served

“at any time within the period allowed for making a claim under the said section”,

and that period is thus prescribed by s. 4 (1):

H “The tenant of a holding to which this Part of this Act applies shall, if a claim for the purpose is made in the prescribed manner—(i) in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant; and (ii) in any other case, not more than thirty-six nor less than twelve months before the termination of the tenancy . . . ”

The same point arises. If this tenancy was terminated by the notice of Mar. 24, it is conceded that within one month of that time notice under the Act was given, but, if it was not so terminated, it is also conceded that no notice under the Act

was given between thirty-six and twelve months before the termination of the tenancy.

The first question that has been argued is whether this notice to quit at any time had any effect or validity in law. If the true view of the sub-lease is that, although it is not expressed to terminate on Mar. 25, 1952, it must be taken so to terminate because the head lease terminated on that date, then the giving of any notice after Sept. 25, 1951, would be merely illusory and of no value or effect. On that basis the construction of the lease would be that it was for two and a half years certain—i.e., its minimum period would be up to June 25, 1948—that its maximum period was until Mar. 25, 1952, and that between those two dates it might be terminated at a quarter day by six months' notice. It has, however, been argued for the third defendants that that is not the effect which ought to be given to the sub-lease. They concede that, if the head lease was determined on Mar. 25, 1952, the sub-lease must fall with it, whether notice had been given or not. But, they say, had the first defendants obtained a new lease going beyond Mar. 25, 1952, or had they obtained the freehold—had they, in short, obtained a title to the land which would have enabled them to continue their sub-lease to the third defendants—since the sub-lease sets no express limit of Mar. 25, 1952, they would have been obliged to continue it until they terminated it in the only way prescribed in the document, which is by giving six months' notice.

This is an arguable contention, but I do not propose to decide the case on that point. I shall assume in favour of the third defendants that the sub-lease did not necessarily come to an end on Mar. 25, 1952, but might have gone on beyond it if the first defendants had acquired a title to the property. On this basis counsel for the third defendants has argued that it was at the time of the giving of the notice of Mar. 24 uncertain how the tenancy would be terminated. It was conceivable that, in the twenty-four hours which elapsed, negotiations might have taken place between the first defendants and the landlords by which the first defendants obtained a title to the property. It might be hardly likely to happen, but counsel is right in saying on his view of the sub-lease that, until the actual expiry of the head lease, no one could know with certainty as a matter of law whether that lease was going to be renewed and the first defendants' title was going to be extended. Therefore, he says, this notice at the time it was given was a valid and effective notice to terminate the tenancy within the period of six months. The fact that something supervened which terminated the tenancy by some other method, does not affect this position. As I understand his argument he says one has to look at the position as at the date the notice was given and if at that date the notice is effective to terminate an existing tenancy, it falls within the provisions of the Act.

That, of course, is a matter of the construction of the words of s. 4 (1):

“in the case of a tenancy terminated by notice, within one month after the service of the notice on the tenant.”

The language evidently refers to some event which either has taken place, or, it may be, is going to take place, and not to any quality in the lease. It does not refer to a tenancy terminable by notice for the obvious reason that many leases are terminable by notice or by effluxion of time according to what happens. A tenancy for twenty-one years may be terminable by notice given at the end of seven or fourteen years, but the Act does not seek to divide leases into categories according to whether they are terminable by notice or not, since there are no such precise categories. The word “terminated” is used deliberately and is not to be construed as if it meant terminable.

The question is, therefore, one, which, I think, is of fact: Was this sub-tenancy terminated by notice? Of course, no tenancy is terminated by notice in the sense that it terminates on the day that the notice is given. The Act clearly means terminated by operation of the notice, although until the notice has

expired the tenancy remains alive. In my opinion, to the question whether this sub-tenancy was terminated by operation of the notice given on Mar. 24 there can be only one answer—it was terminated on Mar. 25, long before the notice had expired, because the head lease then expired, and it is immaterial that the third defendants may be able to say that, if events had happened otherwise, it might have been terminated in some other way. In the vast majority of cases when notice is given, although I suppose one cannot be certain at the date of the notice that the tenancy will be terminated by the notice, one is pretty sure that it will. That may be why the statute is not concerned to distinguish between the state of facts on the day the notice was given and the state of facts as ultimately they may be. If a notice to quit is a six months' notice, the notice under the Act has to be given before the notice to quit has operated. In the ordinary case everybody will know that a notice to quit is going to operate. In this very exceptional case, on the facts which I have assumed, the persons concerned did not know for certain, or might not have known for certain, that the notice was going to operate. That, in my judgment, makes no difference to the inquiry which has to be made, which is: When it is known how the tenancy was brought to an end, was it terminated by notice, and, if it was terminated by notice, was the notice under the Act served within one month after the service of the notice to quit. It would be a dangerous thing to try to get away from the natural meaning of words because exceptional circumstances which the Act may or may not have contemplated have introduced an element which might tempt one to think that the policy of the legislature might have been different. That is not a question which any court has to determine. It has only to apply the words of the Act to the facts of the particular case, and, doing so I think leads inevitably to the conclusion at which I have arrived.

The result is, therefore, that I accept the argument of counsel for the landlords that, no notice having been served within the statutory time, the tribunal could not have jurisdiction, and, therefore, there can be no claim made by the third defendants under the Act of 1927.

Judgment for the plaintiffs.

Solicitors: *Savory, Pryor & Blagden* (for the landlords); *Gery & Brooks* (for the second sub-tenants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

CURTIN v. CURTIN.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.), May 9, 1952.]

Justices—Husband and wife—Maintenance order—Enforcement—Wife “residing with” husband—Husband living in wife’s house—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (c. 51), s. 1 (4).

On Jan. 31, 1951, justices made a maintenance order against a husband. Between that date and May 9, 1951, the parties lived—though not as man and wife—in a house owned by the wife who did not take any step to evict her husband because she was erroneously of the opinion that, if she did so, she might be adjudged guilty of desertion. By May 9 the husband was in arrear with the payments under the order to the extent of £26. On an application to commit him to prison for failure to comply with the order,

HELD: if a husband resided with his wife in her house she also resided with him within the meaning of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4); as, for a period of three months after the making of the order, the wife had so resided the order was no longer enforceable; and no order for the committal of the husband could be made.

FOR THE SUMMARY JURISDICTION (SEPARATION AND MAINTENANCE) ACT, 1925, s. 1 (4), see HALSBURY’S STATUTES, Second Edn., Vol. 11, p. 864.

Cases referred to:

- (1) *Evans v. Evans*, [1947] 2 All E.R. 656; [1948] 1 K.B. 175; [1948] L.J.R. 276; 112 J.P. 23; 2nd Digest Supp.
- (2) *Thomas v. Thomas*, [1948] 2 All E.R. 98; [1948] 2 K.B. 294; [1948] L.J.R. 1943; 112 J.P. 345; 2nd Digest Supp.
- (3) *Wheatley v. Wheatley*, [1949] 2 All E.R. 428; [1950] 1 K.B. 39; 113 J.P. 459; 2nd Digest Supp.

CASE STATED by Middlesex justices.

At a court of summary jurisdiction sitting at Wealdstone on Aug. 15, 1951, an information was preferred by the wife against the husband alleging that he had not complied with an order made on Jan. 31, 1951, on the ground of his wilful neglect to provide her with reasonable maintenance, that he should pay her maintenance at the rate of 40s. a week. Between Jan. 31, 1951, and May 9, 1951, the parties were living in the same house, but not as man and wife. The house was owned by the wife who had not asked the husband to leave or taken any step to evict him because she feared that, if she did so, she might be adjudged guilty of desertion. Otherwise, she would have asked him to leave, and, if he had refused, would have tried to force him to go. By May 9, 1951, the husband was in arrears with the payments under the order to the extent of £26 11s. For the husband it was contended that, as the parties were living under the same roof, under s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the order had ceased to have effect. The wife contended that the husband insisted on residing in her house so as to defeat the order, and that he was residing with her and not she with him. The justices being of the opinion that s. 1 (4) was limited in its operation to a wife who continued to reside with the husband and not to a husband who continued to reside with his wife, held that the order was enforceable and committed the husband to prison for three lunar months in default of payment of the arrears.

Stranger-Jones for the husband.

Charles Lawson for the wife.

LORD GODDARD, C.J.: If we could see our way to uphold the order of the justices we would do so, because it is very desirable that a man should maintain his wife, more especially when the matrimonial home happens to be

the wife's house in which the husband lives and does not pay anything. The difficulty in these cases is the wording of the Act. I am not going to repeat what has been said by the court in *Evans v. Evans* (1), *Thomas v. Thomas* (2) and *Wheatley v. Wheatley* (3). The only difference between this case and *Evans v. Evans* (1) is that in *Evans v. Evans* (1) the house belonged to the husband and the wife insisted on living in it, whereas in this case the wife has allowed the husband to reside in her house. The wording of s. 1 (4) of the Act is that the order shall have no effect

" . . . whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband."

B So that, if she was residing with her husband at the time the order was made and continues to reside with him for three months thereafter, the order automatically comes to an end.

In the opinion of the court, that is what has happened in this case. The justices have sought to draw a distinction between a wife residing with her husband and a husband residing with his wife. I am afraid that is too subtle a distinction for me. If a husband resides with his wife, the wife resides with her husband, and vice versa. In the present case, no doubt, the parties are living at arms' length under the same roof, but they are living together under the same roof. As we pointed out in *Evans v. Evans* (1), and afterwards in *Wheatley v. Wheatley* (3), the words of the statute have to be given their ordinary meaning, and the court could not see how it could be said that the parties did not reside together when they were living in the same house together. In the present case the justices find that for a mistaken reason the wife has never asked her husband to leave the house. Under this Act, she could get an order while she was still living with him, and as soon as she got it she need only tell him to leave the house and bolt the door against him if he did not, or, perhaps, take proceedings in the county court. She never asked him to leave, as the justices have found, because she thought that, if she did, she would be guilty of desertion, but in such a case she would not be guilty of desertion without cause. As it is, at the present moment and ever since she got the order her husband has been living in her house by her leave and licence, and her reason for permitting him to do so is immaterial. If she withdrew the leave and licence and told him to go, and he did not do so, so that he became a trespasser, there would be very different considerations arising, and I think it might well be that in such a state of affairs the court would not regard the parties as living together because it would be very difficult to say that a householder was residing with a trespasser who was on the premises against the will of the householder, but in this case it is abundantly clear that the wife never has requested the husband to go and he is still there with her permission. In my opinion, therefore, she is still residing with him, the decisions in *Evans v. Evans* (1) and *Wheatley v. Wheatley* (3) apply, and the order has come to an end. The wife is not without remedy. She can either take proceedings in the Divorce Court or she can tell the husband to go. If he does not go, he will put himself at once in the wrong, and she can again go to the justices, and, I have no doubt, get another order. For these reasons I think a committal order cannot be made in this case because the order has come to an end.

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal allowed.

Solicitors: *H. R. Hodder & Son* (for the husband); *E. P. Hanney* (for the wife).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

BECKER v. CROSBY CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.), May 9, 1952.]

Housing—Accommodation of working classes—Recovery of possession—Notice to quit—"Notice . . . proceeding from a local authority"—Signature by "clerk or lawful deputy"—Signature by housing manager—Housing Act, 1936 (c. 51), s. 164 (2).

In the course of the management of houses provided by them a local authority required possession of a house let by them to the appellant under the Housing Act, 1936, s. 83 (1), and a notice to quit was served on the appellant, the notice being signed by the housing manager of the authority. In proceedings by the authority to recover possession under the Small Tenements Recovery Act, 1838,

HELD: by taking proceedings to recover possession of the property the local authority were exercising their powers under the Housing Act, 1936; *Shelley v. London County Council*, *Harcourt v. London County Council* ([1948] 2 All E.R. 898), followed; the notice to quit, therefore, was a notice "proceeding from a local authority under this Act" within the meaning of s. 164 (2) of the Act and must be signed by their clerk or his lawful deputy; and, in the absence of evidence that the housing manager was the lawful deputy of the clerk, the notice was bad.

FOR THE HOUSING ACT, 1936, s. 164 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 576.

Cases referred to:

- (1) *Shelley v. London County Council*. *Harcourt v. London County Council*, [1948] 2 All E.R. 898; [1949] A.C. 56; [1949] L.J.R. 57; 113 J.P. 1; 2nd Digest Supp.
- (2) *West Ham Corpn. v. Benabo (Charles) & Sons*, [1934] 2 K.B. 253; 103 L.J.K.B. 452; 151 L.T. 119; 98 J.P. 287; Digest Supp.

CASE STATED by Lancashire justices.

On Sept. 28, 1951, at a court of summary jurisdiction, sitting at Liverpool, on an application by the housing manager of the respondent corporation under the Small Tenements Recovery Act, 1838, s. 1, the justices granted a warrant directing the constables to enter a tenement known as No. 66 Woodend Avenue, and deliver up possession thereof to the respondents. The premises had been let on July 23, 1951, by the respondents to the appellant on a weekly tenancy, and, in exercise of their powers of management under s. 83 (1) of the Housing Act, 1936, they now required possession. On Aug. 17, 1951, a notice to quit signed by the respondents' housing manager was served on the appellant, but he failed to deliver up possession, and on Sept. 6, 1951, the respondents served on him a notice of their intention to apply for a warrant under s. 1 of the Act of 1838, as extended by s. 156 (2) of the Housing Act, 1936. For the appellant it was contended, *inter alia*, that the notice to quit was invalid because it was not signed by the respondents' clerk or his lawful deputy as required by s. 164 (2) of the Housing Act, 1936. For the respondents it was contended that that subsection did not apply to a notice to quit. The justices, being of the opinion that the notice to quit was valid according to the general law and was not a notice within the meaning of s. 164 (2) of the Act of 1936, issued the warrant.

G. W. G. Jones for the tenant.

Squibb for the council.

LORD GODDARD, C.J.: The point which is taken in this case is that the notice to quit which was served on Aug. 17, 1951, to take effect on Aug. 27, 1951, was bad because it was signed by the housing manager of the corporation and not by the town clerk or by his lawful deputy. It is, therefore, necessary to

look at three sections of the Housing Act, 1936, and to bear in mind the interpretation put on them by the House of Lords in *Shelley v. London County Council*. *Harcourt v. London County Council* (1). By s. 83 (1) it is provided:

"The general management, regulation, and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority . . ."

A By s. 156 (2):

"Where a local authority, for the purpose of exercising their powers under any enactment relating to the housing of the working classes, require possession of any building or any part of a building of which they are the owners, then, whatever may be the value or rent of the building or part of a building, they may obtain possession thereof under the Small Tenements Recovery Act, 1838, as in the cases therein provided for, at any time after the tenancy of the occupier has expired, or has been determined."

B

That section gives to the local authority a very special right, because an ordinary landlord can only take proceedings under the Small Tenements Recovery Act, 1838, if the rent of the property does not exceed £20. By s. 164 (2) of the Housing Act, 1936, it is provided:

C

"A notice, demand, or other written document proceeding from a local authority under this Act shall be signed by their clerk or his lawful deputy."

In *Shelley v. London County Council* (1), the House of Lords decided that, in taking proceedings to recover possession of property to which the Housing Act, 1936, applies, the control and management of which is vested in the local authority, the local authority are exercising their powers under the Act. Therefore, it seems to me difficult to say that when they serve a notice to quit to get possession of such property they are not exercising their powers under the Act. The Small Tenements Recovery Act, 1838, indeed, expressly provides that it is only applicable where notice to quit has been served and expired. The corporation served a notice to quit, and took proceedings under the Act of 1838, showing thereby that they were exercising their powers under the Act. Therefore, in my opinion, it is impossible to say that the notice which they served was not a notice proceeding from a local authority under the Act of 1936. The housing manager swore that he had authority to give this notice. But that is not what is required. The Act requires that the notice shall be signed by the town clerk or his lawful deputy. There is no evidence that the housing manager was the lawful deputy of the town clerk, and, therefore, the point which has been taken on behalf of the appellant is good. The appeal must be allowed with costs.

D

E

F

JONES, J.: I agree.

PARKER, J.: I agree.

G

Appeal allowed.

Solicitors: *Fortescue, Adshead & Guest*, agents for *J. W. Wall & Co.*, Liverpool (for appellant); *Lees & Co.*, agents for *H. O. Roberts*, town clerk, Crosby (for the council).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

STACK v. CHURCH COMMISSIONERS FOR ENGLAND.

[COURT OF APPEAL (Somervell, Jenkins and Morris, L.JJ.), April 29, 1952.]

Housing—Conversion of house into several tenements—"Conversion"—Structural alteration—Single-room "flatlets"—Effect on character of neighbourhood—Discretion of county court—Housing Act, 1936 (c. 51), s. 163.

The applicant, assignee of a house belonging to the respondents, found that he could not sub-let it as a single tenement, but could readily do so if it were converted into one-room tenements, and he applied to the county court under s. 163 of the Housing Act, 1936, to vary the terms of the lease which prohibited the conversion. The respondents contended that the applicant's proposed conversion into single-room "flatlets" instead of self-contained flats of two or more rooms would tend to lower the general character of the neighbourhood. They submitted that "conversion" meant structural alteration and that the court had no jurisdiction under s. 163 to vary the terms of the lease. The county court judge made an order granting relief to the applicant.

HELD: "conversion" in s. 163 did not import the necessity of structural alteration; the question whether a proposed conversion would tend to lower the character of the neighbourhood was one for the county court judge; and, he being satisfied on this question of fact, his order was right.

FOR THE HOUSING ACT, 1936, s. 163, see HALSBURY'S STATUTES, Second Edn., Vol. 11, p. 576.

APPEAL by the respondents, the ground landlords, against an order made by His Honour JUDGE PUGH at Bloomsbury County Court on Feb. 1, 1952, varying the terms of the lease of a house granted by them to the applicant whereby he was prohibited from converting the house into separate tenements.

Heathcote-Williams, Q.C., and *Denny* for the respondents: The object of s. 163 of the Housing Act, 1936, was to enable a permanent physical conversion of property subject to a restrictive covenant to be made. The creation of tenements must not be confused with the conversion of a property into several dwelling-houses. The words of the section "if converted" could have been omitted if it had not been the intention of the Act that there should be an actual physical conversion. The language of the section was not apt to permit of a conversion merely by a different mode of letting, otherwise the tenant would be at liberty to create as many separate tenancies as he liked. The county court judge should have limited a number of tenancies into which the house could be converted, and the fact that he had not done so was to allow an alteration of the character of the property which was not in accord with the provisions of the Act of 1936.

Granville Sharp, Q.C., and *Seuffert* for the applicant.

SOMERVELL, L.J.: This is an appeal from an order made by His Honour JUDGE PUGH on an application made under s. 163 of the Housing Act, 1936, which reads:

"Where it is proved to the satisfaction of the county court on an application by the local authority or any person interested in a house that, owing to changes in the character of the neighbourhood in which the house is situate, the house cannot readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements, and that, by reason of the provisions of the lease of or any restrictive covenant affecting the house, or otherwise, such conversion is prohibited or restricted, the court, after giving any person interested an opportunity of being heard, may vary the terms of the lease or other instrument imposing the prohibition or restriction so as to enable the house to be so converted subject to such conditions and upon such terms as the court may think just."

The house with which the application is concerned, 2 Belsize Park Gardens, Hampstead, is one of a number of houses in that neighbourhood owned by the respondents to the application, the Church Commissioners for England. In 1927 it was the subject-matter of a lease for 999 years granted by the respondents to the Royal London Society for Teaching and Training the Blind. There were various repairing and restrictive covenants into the details of which I will not go because the whole of the proceedings before us were on the basis that what the applicant required to do was prohibited by the lease, and, therefore, he would have been in breach unless he obtained relief from the conditions of the lease with regard to the matter in question. He was the assignee of the lease and it is not disputed that he was a person interested in the house within the meaning of the section. Having obtained a leasehold interest, he made this application on the ground that, owing to changes in the character of the neighbourhood in which the house was situate, it could not readily be let as a single tenement but it could readily be let for occupation if converted into two or more tenements, and by reason of the provisions of the lease such conversion was prohibited. When the matter came before the judge it was conceded by counsel for the respondents that there had been a change in the character of the neighbourhood so that the house could not readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements, and there was evidence given as to the user of other houses in the neighbourhood.

The contest between the parties is this. The applicant wanted to sub-let the house as single-room "flatlets", as they were called in the evidence. He said that cooking facilities of some kind would be installed and also a wash basin and a sink. The idea was that these "flatlets" would be suitable as single rooms in which a person could live and cook food. As to the normal sanitary arrangements, water closets and bathrooms would be used by the occupants of these flatlets in common. The respondents' point was that they wanted the houses in this neighbourhood converted only into self-contained flats, that is to say, flats which had their own bathroom and sanitary arrangements, and, no doubt, usually more than one room—two or three-roomed flats. Most of the houses nearby have been so converted, and it was the respondents' policy when they granted new leases to insist on such conversion if a house was not suitable to be let as a single tenement, and they submitted that that would be in accordance with the character of the neighbourhood whereas letting single rooms would tend to lower the general character of the neighbourhood. In giving judgment the learned judge said:

"Once it had been conceded by the respondents that this house could only be let if converted into two or more tenements, I could see no possible objection to the principle of what one of the respondents' witnesses called 'fragmentation' being applied to it, especially in view of the notorious difficulties that lie in the way of young people seeking living accommodation today."

A point taken before the judge is, I think, the only point available before us. Counsel for the respondents took as a point of law that "converted" in this section must mean a structural alteration. The judge said he did not agree. He held that

"to turn a house into one in which each room has its own cooking and washing arrangements is a conversion. I do not think this section requires a structural alteration."

Counsel for the respondents emphasised that what s. 163 is dealing with is the conversion of a house, and that it would be wrong to treat those words as covering a purely functional division—i.e., without any structural alteration letting rooms separately as they are. No doubt, the section was intended to cover cases where structural alteration was necessary, and that as a rule would make a more serious

inroad on the covenants in the lease than a mere breach of a covenant with regard to letting because the breach of a covenant with regard to letting is not incurable, whereas, if there is a structural alteration and what was a single twelve-roomed house is turned into four or more self-contained flats, what the landlord will get at the end of the lease is something different from what he demised. So, words had to be used to cover that case, and I should have thought that, *prima facie*, the greater included the less. Parliament was prepared to give power to the county court to sanction the greater inroad, and unless there were express words I should have thought that covered the lesser inroad.

I do not find any difficulty in construing the word "converted", which is a wide word, to cover the type of change which is contemplated here. It did, indeed, involve some structural alteration. It is very difficult to conceive of a case in which the letting of a single room for occupation by people would not involve some structural alteration, but, even if, owing to a multiplicity of bathrooms and sanitary arrangements, a house could be let off as two or more tenements, self-contained flats, without any structural alteration, I cannot see why the county court should not have jurisdiction to deal with an application of that kind under the words used in the section. When I put to counsel for the respondents what was the policy, as it were, which sanctioned the greater, but excluded the less, he submitted that one ought to find in this section a desire to maintain housing standards. In a sense, however, the section contemplates the lowering of housing standards in that it provides for families being housed in fewer rooms than they were housed in when the whole house was let as a single tenement. The section leaves it to the court to decide what shall be sanctioned. I think such questions as to standard, whether for instance a house is to be turned into five or six-roomed flats, or two-roomed flats with their own sanitary arrangements, or one-roomed flats fitted with washing equipment, are questions which under this section Parliament has left to be determined by the county court judge. I, therefore, come to the conclusion that in this case the judge had jurisdiction to make the order which he made, and, having read his judgment, I cannot see any other possible ground on which we should interfere with the conclusion to which he came. I think this appeal should be dismissed.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed.

Solicitors: *J. H. MacDonnell* (for the applicant); *Milles, Day & Co.* (for the respondents).

[*Reported by D. W. O. LAWRENCE, Esq., Barrister-at-Law.*]

RELIANCE CAR FACILITIES, LTD. v. RODING MOTORS (a firm).

[COURT OF APPEAL (Singleton, Denning and Hodson, L.J.J.), April 29, 30, 1952.]

Hire-Purchase—Recourse agreement—In event of termination of hiring agreement dealer to re-purchase hired car from finance company—“Termination of agreement”—Finance company requesting dealer to re-possess car, but not informing hirer that hiring was terminated.

The defendants, a firm of motor car dealers, sold to the plaintiffs, a finance company, a car which the plaintiffs thereupon let on hire-purchase to a customer of the defendants. The hire-purchase agreement provided that “should the hirer make default in any monthly payment” the plaintiffs had a right “to declare the hiring terminated”. At the same time a “recourse agreement” was made between the plaintiffs and the defendants whereby the defendants were to re-purchase the car from the plaintiffs “in the event of the termination of the hiring agreement”. The hirer defaulted in payment under the hire-purchase agreement, and the plaintiffs pressed for payment. As they could not obtain satisfaction, they requested the defendants to re-possess the car as their agents, and informed them that they, the plaintiffs, would send them an invoice for the re-purchase price within fourteen days. This they did, but they did not at any time notify the hirer that the hiring was terminated. In a claim by the plaintiffs against the defendants for the agreed re-purchase price of the car,

HELD: to be effective a declaration under the hire-purchase agreement that the hiring was terminated must be communicated to the hirer or there must be an unequivocal act equivalent to a declaration to the hirer; as the plaintiffs had not declared the hiring terminated by any communication to the hirer or by any such unequivocal act, the hiring had not terminated; and, therefore, the recourse agreement had not come into operation and the defendants were not liable to the plaintiffs for the re-purchase price of the motor car.

North Central Wagon & Finance Co., Ltd. v. Graham ([1950] 1 All E.R. 780), distinguished.

AS TO TERMINATION OF HIRE-PURCHASE AGREEMENT, see HALSBURY, Hailsham Edn., Vol. 16, p. 513, para. 756; and FOR CASES, see DIGEST, Vol. 3, pp. 95-98, Nos. 256-266.

F Cases referred to:

- (1) *North Central Wagon & Finance Co., Ltd. v. Graham*, [1950] 1 All E.R. 780; [1950] 2 K.B. 7; 2nd Digest Supp.
- (2) *Dumper's Case*, (1603), 4 Co. Rep. 119 b; 76 E.R. 1110; *sub nom. Dumper v. Syms*, Cro. Eliz. 815; 78 E.R. 1042; 31 Digest, Replacement, 436, 5639.

APPEAL by the defendants from an order of SELLERS, J., dated Feb. 11, 1952, holding the defendants liable to the plaintiffs for the purchase price of a motor car due under a “recourse agreement” made between the plaintiffs and the defendants. The judge held that, on the authority of *North Central Wagon & Finance Co., Ltd. v. Graham* (1) ([1950] 1 All E.R. 780), the hiring of the motor car by the plaintiffs to the hirer had been terminated, and so the recourse agreement had come into operation. The defendants appealed.

Hallis for the defendants.

W. M. F. Hudson for the plaintiffs.

SINGLETON, L.J.: DENNING, L.J., will deliver the first judgment.

DENNING, L.J.: The defendants, who were motor car dealers, had a Dodge utility van for sale. A customer of theirs was minded to buy it, but had

not the money to pay for it, so the parties went to a finance company, the plaintiffs. As a result, the defendants sold the car to the plaintiffs and then the plaintiffs made a hire-purchase agreement with the defendants' customer, and, in addition, the defendants entered into a "recourse agreement" with the plaintiffs. The plaintiffs now sue the defendants on the recourse agreement.

The object of the recourse agreement was to make the defendants responsible for seeing that the hirer duly paid the instalments to the plaintiffs, but, instead of being by way of guarantee, it was carried out by an agreement of re-purchase. In case of default by the hirer, the defendants were to buy the vehicle back from the plaintiffs. Under the recourse agreement it was provided that "in the event of the termination of the hiring agreement" the defendants were to re-possess the vehicle and purchase it back at a price equal to the balance due under the hiring agreement. The words "in the event of the termination of the hiring agreement" are clearly a condition precedent to the recourse agreement coming into operation at all. The question is whether that condition precedent has been fulfilled. Was the hiring agreement terminated? The plaintiffs say that it was terminated under cl. 3, which provided:

"Should the hirer make default in any monthly payment as agreed or commit any other breach of this agreement . . . the owner shall have the right at any time to declare the hiring terminated and to re-take possession of the said motor vehicle."

The hire-purchase agreement was made on Oct. 15, 1948. The hirer paid the first instalment in November, 1948, but did not pay any more. Six months or more elapsed without the hirer paying a penny. The plaintiffs then wrote to the hirer asking for a cheque for the outstanding instalments and said:

"Unless this matter is attended to without delay we shall have no alternative but to put into effect para. 3 of the hire-purchase agreement."

Thereupon the hirer sent a cheque for £100, but it was dishonoured. So the plaintiffs wrote to the hirer again and said:

"We must ask you to call and see us in respect of your hire-purchase account without further delay."

The hirer did not call. Then took place the act which is said to terminate the hiring and on which it is said that the recourse agreement came into operation. It is a letter of July 28, 1949, sent, not to the hirer, but to the defendants. The plaintiffs told the defendants that they could not get the hirer to meet his obligations. Then they added:

"As we hold a 100 per cent. dealer recourse on this vehicle we must request you to re-possess this as our agents. On the expiration of fourteen days from this date we shall forward you an invoice for the balance due."

The defendants did not re-possess the vehicle. They complained that the plaintiffs had not been diligent in pressing the hirer for the money. The plaintiffs took no notice of the complaint. They simply sent an invoice to the defendants for the amount outstanding and demanded it as the price of the vehicle as though it had been sold to the defendants.

The whole question is whether that letter of July 28, 1949, from the plaintiffs to the defendants terminated the hiring. It was sent, not to the hirer, but only to the defendants. Was that sufficient? If it did terminate the hiring, it is quite clear that the recourse agreement came into operation. If it did not terminate the agreement, then, of course, the recourse agreement did not come into operation. SELLERS, J., made it clear that, apart from the authorities, he would have held that the hiring was not terminated, because there had been no notice sent to the hirer, but he thought that, by reason of the decision in *North Central Wagon & Finance Co., Ltd. v. Graham* (1), he was constrained to come to a different conclusion. In my view, SELLERS, J.'s, own unaided judgment was

correct. This hiring agreement could not be terminated simply by a letter from the plaintiffs to the defendants.

I put this to counsel for the plaintiffs in the course of the case: "Does your argument mean that, if the plaintiffs wrote a letter to a garage asking them to collect the car, or if one clerk in their office told another clerk in the office that the agreement was terminated, it would at once automatically terminate?"

A He was forced to say: "Yes". That rather reminds me of the solicitor's office which was said to have an informing clerk and a believing clerk for the purpose of making affidavits on information and belief. Here you might have a declaring clerk and a hearing clerk for the purpose of determining such an agreement. In my opinion, under the terms of this recourse agreement, to terminate the hiring agreement there must be a declaration by the plaintiffs communicated to the hirer, or some unequivocal act equivalent to a declaration to the hirer, such as an actual re-taking of possession. Nothing short of that will suffice because a clause of this kind is like a forfeiture clause in a lease, which, if there is a breach, does not terminate the letting automatically. A breach only makes the letting voidable at the election of the lessor, and there must be some unequivocal act by him evincing his election before it can be said to be actually terminated: see the notes to *Dunpor's* case (2). In this case the agreement provides the nature of the act: the plaintiffs must "declare the hiring terminated". A mere declaration in the mind of the party, or even to his agent or a third party, will not do. It must be a declaration communicated to the hirer who is affected by it, or an unequivocal act which is equivalent to a declaration to the hirer. For that reason I am satisfied that the mere communication of the letter of July 28, 1949, to the defendants was not a termination of the hiring. B The recourse agreement, therefore, never came into operation.

I must say a word about the case on which *SELLERS, J.*, was persuaded to decide otherwise—*North Central Wagon & Finance Co., Ltd. v. Graham* (1). In that case the hirer had himself sold the car in complete defiance of the agreement of bailment. He had sold it through an auctioneer and the claim was against the auctioneer for conversion of the goods. To sustain a claim in conversion, it is essential that the bailor should have the right to immediate possession or that the hiring should be determinable at will. It is not necessary that it should in fact be terminated. In that case the hiring was determinable at will by reason of the sale having been made. It was not automatically terminated. In none of the judgments is to be found any statement that the hiring was terminated, whereas in the present case, in order that the recourse agreement should operate, it must be actually terminated. There is an observation of *ASQUITH, L.J.*, which, I think, must have led *SELLERS, J.*, to take the view he did. *ASQUITH, L.J.*, said ([1950] 1 All E.R. 783):

"... the question, to my mind, reduces itself to this: On the true construction of this contract, was any notice needed to terminate the agreement?"

G Reading that passage alone it would look as though the lord justice was holding that no notice was necessary to terminate the agreement, but when one reads the judgment as a whole, particularly the last few words of the judgment of *ASQUITH, L.J.*, and the judgment of *COHEN, L.J.*, it becomes plain that the ratio decidendi of that case was, not that the agreement had been terminated, but that it was determinable at will by reason of the sale which had taken place. H That being so, the case is distinguishable from the present, because here it is necessary that the hiring agreement should be terminated and there has never been a declaration within cl. 3 sufficient to terminate it. For those reasons, in my opinion, the appeal should be allowed and judgment entered for the defendants in the action.

HODSON, L.J.: On Oct. 15, 1948, the plaintiffs entered into a hiring agreement with a hirer in relation to a motor car, and the question is whether

the hiring agreement has been terminated. This question arises because, by what is called a recourse agreement dated Oct. 16, 1948, entered into between the plaintiffs and the defendants, the defendants undertook, in the event of the termination of the hiring agreement, to re-possess the vehicle and purchase it back at the request of the plaintiffs. The learned judge clearly would have found in favour of the defendants had he not been persuaded to do otherwise by having cited to him *North Central Wagon & Finance Co., Ltd. v. Graham* (1). He said this:

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"Under the general law a contract, though broken, does not terminate automatically. It is left open for the party who has the right to treat the contract as at an end, if it is a fundamental breach, either to treat that as a termination of the contract or to ignore it and treat the contract as still subsisting . . . But in the case of the *North Central Wagon & Finance Co., Ltd. v. Graham* (1), a clause very similar to this one in its effect was brought into consideration."

The clause under consideration is cl. 3 of the hiring agreement which contains the words "the owner shall have the right at any time to declare the hiring terminated", whereas the words in the *North Central Wagon* case (1), which dealt with a hiring agreement, were "may terminate the hiring." In the present case nothing was done by the plaintiffs vis-à-vis the hirer to terminate the hiring. So, by the ordinary law of contract, the contract was not terminated, and it could not, therefore, be properly said that by the letter of July 28, 1949, written by the plaintiffs to the defendants, any termination could have been brought about, because that was a letter not written to the hirer at all. For myself I think that it is unnecessary to go into the nice question whether there is any difference in the wording of the particular contracts—between "declare the hiring terminated" or "may terminate the hiring." *SELLERS, J.*, felt himself constrained to consider that distinction, but I think that there is the fundamental difficulty in the way of the plaintiffs that, on any view, the contract has not been terminated.

The decision in the *North Central Wagon* case (1) was not one, in my view, that compelled the learned judge to find otherwise. I think the effect of that decision, to which *SINGLETON, L.J.*, was a party, was that, on the breach by the hirer of his stipulations under the agreement, the owners had the right, not merely to terminate the agreement, but to the immediate possession of the motor car, their right to possession arising as soon as the defendant was instructed to sell the car. There is no finding of the court in that case that the agreement in question had actually been terminated, but merely that there was a right to terminate, and, accordingly, a right to the immediate possession of the motor car which had been sold. That is put shortly by *COHEN, L.J.* ([1950] 1 All E.R. 784), founding himself on a passage in *HALSBURY'S LAWS OF ENGLAND*, Hailsham ed., vol. 1, p. 736, para. 1211:

"The act of the bailee in doing something inconsistent with the terms of the contract terminates the bailment, causing the possessory title to revert to the bailor, and entitling him to maintain an action of trover."

I agree, therefore, that the appeal should be allowed.

SINGLETON, L.J.: I agree, and I would base my judgment solely on the fact that no question can arise under that which is called a recourse agreement until the termination of the hiring. Clause 3 of the agreement of hiring provides that in certain events the owner shall have the right at any time to declare the hiring terminated. It is said on behalf of the plaintiffs that that was done by a letter of July 28, 1949, addressed by the plaintiffs to the defendants who were not parties to the hiring agreement at all. I do not think that that letter of July 28 can be read as terminating the hiring or declaring it terminated. Before that can be done under the terms of this hiring agreement, it seems to me that

there must be a declaration, or notice, to the hirer, or some act towards him showing unequivocally that the hiring agreement was terminated.

Appeal allowed.

Solicitors: *Albin Hunt & Stein* (for the defendants); *J. H. Fellowes* (for the plaintiffs).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

NOTE.

DAVIES v. FORTIOR, LTD.

[QUEEN'S BENCH DIVISION (Donovan, J.), April 28, 29, 1952.]

Negligence—Evidence—Res gestae—Fatal accident to workman—Subsequent death—Statement by workman immediately after accident.

ACTION for damages for negligence and breach of statutory duty.

The plaintiff was the widow of a former employee of the defendant company and brought the action under the Fatal Accidents Act, 1846, for her own benefit and that of her child, and also under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of the employee's estate. The defendant company were metal workers engaged, inter alia, in chromium plating processes at their premises, which were a factory within the meaning of the Factories Act, 1937. On or about Nov. 6, 1948, the employee was working in the processes concerned with the chromium plating of sheets of copper, when he fell from a platform into a bath of chromic acid. He died on Nov. 8. The plaintiff alleged that the employee's death was occasioned by the defendant company's negligence and breach of statutory duties, in failing to provide a safe place to work in, in failing to provide adequate supervision and inspection by a competent person and a safe system of work, and in failing to comply with the Factories Act, 1937, s. 18 and s. 26, and the Chromium Plating Regulations, 1931 (S.R. & O., 1931, No. 455), reg. 3, in relation to the process and the bath. The defendant company denied that they had been guilty of negligence or of any breach of statutory duty or that the death of the employee had been occasioned thereby or in the manner alleged, and said that it was occasioned solely by, or alternatively contributed to by, the negligence of the employee, who was a foreman, in failing to keep any or any proper look-out for his own safety, in failing to wear the protective clothing and equipment provided, and in causing or permitting himself to fall into the bath.

Evidence at the hearing showed that no one witnessed the accident and there was no direct evidence to show how the employee fell into the bath. To support an inference that the employee had been guilty of some negligent conduct, e.g., sitting on the guard rail of the bath, the defendant company sought to give evidence that, within a period variously estimated by the witnesses at from a few seconds to two minutes after he had been assisted out of the bath, he had said several times "I shouldn't have done it".

Beney, Q.C., and *Joseph Jackson* for the plaintiff.

Marven Everett, Q.C., and *Tudor Evans* for the defendant company.

DONOVAN, J., held that what the employee said immediately after the accident was admissible evidence as part of the *res gestae*. The action was finally settled.

Solicitors: *Radcliffes & Co.* (for the plaintiff); *E. P. Rugg & Co.* (for the defendant company).

F.A.A.

CHIPPERFIELD v. CHIPPERFIELD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Pearce, J.), April 30, 1952.]

Justices—Custody—Revocation of order in wife's favour—No misconduct by wife—Welfare of child paramount consideration—Guardianship of Infants Act, 1925 (c. 45), s. 1.

On June 22, 1951, justices made an order in the wife's favour under the Summary Jurisdiction (Married Women) Acts, granting her (inter alia) the custody of the child of the marriage. On Jan. 9, 1952, the husband's application to revoke or vary that part of the order relating to custody was dismissed by the justices on the ground that, as there was no evidence of misconduct by the wife, in view of the decision in *Cobbe v. Cobbe* (1909) (73 J.P. 208), they had no jurisdiction to interfere with the order.

HELD: since it had been enacted by the Guardianship of Infants Act, 1925, s. 1, that: "Where . . . the custody . . . of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration . . ." the decision in *Cobbe v. Cobbe* was no longer good law, and, therefore, the justices had misdirected themselves in law and their dismissal of the application must be set aside.

FOR THE GUARDIANSHIP OF INFANTS ACT, 1925, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 955.

Case referred to:

(1) *Cobbe v. Cobbe*, (1909), 73 J.P. 208; 27 Digest 566, 6251.

APPEAL by the husband against the dismissal by justices for the Highgate petty sessional division on Jan. 9, 1952, of his application to revoke or vary an order under the Summary Jurisdiction (Married Women) Acts, dated June 22, 1951, made by the same court in the wife's favour, in so far as that order related to the custody of the child of the marriage.

P. A. Bruce for the husband.

Vincent for the wife.

LORD MERRIMAN, P.: This is an appeal by a husband against the dismissal by the justices for the Highgate petty sessional division of his application to revoke or vary an order made in favour of the wife by the same court on June 22, 1951, on the ground of desertion, whereby the husband was ordered to pay maintenance to the wife at the rate of £2 a week, she was given custody of the child of the marriage, and a further sum of 20s. a week maintenance for the child was ordered to be paid by the husband. By his summons the husband wishes to have the order in favour of the wife cancelled so far as it relates to custody, so that, in effect, the custody of the child, a daughter, will revert to him, though, of course, under the Summary Jurisdiction (Married Women) Acts, it is not possible to make a positive order for custody in favour of a husband as would be the case if the summons were under the Guardianship of Infants Acts. It appears that the Highgate justices are no longer the proper tribunal to deal with a summons under the Guardianship of Infants Acts because neither of the spouses is any longer resident in their jurisdiction, and that is why the application took the form it did—an application for the revocation or variation of the existing custody order.

The case raises a pure question of law, which can be simply stated—whether the decision of this court in *Cobbe v. Cobbe* (1), is still law. Before the justices the point was taken for the wife that under that decision they had no jurisdiction to interfere with this order for custody unless evidence were laid before them that the wife had been guilty of misconduct. They accepted that submission, and it is said that they were wrong in doing so. Nobody suggests that the wife has been

guilty of any misconduct, giving that word its widest sense and not limiting it only to adultery. What is said is that the decision in *Cobbe v. Cobbe* (1) can no longer be regarded as law, having regard to the express provision of s. 1 of the Guardianship of Infants Act, 1925, whereby:

A “Where in any proceeding before any court (whether or not a court within the meaning of the Guardianship of Infants Act, 1886) the custody or up-
bringing of an infant, or the administration of any property belonging to
or held on trust for an infant, or the application of the income thereof, is
in question, the court, in deciding that question, shall regard the welfare of
the infant as the first and paramount consideration, and shall not take into
consideration whether from any other point of view the claim of the father,
B or any right at common law possessed by the father, in respect of such
custody, upbringing, administration or application is superior to that of the
mother, or the claim of the mother is superior to that of the father.”

C The substance of the decision in *Cobbe v. Cobbe* (1) is that when magistrates
had once given the custody of a child to a wife under an order which was
equivalent to a judicial separation they had no power to transfer the custody of
the child to the husband unless there was evidence that the wife had been guilty
of some misconduct, and that, as that had not been suggested in that case, an order
varying the original order could not stand. It seems to me that, although
Cobbe v. Cobbe (1) is still referred to in well-known text-books as if it were the
law, it cannot now be so because that case decides that on any application
to vary a custody order made under the Summary Jurisdiction (Married Women)
D Acts the overriding consideration, the condition precedent to the granting of the
application, is that it should be proved that the wife has been guilty of mis-
conduct, and I understand that there is authority which indicates that the
misconduct need not necessarily be adultery.

E I do not think that such a decision as that can stand in view of the express
wording of s. 1 of the Guardianship of Infants Act, 1925, which says that the
paramount consideration shall be something entirely different, namely, the
welfare of the child. It is obvious that in certain cases the two issues may conflict,
and it is well recognised in LUSHINGTON'S SUMMARY JURISDICTION (MARRIED
WOMEN) ACTS, 3rd ed., c. 19, that, for example, a husband may apply to have
the whole order set aside under s. 7 of the Summary Jurisdiction (Married
Women) Act, 1895, which, unless one or other of the exceptions added to s. 7
F by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (1),
applies, makes it compulsory to discharge the order on proof of an act of adultery
since the making of the order. In my opinion, in considering whether, with
the maintenance, or the non-cohabitation clause, or whatever else may be in
the order, the order for custody should be varied, it would still be necessary to
give effect to the paramount consideration: What is in the best interests of the
G welfare of the child in the circumstances of the case? In my opinion, the
decision in *Cobbe v. Cobbe* (1) cannot survive the passing of s. 1 of the Guardian-
ship of Infants Act, 1925. The point, therefore, on which the justices dismissed
the husband's summons was a bad point, and the dismissal must be set aside.

H PEARCE, J.: Since *Cobbe v. Cobbe* (1) was decided the Guardianship of
Infants Act, 1925, has been passed. Section 1 of that Act is deliberately framed
in the widest terms to secure consideration of the infant's interest in any court
where its custody or upbringing is at stake. In RAYDEN ON DIVORCE, 5th ed.,
p. 458, *Cobbe v. Cobbe* (1) is still cited as an authority for the proposition that a
custody order in favour of a wife may only be varied on evidence of the wife's
misconduct. If that were still the law, the paramount consideration would be
whether the wife had committed misconduct, whereas Parliament has deliberately
stated that the welfare of the infant shall be the paramount consideration. Since
the Act has expressly said that the court shall not take into consideration whether

from any other point of view the claim of the father is superior to that of the mother or the claim of the mother is superior to that of the father, the court should not take into consideration the personal right of the mother to retain a custody order that she has obtained, a right that in *Cobbe v. Cobbe* (1) was considered to be the deciding factor. *Cobbe v. Cobbe* (1) is, therefore, no longer good law. In considering whether they shall vary a custody order, the paramount question for the justices is, not the conduct of the parents, but the interests of the child. The conduct of the parents is obviously relevant to this so far as it affects the child, but it is not the deciding factor.

Appeal allowed.

Solicitors: *Pennington & Son*, agents for *Church, Bruce & Co.*, Gravesend (for the husband); *Donovan J. Smalley* (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

McMASTER & ANOTHER v. BYRNE.

[PRIVY COUNCIL (Lord Goddard, Lord Normand, Lord Radcliffe, Lord Asquith of Bishopstone and Lord Cohen), March 10, 11, 12, 13, April 24, 1952.]

Solicitor—Breach of duty—Purchase from client of shares in company—Failure to disclose negotiations for sale of controlling interest in company.

In 1933 M. and two associates, P. and E., promoted a company, S.P., Ltd., in Canada, M. and P. receiving one thousand common shares in the company and E. five hundred. The promoters then acquired another company to which they transferred their holdings in S.P., Ltd., receiving in exchange shares in the holding company. The respondent, who was a solicitor, was employed by the promoters in the formation of S.P., Ltd., the acquisition of the holding company, and the transfer to that company of the promoters' shares in S.P., Ltd. In 1936 M., who had become a director of S.P., Ltd., on its formation, resigned from that company, and in 1939 he set up in business on his own account. Thereafter he made frequent attempts to realise his interest in S.P., Ltd., as represented by his shares in the holding company. In 1944 M.'s business was formed into a company, M.P., Ltd., the respondent acting for M. in its incorporation. In the same year the respondent drew up M.'s will, under which he was appointed one of the executors, and the will was placed in his custody. In 1946 M. granted P. an option to purchase his (M.'s) shares in the holding company for \$30,000. At about the same time negotiations, conducted by P., were opened for the sale of a controlling interest in S.P., Ltd., to an English company. On Mar. 21, 1947, the respondent had an interview with P. at which the respondent was informed of the negotiations with the English company. At that interview he obtained from P. an assignment of P.'s option in M.'s shares. On Mar. 22, 1947, the respondent had a meeting with M. and obtained from him a fresh option on his shares. It was doubtful whether at that meeting the respondent disclosed to M. all the facts of which he was aware regarding the negotiations for the sale of S.P., Ltd. On Apr. 8, 1947, the respondent exercised his option and purchased the shares from M. for \$30,000. On June 2 the English company's offer to buy a controlling interest in S.P., Ltd. was accepted, and on completion of the sale the respondent received \$127,000 for the holding, representing a profit of \$97,000. In July, 1947, M. executed a codicil to his will appointing his two sons executors in place of the respondent and removing the will from his custody. In 1948 M. died. In an action by his executors against the respondent for an account of the profit made on the transaction,

Held: although the respondent was not acting as solicitor for M. on Mar. 22 when obtaining the option from him, in the circumstances the confidence arising from the relationship of solicitor and client which had

previously existed between them must be taken to have continued to exist on that date; it was the duty of the respondent to disclose to M. all the material facts within his knowledge, and, although M. had continually tried to dispose of his shares, the necessity for disclosure was to be tested, not by his probable reaction to the information, but by the natural reaction of a reasonable man; the onus was on the respondent to prove that he had discharged his duty to M., and, there being doubt on this point, there must be a new trial.

A Dictum of PARKER, J., in *Allison v. Clayhills* (1907) (97 L.T. 712) approved and applied.

Decision of COURT OF APPEAL FOR ONTARIO ([1951] 1 D.L.R. 593) reversed.

AS TO TRANSACTIONS BETWEEN SOLICITOR AND CLIENT, see HALSBURY, Hailsham Edn., Vol. 31, p. 116, para. 163; and FOR CASES, see DIGEST, Vol. 42, pp. 76, 77, 79-86, Nos. 672-683, 710-772.

Cases referred to :

(1) *Allison v. Clayhills*, (1907), 97 L.T. 709; 42 Digest 85, 765.

(2) *Wright v. Carter*, [1903] 1 Ch. 27; 72 L.J.Ch. 138; 87 L.T. 624; 42 Digest 79, 702.

(3) *Edwards v. Meyrick*, (1842), 2 Hare, 60; 12 L.J.Ch. 49; 67 E.R. 25; 42 Digest 82, 738.

(4) *Montesquieu v. Sandys*, (1811), 18 Ves. 302; 34 E.R. 331; 42 Digest 84, 761.

D APPEAL by the plaintiffs against an order of the Court of Appeal for Ontario dated Nov. 8, 1950, and reported [1951] 1 D.L.R. 593, dismissing an appeal by them against an order of SMILY, J., dated Apr. 27, 1950, whereby he gave judgment for the respondent in an action by Harry J. McMaster, who died on Nov. 30, 1948, and whose executors, the appellants, continued the action.

E McMaster was the holder of forty per cent. of the shares of a holding company known as Carleton Securities, Ltd., which owned half of the common shares of a company, Sovereign Potters, Ltd. The respondent, who was solicitor for and secretary of the latter company and who had also acted as solicitor for McMaster, purchased all McMaster's shares in Carleton Securities, Ltd. and later, when an English company, Johnson Brothers (Hanley), Ltd. bought the business of Sovereign Potters, Ltd. and in connection therewith purchased all the shares of Carleton Securities, Ltd., the respondent realised a substantial profit. McMaster claimed an account of this profit on the ground that the purchase by the respondent from him was in breach of the fiduciary duty which, it was alleged, the respondent owed him by reason of the confidential relationship as solicitor and client that existed between them. The respondent denied that at the material time the relationship of solicitor and client existed between him and McMaster, and further that the negotiations for the sale to Johnson Brothers (Hanley), Ltd. of the shares in Sovereign Potters, Ltd. were a matter of common knowledge among the shareholders of Sovereign Potters, Ltd. and Carleton Securities, Ltd., including McMaster, and that on Mar. 22, 1947, when the respondent obtained an option to purchase McMaster's shares, the respondent disclosed to him all the relevant facts known to the respondent in connection with the sale. SMILY, J., held that the relationship of solicitor and client existed between the parties at the time of the transaction on Mar. 22, 1947, and that the respondent was at that time in possession of all the information then available concerning the negotiations for the sale. The judge, however, dismissed the action on the ground that, in his opinion, no information which the respondent could give to McMaster would have affected McMaster's decision to sell, and, consequently, there was no withholding of relevant information. The judge also considered the transaction was fair and would not have been affected by proper legal advice. The Court of Appeal held that the relationship of solicitor and client did not exist at the time of the transaction and for that reason dismissed the appeal.

A. C. Heighington, Q.C. (of the Canadian Bar), and *Gahan, Q.C.*, for the appellants.

C. F. H. Carson, Q.C. (of the Canadian Bar), and *Lord Hailsham* for the respondent.

April 24. **LORD COHEN:** This is an appeal from a decision of the Court of Appeal for Ontario affirming the decision of *SMILY, J.*, who dismissed the appellants' action with costs. The action was commenced by the late Harry J. McMaster on Sept. 15, 1947. By his statement of claim McMaster claimed from the respondent, who is a barrister and solicitor practising in the city of Hamilton, an accounting of the profits derived by the respondent from a transaction between them relating to one thousand shares in a company called Carleton Securities, Ltd.

The history of the matter (stating for the moment only facts which are not in dispute) is as follows. In the year 1933 McMaster and two associates by name Pulkingham and Etherington promoted a company called Sovereign Potters, Ltd. The capital of that company consisted of a number of preference and five thousand common shares. Of the common shares half were issued to the group who provided finance for the company, the other half being issued to the three promoters. Pulkingham and McMaster each received one thousand shares and Etherington five hundred shares. The respondent acted in the formation of the company on behalf of all the interested parties, and he became, and has at all material times been, the secretary of the company, Sovereign Potters, Ltd. McMaster was anxious to tie up the holdings of the three promoters so that there could not be a majority interest formed against any one of them. With this in view the promoters took over a company, Carleton Securities, Ltd., and transferred to it their respective holdings of common shares in Sovereign Potters, Ltd. They received in exchange shares in Carleton Securities, Ltd., McMaster receiving one thousand shares. Again the respondent acted in the taking over of Carleton Securities, Ltd. for the purpose above mentioned and was appointed secretary of it. In this case, however, it appears that he never, in fact, acted as secretary. McMaster became a director and production superintendent of Sovereign Potters, Ltd. on its formation and remained in that capacity until November, 1936, when he fell out with his colleagues and resigned. Under an agreement with Sovereign Potters, Ltd., McMaster was under obligation not for three years after the termination of his service directly or indirectly to enter into competition with Sovereign Potters, Ltd., within the dominion of Canada. When that period expired in 1939, McMaster set up in business on his own account in Dundas under the name of McMaster Potteries. In 1944 that business was transferred to McMaster Potters, Ltd., and again the respondent acted for McMaster in the incorporation of the company. In the same year the respondent advised McMaster as to the probable liability for succession duty on his estate when he died. In 1946 McMaster, acting, no doubt, on behalf of McMaster Potters, Ltd., consulted the respondent as to the liability of that company for excise duty. Going back to the year 1944, in that year the respondent drew up McMaster's will under which he was appointed one of the executors and trustees, the other being McMaster's wife. That will was duly executed and remained in the respondent's custody until after the transactions which gave rise to the present dispute. It was then removed from his custody, and on Nov. 16, 1948, McMaster executed a codicil appointing his two sons executors and trustees in place of the executors named in the original will. On Dec. 6, 1946, the respondent's firm rendered an account to McMaster Potters, Ltd., for their services aforesaid to that company and to McMaster personally. The respondent says that, apart from the matters mentioned in that account, the only other matters in respect of which he acted for McMaster were (a) in 1938 the patentability of a wrench which McMaster had designed, and (b) in

1945 the purchase of a house. He says that on the latter occasion he had nothing to do with the negotiations : he merely dealt with the conveyancing business.

A Robert McMaster deposed to a number of visits and telephone calls by McMaster to the respondent. The respondent did not agree as to the frequency of these events, and maintained that, if and so far as McMaster ever raised any question with him about Carleton Securities, Ltd., it was in his capacity as secretary of Sovereign Potters, Ltd., two thousand five hundred common shares of which constituted the only asset of Carleton Securities, Ltd. The evidence of Robert McMaster shows that on three occasions his father employed a solicitor other than the respondent. According to Robert McMaster's evidence, on the first occasion it was because it was thought that the solicitor concerned, Mr. Braden, could exert influence to procure some plant required for the family business. On the second occasion the solicitor, Mr. Lampard, was employed for some unspecified business at the request of one of McMaster's daughters. On the third occasion B Mr. Shaver was employed by both vendor and purchaser on the acquisition by McMaster Potters, Ltd. of a piece of land. It is clear that from the time McMaster resigned his posts with Sovereign Potters, Ltd., he was anxious to realise his interest in that company which was represented by his holding of shares in C Carleton Securities, Ltd. He appears to have raised that matter each year at the annual meeting of Carleton Securities, Ltd., which was held to discuss how the voting interest of that company on Sovereign Potters, Ltd., should be exercised. Ultimately McMaster granted Pulkingham an option to purchase his shares in Carleton Securities, Ltd. for \$30,000. The option was granted on or about Sept. 19, 1946, and was a ninety days option. It was renewed for a further one hundred days. It appears, though this is not absolutely clear, that on Mar. 21, 1947, the option had not expired, but was due to expire in the course of a day or two.

D There had been several feelers for the purchase of the business of Sovereign Potters, Ltd., but nothing had come of any of them before the autumn of 1946. An intimation was then received that an English company, Johnson Brothers (Hanley), Ltd. (hereinafter referred to as Johnsons), might be interested in obtaining a controlling interest in Sovereign Potters, Ltd. This was followed by E a visit by Mr. Johnson, a director of Johnsons, to the plant of Sovereign Potters, Ltd. Pulkingham, who was conducting the negotiations on behalf of Sovereign Potters, Ltd., intimated to Johnsons that he doubted whether the board of Sovereign Potters, Ltd. would recommend the sale of the whole of the shares of Sovereign Potters, Ltd. for less than \$1,500,000. Early in March, 1947, Mr. F Johnson telephoned to Pulkingham that his company was sincerely interested in buying control and early in the same month he telegraphed that a lower price namely, \$160 per share for the preference shares, and \$150 per share for the common shares, representing, as their Lordships are told, a total sum of over \$1,000,000, might be acceptable to Johnsons. By the same cable he asked Pulkingham to recommend a Canadian solicitor to act for Johnsons and intimated G that a draft agreement would be sent. Pulkingham asked the respondent to suggest a solicitor and on Mar. 6, the respondent suggested Messrs. Mason Foulds, Davidson & Gale. Pulkingham and the respondent discussed the situation and decided that a board meeting of Sovereign Potters, Ltd., must be convened to discuss the position. This was summoned for Mar. 28 and the facts set forth above and other relevant facts were embodied by the respondent in a letter dated Mar. 27 which he circulated to all the directors of Sovereign Potters, H Ltd. It is not clear how many of the above-mentioned facts were known to the respondent before Mar. 22, 1947, nor is it clear what facts (if any) relating to the Johnson negotiations were communicated by the respondent to McMaster at the interview on Mar. 22, 1947, mentioned below. It seems, however, that at a meeting of Carleton Securities, Ltd. on Dec. 10, 1946, Etherington had advised McMaster not to be in a hurry to sell his stock as there might be negotiations to sell Sovereign Potters, Ltd.

On Mar. 21, 1947, the respondent had an interview with Pulkingham at which he gave the respondent some information about the negotiations with Johnsons. He also told the respondent about his option on McMaster's shares in Carleton Securities, Ltd. The respondent obtained an assignment of this option and fixed an appointment with McMaster for the following day, Mar. 22, 1947. At that interview at which there was also present McMaster's son, Robert, the respondent obtained from McMaster a fresh option for thirty days at the same price, \$30,000. He also got McMaster to sign a document containing a statement that McMaster knew that the respondent was supposed to share in the promoters' shares in Sovereign Potters, Ltd., having been told this by Etherington on several occasions. The respondent exercised the option on Apr. 8, 1947. It seems clear that, from the time he obtained the option, the respondent played a very active and helpful part in the negotiations with Johnsons. There were several hitches—for instance, to meet the views of the holders of preference shares as to the division of the spoils as between the preference shares and the common shares in Sovereign Potters, Ltd., an adjustment in the price per share for each class of shares became necessary. Again, there was difficulty in securing for Johnsons the Canadian dollars required to complete the purchase. These difficulties were overcome, and on June 2, the respondent cabled to Mr. Johnson an acceptance of his final offer. On completion of the sale the respondent received \$127 per share.

There is a dispute as to the extent to which McMaster was aware of the progress of the negotiations with Johnsons, but it is clear that he knew of the agreement finally reached by July 5, 1947, when his solicitors wrote to the respondent alleging that on Apr. 8, the date on which the respondent exercised his option, the relationship of solicitor and client subsisted between McMaster and the respondent and that, accordingly, the respondent was accountable to McMaster for the profit he made out of the transaction, i.e., \$97,000. Their Lordships think it well to observe that the material date for determining whether a duty of confidence between the respondent and McMaster subsisted is Mar. 22, when the option was granted, and not Apr. 8, when it was exercised. Receiving no satisfaction, on Sept. 15, 1947, McMaster issued the writ in this action.

McMaster died on Nov. 30, 1948, but on Sept. 8, 1949, an order of revivor was made and his executors became the plaintiffs in the action. The action came on for trial before SMILY, J., and on Apr. 27, 1950, he dismissed the action. He held that the respondent was not acting as McMaster's solicitor in the particular transaction in question, but added:

"Nevertheless, while I think that at the time of the transaction in question between the [respondent] and Mr. McMaster it must be said the relationship of solicitor and client in a strict sense had discontinued, I think it must also be said that the confidence naturally arising from such a relationship should be presumed to have continued, as was said by PARKER, J. . . . in *Allison v. Clayhills* (1). And, as was also said by PARKER, J., in the same case, although the relationship of solicitor and client in its strict sense has been discontinued, the same principle, namely, that the onus of upholding the transaction would rest upon the solicitor, applies as long as the confidence naturally arising from such a relationship is proved or may be presumed to continue."

He found, however, that there had not been a breach of the fiduciary duty owing by the respondent to McMaster and, accordingly, dismissed the action. The plaintiffs appealed from the decision and the Court of Appeal for Ontario dismissed the appeal. LAIDLAW, J. A., who delivered the principal judgment, stated the questions which the court had to determine as follows:

"(1) Was the relationship between the respondent and the late Harry J. McMaster on Mar. 22, 1947, when the respondent obtained from Mr. McMaster an option to purchase his shares of Carleton Securities, Ltd., of

such a character as imposed on the respondent a special duty in respect of the transaction ? (2) If there was such a duty on the part of the respondent, was there a breach of it ? ”

The judges of appeal were unanimous in answering the first question in the negative. On this basis it was not necessary to decide the second question, but all three judges expressed their opinion on it. HENDERSON, J. A., and LAIDLAW, J. A., were of opinion that before McMaster gave the option the respondent disclosed without reservation all the information in his possession concerning the possible deal with Johnsons. HOGG, J. A., disagreed. He was of opinion that the facts set out in the respondent's letter of Mar. 27, 1947, to the directors of Sovereign Potters, Ltd. were known to him before his interview with McMaster on Mar. 22, and that these facts, or the most important of them relating to the negotiations with Johnsons, were not known to McMaster and were not placed before him by the respondent before the latter secured the option.

That being the position in the Canadian courts, counsel for the respondent argued before this Board that the decision of the Court of Appeal or the majority of the judges thereof was correct, but he took the preliminary point that there were concurrent findings of fact that, even if the confidence arising from the former relationship of solicitor and client continued, the duty owing to McMaster by the respondent had been fully discharged. If he were right on this point, there would be an end of the matter, but their Lordships are unable to accede to this argument. There is a clear finding in favour of the respondent by the majority in the Court of Appeal, but there is no corresponding finding by SMILY, J., in the court of first instance. He makes no finding of fact as to what was known to the respondent prior to the interview of Mar. 22, 1947, or as to what the respondent told McMaster on that occasion. On the contrary he says:

“ Now as to the [respondent] having disclosed, without reservation, all the information in his possession, this in my opinion means information which might assist or affect Mr. McMaster in deciding whether to enter into the transaction. As I have previously indicated in my opinion there was no such information in the [respondent's] possession at that time. I do not believe any of the information mentioned in the letter of Mar. 27, previously referred to, would have made any difference to Mr. McMaster's desire to sell his stock at the price mentioned.”

and:

“ It seems abundantly clear on all the evidence, and having regard to Mr. McMaster's efforts over the years to get rid of these shares, that there was nothing in the situation then existing which would have caused him to miss this opportunity.”

He seems to have considered that the necessity for disclosure was to be tested by the probable reaction of the particular individual to whom the disclosure should have been made whereas in their Lordships' opinion the proper test is what would be the natural reaction of the reasonable man. Their Lordships may add that it seems particularly undesirable to apply the test adopted by SMILY, J., in a case where the particular individual was dead and could not give evidence before the court. In the result, their Lordships are of opinion that SMILY, J., posed to himself the wrong question and made no findings of fact relevant to the point on which the Court of Appeal based their decision. Their Lordships must, therefore, proceed to consider what is the proper answer to the questions propounded by LAIDLAW, J.A.

On the first question their Lordships find themselves in complete agreement with SMILY, J., that, notwithstanding that the respondent was not acting as solicitor for McMaster in the transaction now in dispute, the confidence arising from the relationship of solicitor and client which had existed between the respondent and McMaster must be taken to have continued to be in existence

at the time of the interview between them on Mar. 22, 1947. The Court of Appeal, or at any rate HENDERSON, J.A., and HOGG, J.A., came to the conclusion, no doubt correctly, that the respondent was not acting as solicitor for McMaster on that date. They seem to have been under the belief, but, as the observations of PARKER, J., in *Allison v. Clayhills* (1) show, under the erroneous belief, that that was the end of the matter. The passages from the judgment of PARKER, J., which were cited by SMILY, J., clearly show that the duty of the solicitor may continue after the relationship of solicitor and client in its strict sense has been discontinued. PARKER, J., goes on to say (97 L.T. 712):

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"In considering whether in any particular transaction any duty exists such as to bring the ordinary rule into operation, all the circumstances of the individual case must be weighed and examined. Thus, a solicitor may by virtue of his employment acquire a personal ascendancy over a client and this ascendancy may last long after the employment has ceased, and the duty towards the client which arises out of any such ascendancy will last as long as the ascendancy itself can operate. Again, a solicitor may by virtue of his employment acquire special knowledge, and the knowledge so obtained may impose upon him the duty of giving advice or making a full and proper disclosure in any transaction between himself and his client, though such transaction may take place long after the relationship of solicitor and client in its stricter sense had ceased to exist. And there may be other circumstances which may impose a duty on a solicitor, which duty may continue to exist after the relationship of solicitor and client in the strict sense has ceased."

It is impossible to define precisely what circumstances will justify the inference that the confidential relationship continues. The more important factors in the present case which have led their Lordships to agree with the conclusion of SMILY, J., on this point are : (i) the fact that McMaster employed the respondent in a number of important business transactions in which McMaster was interested, in particular, (a) the acquisition of Carleton Securities, Ltd., and the transfer to that company of the promoters' holdings in Sovereign Potters, Ltd., (b) the formation of McMaster Potters, Ltd.; (ii) the fact that the respondent was employed by McMaster in the matter of McMaster's will, and was named as one of his executors therein and remained in charge of the will until the parties fell out in July, 1947; (iii) the events of Mar. 22, 1947, when, at the instance of the respondent, McMaster not only granted the option, but signed a document witnessing that Etherington had promised McMaster a portion of the vendor's share in Sovereign Potters, Ltd. Their Lordships must point out that if, as the respondent testified, he came to that interview ready to buy McMaster's holding in Carleton Securities, Ltd., for \$30,000, the grant of the option was a transaction solely for the benefit of the respondent and against the interest of McMaster.

As, in their Lordships' view, the respondent was under a duty to McMaster on Mar. 22, 1947, it becomes necessary to consider what the measure of that duty was. It is plain that the respondent did not discharge that duty unless he communicated to McMaster all material facts within his knowledge, a description which their Lordships think would include the facts within his knowledge as to the negotiations between Sovereign Potters, Ltd., and Johnsons. It is also plain that the onus of upholding the transaction lay on the respondent. The majority of the Court of Appeal found that there had been full disclosure, basing themselves on some answers given by the respondent as follows:

"Q.—What was said about it? —A.—Well, there was quite a lot said about it, Mr. Mason. It was on the basis that all I knew at that time was that there had been [negotiations] with Mr. Johnson for a million and a half, and that I had recommended Mason Foulds, and that I was going to go and see him soon. Q.—That is substantially what you knew about it

at the time ?—A.—That is substantially what I knew about it at the time.

Q.—Was that or was that not discussed with Mr. McMaster ?—A.—Yes, sir."

A Those answers, said LAIDLAW, J.A., satisfied him that the respondent disclosed without reservation all the information in his possession concerning the deal with Johnsons. Their Lordships feel the same difficulty as did HOGG, J.A., in accepting this view. In the answers on which LAIDLAW, J.A., relies the respondent mentions only two facts in connection with the negotiations with Johnsons. The first is the original asking price of \$1,500,000; the second is that he had recommended Mason Foulds & Co. to act as Johnson's solicitors in Canada. This, he says, was substantially what he then knew and was what he told McMaster. Other portions of his evidence tend to show that he knew of the reduced price of \$160 per preferred share and \$150 per ordinary share by Mar. 22, 1947, and B Pulkingham seems to have told him on Mar. 21 that it looked as though the negotiations might come through. There is nothing to prove that he passed on either of these pieces of information to McMaster. Looking at the evidence as a whole, one is left in doubt whether there was not further material information beyond that referred to in the passage cited by LAIDLAW, J.A., which the C respondent had before Mar. 22, 1947, and which did not reach McMaster.

Counsel for the appellants urged on their Lordships that, if they were left in doubt on this point, the defendant had failed to discharge the onus which rested on him and that judgment should be entered for the appellants for the amount claimed. Their Lordships are unable to accept this contention. The case made by the appellants, relying on this point on Robert McMaster's evidence, was that D nothing had been said on Mar. 22 about negotiations with Johnsons. This is in flat contradiction with the respondent's evidence and their Lordships are not assisted by any finding of the trial judge as to which witness he believed. Moreover, some of the important points mentioned by Pulkingham were not put to the respondent. On the whole, their Lordships have come to the conclusion that justice cannot be done without a fresh trial of the issue whether the respondent E had discharged the onus resting on him by reason of the confidential relationship existing between him and McMaster on Mar. 22, 1947. Since the matter must be re-tried, their Lordships think it better to refrain from further comment on the details of the evidence.

There is one other matter to which their Lordships may usefully refer. It was argued on behalf of the appellants that, if their Lordships were in favour of the F appellants on the first question, the appellants were entitled to succeed as McMaster had had no independent advice. This argument was based on the observation of STIRLING, L.J. ([1903] 1 Ch. 60) in *Wright v. Carter* (2) that "secondly, he must have competent independent advice." Their Lordships respectfully agree with the comment of PARKER, J., on that dictum in *Allison v. Clayhills* (1) where he says (97 L.T. 712):

G " . . . I doubt whether the learned lord justice really meant to lay this down as an invariable rule whatever might be the nature of the transaction in dispute, for, if this were an invariable rule in all transactions, it is difficult to see how either *Edwards v. Meyrick* (3) or *Montesquieu v. Sandys* (4) were rightly decided."

H The question whether the facts of this case make independent advice indispensable is a matter for the judge who tries the issue. When all the facts have been ascertained the trial judge may, or he may not, consider that the question what was the proper price to ask for the shares was one which McMaster as a business man could well determine for himself if fully informed as to the facts.

Their Lordships have given consideration to the question of costs. The necessity for the new trial is due largely to the course which the proceedings took in the courts in Canada. For this both sides must bear their share of responsibility and their Lordships think that justice will be done if each party

has to bear his own costs of those proceedings. Before this Board the appellants have succeeded on one issue, but it will avail them nothing unless they succeed on the other issue in the new trial. Their Lordships think, therefore, that the respondent should pay only one half of the appellants' costs of appeal to this Board.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the judgments in the Canadian courts set aside, that it be declared that on Mar. 22, 1947, the respondent, by reason of the relationship of solicitor and client formerly subsisting between him and the late Harry J. McMaster, owed a duty to the late Harry J. McMaster in relation to the acquisition of the option granted to the respondent by the said Harry J. McMaster on the date aforesaid, and that the matter be remitted to the Supreme Court of Ontario for a new trial of the other issues outstanding between the appellants and the respondent in the action commenced by writ dated Sept. 15, 1947. The appellants and respondent must respectively bear their own costs to this date of the proceedings in the courts in Canada other than the costs made costs in the appeal to this Board by the order dated Jan. 12, 1951. The respondent must pay to the appellants half the appellants' costs of the appeal to this Board.

Appeal allowed.

Solicitors: *Blake & Redden* (for the appellants); *Charles Russell & Co.* (for the respondent).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

R. v. INDUSTRIAL DISPUTES TRIBUNAL AND ANOTHER. *Ex parte* PRACTICAL BANKING, LTD.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Jones and Parker, JJ.), May 15, 1952.]

Master and Servant—Trade dispute—Recognised terms and conditions of employment—Observance by employer not member of negotiating trade organisation—Industrial Disputes Order, 1951 (S.I., 1951, No. 1376), art. 2.

The proprietors of a newspaper employed as editor a member of the National Union of Journalists. On being asked by the union to pay to members of the union employed by them the rate of wages agreed between the Newspaper Society and the union, the newspaper proprietors replied that they were not members of the society. On Aug. 21, 1951, the union reported to the Minister of Labour and National Service an issue under art. 2 of the Industrial Disputes Order, 1951, viz., whether the newspaper proprietors should observe the terms and conditions of employment for journalists negotiated between the union and the society, and on Nov. 19, 1951, acting under art. 9 (1) of the order of 1951, the Minister referred the issue to the Industrial Disputes Tribunal. On a motion for prohibition to prohibit the tribunal from proceeding on the reference,

HELD: the object of art. 2 of the order of 1951 was to enable terms which had been negotiated between representatives of a substantial proportion of employers and workmen in a trade, or section of a trade, to apply to the trade as a whole and to be imposed on employers and workmen who were not members of the negotiating bodies; the sole question referred by the Minister to the tribunal being whether the newspaper proprietors should observe the terms and conditions of employment for journalists which had been negotiated by the union and the society, the reference fell within the provisions of art. 2; although the question of the editor's wages might come into the matter incidentally, the reference was not in regard to the

wages of a single workman; and, therefore, there was no ground for prohibiting the tribunal from proceeding with it.

R. v. National Arbitration Tribunal. Ex p. South Shields Corpn. ([1951] 2 All E.R. 828), distinguished.

FOR THE INDUSTRIAL DISPUTES ORDER, 1951, see BUTTERWORTH'S COMMERCIAL CONTROLS, Service, Title Employment [8], p. 1.

A Case referred to:

(1) *R. v. National Arbitration Tribunal. Ex p. South Shields Corpn.*, [1951] 2 All E.R. 828; [1952] 1 K.B. 46; 115 J.P. 594.

MOTION for prohibition.

B The applicants, Practical Banking, Ltd., were the proprietors of a newspaper and employed as editor a member of the National Union of Journalists. On receiving a letter from the union asking them to pay to members of the union employed by them the rate of wages agreed by the Newspaper Society and the union, the applicants replied that they were not members of the society. On Aug. 21, 1951, the union reported to the Minister of Labour and National Service an issue under art. 2 of the Industrial Disputes Order, 1951, viz., whether the applicants should observe the terms and conditions of employment for journalists negotiated between the union and the society, and the Minister referred the issue to the Industrial Disputes Tribunal under art. 9 (1) of the order. The applicants sought to prohibit the tribunal and the union from proceeding in the issue.

D. L. Renton for the applicants.

D *S. B. R. Cooke* for the Industrial Disputes Tribunal.

H. P. Stirling for the National Union of Journalists.

LORD GODDARD, C.J.: Counsel for the applicants, Practical Banking, Ltd., moves for an order prohibiting the Industrial Disputes Tribunal from entertaining a reference by the Minister of Labour and National Service, made on Nov. 19, 1951, of the question:

E “Whether Practical Banking, Ltd. . . . proprietors of the ‘Muswell Hill Record’, should observe the terms and conditions of employment for journalists employed by weekly newspapers within twelve miles radius of Charing Cross negotiated between [the National Union of Journalists] and the Newspaper Society.”

F The matter turns on the construction of the Industrial Disputes Order, 1951, and it is contended by the applicants that it is concluded in their favour by the decision of this court in *R. v. National Arbitration Tribunal. Ex p. South Shields Corpn.* (1). In my opinion, however, that case has no application to the present reference.

G The Industrial Disputes Order, 1951, was made under the Defence (General) Regulations, 1939 (as amended by S.R. & O., 1940, No. 1217), reg. 58AA (1), which gives the Minister of Labour power to make provision, by order

“(c) for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the order to be, or to be not less favourable than, the recognised terms and conditions.”

H Part I of the order of 1951 is headed “Reporting of disputes and issues”, art. 1 deals with the reporting of a trade dispute, and art. 2 deals with

“Reporting of issues concerning recognised terms and conditions of employment.”

By art. 12 (1) (the interpretation article):

“‘issue’ has the meaning assigned to it in art. 2 of this order.”

That is not a happy way of defining the word “issue”, because, although

art. 2 (b) states what is to be referred to as "an issue", the article contains no actual definition of "issue".

The matter arose in the following way. The applicants employed as editor of their newspaper, "Muswell Hill Record", one Miss Finnemore, who is a member of the National Union of Journalists. On July 10, 1951, the organiser of the union wrote to the editor of "Muswell Hill Record" saying:

"I am informed that my members employed in your office have not been paid the increased rate of wages and cost of living bonus agreed between this union and the Newspaper Society. It occurs to me that there might be some misunderstanding, and I shall be obliged if you will take steps to have the necessary adjustments made."

On July 13 the applicants' general manager replied:

"Thank you for your letter of July 10 and for its courteous tone. There does seem to be some misunderstanding, for the 'Muswell Hill Record' is not a member of the Newspaper Society."

That correspondence seems to me to raise at once an issue under art. 2 of the order of 1951, as I think that the inference to be drawn from those letters is that, while the union say that the applicants must abide by the terms and conditions of employment which have been negotiated between them and the Newspaper Society, the applicants say that they are not going to recognise the rates of wages which prevail by reason of any agreement between the two organisations, as they are not members of the Newspaper Society.

Regulation 58AA (1) (c) does not deal with employers who are members of organisations, but it empowers the Minister to make provision by order

"for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the order to be, or to be not less favourable than, the recognised terms and conditions."

In other words, if an employer is employing people on terms other than those to which the regulation refers as "the recognised terms and conditions", the regulation applies. Article 2 of the order of 1951 provides:

"Where—(a) in any trade or industry or section of trade or industry in any district terms and conditions of employment are established which have been settled by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in that trade or industry or section of trade or industry in that district (hereinafter referred to as 'recognised terms and conditions'); and (b) an issue as to whether an employer in that district should observe the recognised terms and conditions (hereinafter referred to as 'an issue') is reported to the Minister in accordance with this order by an organisation of employers or a trade union; and (c) the Minister is of opinion that the organisation of employers or trade union reporting the issue habitually takes part in the settlement of terms and conditions of employment in the trade or industry or section of trade or industry concerned; that issue shall be dealt with in accordance with the subsequent provisions of this order."

The object of that article, as it seems to me, is to enable the terms which have been negotiated between representatives of a substantial proportion of employers and workmen to be imposed on other employers and workmen, whether they are members of the negotiating bodies or not. Presumably, employers and workmen who were members of negotiating bodies would agree to abide by the terms that had been agreed between the parties. Article 2 of the order of 1951, obviously is intended to provide for the case where workmen are being employed on conditions of employment which are different from those negotiated, it being intended that the negotiated terms should apply to the trade as a whole.

Counsel for the applicants attempted to apply the decision of this court in the *South Shields* case (1) to the case now before us, but, in effect, the *South Shields* case (1) is quite different. In the first place, it was sought to refer the *South Shields* case (1) as a trade dispute and not as an issue concerning recognised terms and conditions of employment under art. 2 of the order of 1951. In the *South Shields* case (1) a joint committee set up by the Association of Municipal Corporations and the Society of Town Clerks made recommendations in regard to the conditions of service and the scale of salaries applicable to town clerks. The *South Shields* Corporation refused to adopt the recommendations as they considered that their town clerk was already being paid an adequate salary. The society, on behalf of the town clerk, reported to the Minister of Labour and National Service that a trade dispute had arisen as to the town clerk's conditions of service and salary and the Minister referred the dispute to the National Arbitration Tribunal under the Conditions of Employment and National Arbitration Order, 1940, art. 2. Before the dispute was heard by the tribunal, the order of 1940 was revoked by the Industrial Disputes Order, 1951, art. 13 (1). By art. 13 (2) and sched. II, para. 1 (b) (ii), of the order of 1951, it was provided that the new order should apply to any pending cases. But for that fact, our decision in the *South Shields* case (1) would have been different from what it was. Our decision in that case was that a dispute between an employer and one workman in regard to the wage to be paid to that workman could not be referred to the Industrial Disputes Tribunal, as the order of 1951 was intended to deal with disputes which affected all the workmen in the service of an employer or a section of workmen in his employment, and the tribunal had no jurisdiction to deal with an individual case.

In the case now before us, although the matter may have arisen as a result of the allegation by the National Union of Journalists that the editor of the applicants' newspaper was being paid less than the recognised rate of wages, the reference is not with regard to her wages, although the question of her wages may come into the matter incidentally. The sole question for the Industrial Disputes Tribunal is whether the applicants should observe the terms and conditions of employment which have been agreed between the Newspaper Society and the National Union of Journalists. For these reasons it seems to me that the reference by the Minister falls exactly within the provisions of art. 2 of the order of 1951, and, consequently, there is no ground for prohibiting the tribunal from proceeding with the reference.

JONES, J.: I agree.

PARKER, J.: I also agree.

Application refused.

Solicitors: *Slaughter & May* (for the applicants); *Solicitor, Ministry of Labour and National Service* (for the tribunal); *Vizard, Oldham, Crowder & Cash* (for the respondent union).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

THACKRAY v. CENTRAL LAND BOARD.

[CHANCERY DIVISION (Danckwerts, J.), May 7, 1952.]

Town and Country Planning—Permission for development—Consent in agreement made under the Town and Country Planning Act, 1932, s. 34 (1)—Town and Country Planning Act, 1947 (c. 51), s. 12 (1).

In 1933 a town planning scheme prepared by a borough council, as local planning authority, was approved. On July 24, 1937, pursuant to para. 40 of the scheme, which provided that the planning authority might enter into agreements for the purpose of carrying the scheme into effect, the borough council entered into an agreement with T., expressed to be made under the Town and Country Planning Act, 1932, s. 34 (1), by which agreement the borough council consented to the erection on certain land of fourteen buildings each consisting of a shop on the ground floor with two self-contained residential flats above. T. agreed that the said land should be permanently subject to the conditions restricting the planning development and use thereof contained in the schedule to the said agreement. After the appointed day (July 1, 1948) under the Town and Country Planning Act, 1947 (by which the Act of 1932 was repealed and the county council was substituted for the borough council as planning authority), T. desired to proceed with the erection of the buildings, and, the consent contained in the agreement of 1937 not having been revoked, he claimed that planning permission under the Act of 1947 was not required, with the result that no development charge was exigible.

HELD: notwithstanding that the agreement remained effective and enforceable against the county council by virtue of para. 10 of sched. X to the Act of 1947 and reg. 10 of the Town and Country Planning (Transfer of Property and Officers and Compensation to Officers) Regulations, 1948, made under s. 101 of the Act, and notwithstanding the provisions of s. 38 (2) of the Interpretation Act, 1889, relating to the preservation of rights acquired under a repealed enactment, the consent did not constitute the permission under Part III of the Act of 1947 which was made requisite by s. 12 (1) of that Act, and, therefore, it was necessary for T. to obtain permission under s. 12.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 12, see HALSBURY'S STATUTES, Second Edn., Vol. 25, pp. 506-509.

Cases referred to:

- (1) *London County Council v. Allen*, [1914] 3 K.B. 642; 83 L.J.K.B. 1695; 111 L.T. 610; 78 J.P. 449; 40 Digest 302, 2602.
- (2) *Ransom & Luck, Ltd. v. Surbiton Borough Council*, [1949] 1 All E.R. 185; [1949] Ch. 180; [1949] L.J.R. 809; 113 J.P. 95; 2nd Digest Supp.

ADJOURNED SUMMONS to determine (i) whether on the construction of (a) an agreement in writing made on July 24, 1937, between the plaintiff, of the one part, and the mayor, aldermen and burgesses of the borough of Ealing (the planning authority), of the other part, and (b) the Town and Country Planning Act, 1947, s. 12 (1), and sched. X, para. 10, the plaintiff was entitled to carry out the operations and changes of use specified in para. 1 of the said agreement without any permission under the said Act; and (ii) whether the plaintiff was entitled to carry out the operations and changes of use specified in para. 1 of the said agreement without being required to pay to the defendants under Part VII of the said Act any development charge in respect of such operations or changes of use.

Heathcote-Williams, Q.C., and *R. H. Bernstein* for the plaintiff, the landowner.
Denys B. Buckley for the defendants, the Central Land Board.

DANCKWERTS, J.: This application raises two questions under the Town and Country Planning Act, 1947. They are: (i) whether permission was required for certain development which the plaintiff wished to carry out under that Act, and (ii) whether a development charge was payable under the provisions of the Act in question. The second question depends on the answer to the first. That appears from the provisions of s. 69 of the Town and Country Planning Act, 1947, which provides:

A " (1) Subject to the provisions of this Act, there shall be paid to the Central Land Board in respect of the carrying out of any operations to which this Part of this Act applies, and in respect of any use of land to which this Part of this Act applies, a development charge of such amount (if any) as the board may determine . . . (2) This Part of this Act applies to all operations for the carrying out of which planning permission under Part III of this Act is required, and to all users of land for the institution or continuance of which such permission is so required."

B So it is plain that, if permission is required under the provisions of the Act, the exaction of a development charge must follow. The Ealing Borough Council were the planning authority for the relevant area under the Town Planning Act, 1925, and the Town and Country Planning Act, 1932, but under the Town and Country Planning Act, 1947, the Middlesex County Council have been substituted for the borough council.

C Under the Town Planning Act, 1925, s. 1 and s. 2, power was conferred on the borough council to make town planning schemes, and those provisions were continued by the Town and Country Planning Act, 1932, s. 54. On Mar. 28, 1933, a scheme prepared by the borough council was approved by the Minister. In para. 28 of that scheme there are provisions as to the character of the buildings which were to be erected, and para. 40 of the scheme provides that the local authority may enter into agreements for the purpose of carrying the scheme into effect. On July 24, 1937, such an agreement was entered into between the borough council and the plaintiff, Mr. James Deighton Thackray, and that agreement is expressed in the recital to have been made pursuant to the Town and Country Planning Act, 1932, s. 34, and all other powers them enabling. The Town and Country Planning Act, 1932, s. 34 (1), enables local authorities to enter into agreements with landowners to impose restrictions on the land held by the latter, and it further enables local authorities to enforce such agreements in a way which was not previously possible because of the decisions relating to restrictive covenants—in particular, *London County Council v. Allen* (1)—that to enforce a covenant against other than the covenantor a covenantee must be interested in neighbouring land to which the benefit of the covenants could be attached. Section 34 (1) has been said by the Court of Appeal in *Ransom & Luck, Ltd. v. Surbiton Borough Council* (2) to be strictly limited, and it was held in that case that the section could not prevent a planning authority exercising such powers of revocation as they had under the Town and Country Planning (Interim Development) Act, 1943.

D The agreement in the present case provides by cl. 1:

" Subject to the terms hereinafter mentioned the council hereby consent to the erection of fourteen buildings each consisting of a shop on the ground floor with two self-contained residential flats over on the said land (other than [an open space.])"

E Clause 2 provided that the owner, i.e., the plaintiff, was to submit plans for the approval of the council when he came to carry out his erection of the buildings. By cl. 4 the plaintiff agreed that:

" the said land shall be permanently subject to the conditions restricting the planning development and use thereof contained in the schedule hereto and that such restrictions shall be enforceable by the council against

the owner and persons deriving title under him in like manner and to the like extent."

It was contended on behalf of the plaintiff that that consent to the erection of the buildings is still effective, and, therefore, he, now desiring to proceed with the erection of the buildings, is not liable to obtain any permission under the Town and Country Planning Act, 1947 (although it appears to be the fact that such permission has been obtained), and, therefore, it follows that no development charge is payable by him in the circumstances. It is not contended on behalf of the plaintiff that the Ealing Borough Council, or, it must follow, I think, the Middlesex County Council, are prevented from revoking the permission or consent which is contained in that agreement, but it is pointed out that such permission or consent has not been revoked, and, therefore, it is said that it is still effective having regard to the provisions of the Town and Country Planning Act, 1947.

I have referred to s. 69 of the Act of 1947 which imposes a development charge, except in the case which is mentioned in s. 80, i.e., land which is ripe for development and with regard to which there has been a building contract entered into (which cannot apply in the present case). Section 12 of the Act is most important. It provides, under sub-s. (1):

"Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day."

The appointed day was July 1, 1948, and, therefore, in the present case, the development which it is desired to carry out will be work "which is carried out after the appointed day." Sub-section (2) provides:

"In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

There is no doubt that the erection of the buildings by the plaintiff will be a "development" within the meaning of that provision.

[HIS LORDSHIP referred to s. 12 (5), s. 77 (1), and s. 78 (1) and continued:] Those provisions cannot apply to the present case, and the point of the reference to them is to show, as contended by counsel for the Central Land Board, that, where it is desired to preserve the effect of permissions previously given, the Act provides in appropriate terms that permission under the Act shall be deemed to have been given in those cases.

Section 101 (1) contains provisions under which the Minister may make regulations

"(a) for the transfer to local planning authorities of property and liabilities of councils of county districts, being property and liabilities held or incurred for the purposes of the exercise, under the enactments relating to town and country planning in force before the appointed day, of functions corresponding with the functions of local planning authorities under this Act; (b) for the transfer to local planning authorities, or to the constituent authorities of joint planning committees, of property and liabilities of such committees . . ."

Then the transfer of officers and the continuation of proceedings are dealt with.

In pursuance of s. 101 the Minister has made the Town and Country Planning (Transfer of Property and Officers and Compensation to Officers) Regulations, 1948 (S.I., 1948, No. 1236). Regulation 3 of those regulations provides:

"Save as is mentioned in reg. 5 of these regulations, the property and liabilities of the council of a county district being property and liabilities held or incurred for the purpose of old planning functions shall on the appointed

day be transferred to and vest in the local planning authority for the area in which such district is situated."

Regulation 10 provides that:

" All contracts, deeds, agreements, notices and other instruments affecting any old planning functions or any property or liabilities transferred by virtue of these regulations and subsisting at the appointed day shall be of as full force and effect against or in favour of the local planning authority or authorities to whom the transfer was made and may be enforced as fully and effectually as if, instead of the council or joint planning committee named in the instrument, the authority or authorities to whom the transfer was made had been a party thereto."

That regulation does not seem to be authorised under the particular powers conferred in paragraphs (a) to (f) of s. 101 (1), but I think it is justified under the general authority in the sub-section to make regulations consequential on or supplementary to the provisions of s. 4, and the effect appears to be that I must treat the agreement of July 24, 1937, as though the Middlesex County Council were a party to it instead of the Ealing Borough Council.

The Act of 1932 has been repealed by virtue of s. 113 (2) of, and sched. IX to, the Act of 1947. In sched. X, which is entitled: "Transitory Provisions and Provisions Consequential on Repeals" I find the following provisions in para. 10:

" Subject as hereinafter provided, any agreement for restricting the planning, development or use of land made under s. 34 of the Act of 1932 with any such authority as is mentioned in sub-s. (2) of that section, or made or having effect as if made under a planning scheme with the responsible authority for the purposes of the scheme, shall, if in force on the appointed day, continue in force in accordance with the terms thereof and may be enforced under the said s. 34 or under the scheme, as the case may be."

It appears to me that the principal object of that transitional provision is to enable the restrictive provisions contained in an agreement made with a former planning authority to be enforced by the new and substituted planning authority against any landowner who has submitted to the imposition of restrictive covenants on his land. It would appear that s. 34 (1) of the Act of 1932, as construed by the Court of Appeal in *Ransom & Luck, Ltd. v. Surbiton Borough Council* (2), had a very limited effect and was really concerned with the making effective of an agreement for restrictive covenants, but there is, of course, the provision that, if it has effect under a planning scheme, it will be enforceable under the scheme. Therefore, there is to that extent a wider provision in para. 10 of sched. X to the Act of 1947 than simply the continuing in force of the terms of s. 34.

Consequently, it seems that the agreement in the present case remains in force and is enforceable by virtue of the provisions of this paragraph. There are certain provisos which also appear in the paragraph. Provisos (b) and (c) are concerned with the modification of any restrictive provisions for the development or use of the land either by the Minister or on the application of a party or by arbitration. Proviso (a) is certainly in wider terms. It provides that:

" nothing in any such agreement shall be construed as restricting the exercise, in relation to land to which any such agreement applies, of any powers exercisable by any Minister or authority under this Act so long as those powers are exercised in accordance with the provisions of the development plan or in accordance with any directions which may have been given by the Minister under s. 36 of this Act, or as requiring the exercise of any such powers otherwise than as aforesaid."

Counsel for the Central Land Board has said that that is simply a recognition of the principle which was stated by the Court of Appeal in *Ransom & Luck, Ltd.*

v. *Surbiton Borough Council* (2). However that may be, this provision is, undoubtedly, wider than merely the consideration of restrictions on the use of land contained in an agreement by a landowner. Furthermore, I find that under the Interpretation Act, 1889, s. 38 (2):

“Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed.”

The Act of 1932 has been repealed by the Act of 1947, and it is said, with some force, that the right given by the consent of the Ealing Borough Council under the agreement of July 24, 1937, made under s. 34 (1) of the Act of 1932, is a right which has been acquired by the plaintiff under the provisions of the repealed enactment. Therefore, it is said that the repeal of the Act of 1932 ought not to affect the right which the plaintiff acquired by virtue of the consent. All that is true, but it seems to me that it is not sufficient for the plaintiff's purposes.

It would have been extremely simple for the legislature to have provided in the Town and Country Planning Act, 1947, that any consent or permission given by a planning authority under the Acts which previously existed should remain effective so that permission under the Act of 1947 should not be required. The legislature has not done that, and, furthermore, the legislature has provided in certain cases where permission has been given that permission should be deemed to have been given under the Act of 1947. That seems to me to be of importance, as indicating the manner in which I should approach the question which I have to decide. Although I must treat any right as given by the agreement of July 24, 1937, as not affected by the repeal of the Act under which it was given, and although I must treat the agreement as being an effective agreement, enforceable according to the provisions of para. 10 of sched. X to the Act of 1947, and, by virtue of s. 101 and the regulations made thereunder, as an agreement which was entered into by the Middlesex County Council, the present planning authority, yet all that does not make the consent contained in the agreement more than a consent which was given under the provisions of the Act of 1932 and does not amount to a permission of the necessary nature, i.e., a permission given under the Town and Country Planning Act, 1947. Accordingly, I am driven to the conclusion, however arbitrary the result may be, that in this case permission was required under the provisions of s. 12 of the Act of 1947 for the development desired by the plaintiff, there being no effective provision which excepts him from the express terms of s. 12. Such permission being necessary, it follows from s. 69 of the Act of 1947 that the development charge will be payable.

Order accordingly.

Solicitors: *Lamartine Yates & Lacey*, agents for *Francis & Davies*, Sudbury, Middlesex (for the plaintiff) ; *Treasury Solicitor* (for the defendants).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

Re GALLOWAY (deceased). HOLLINS AND OTHERS v.
ATTORNEY-GENERAL OF THE DUCHY OF LANCASTER
AND OTHERS.

[CHANCERY OF THE COUNTY PALATINE OF LANCASTER (Sir Leonard Stone, V.-C.), March 12, April 22, 1952.]

A

National Health Service—Hospital—Transfer of property and endowment—
“Held by trustees solely for the purposes of that hospital”—*Trustees having liberty to pay or apply income of fund to or for a hospital until further order of court—National Health Service Act, 1946 (c. 81), s. 7 (4) (10).*

B

By his will dated Apr. 12, 1933, the testator gave his residuary estate
“Upon trust for such one or more charitable institutions objects or purposes established at the time of my death or to be established within twenty-one years after my death by my trustees or other persons in or within five miles from Preston aforesaid for the furtherance of or in connection with the maintenance or benefit of poor people residing in or in the neighbourhood of Preston aforesaid in such shares if more than one upon such terms and conditions in such manner in every respect as my trustees in their absolute discretion shall direct with power for them in that behalf to make or approve any settlements or dealings and to transfer any property to any person or corporation.” In 1938 proceedings were commenced by the trustees asking for the directions of the court regarding the execution of these trusts. By an order dated Apr. 4, 1938, the trustees were given liberty to set aside a sum of £20,000 and to invest the same in their own names and until further order “from time to time to pay or apply the whole or such part (if any) as they shall think fit of the income of such investments for the maintenance of the ” Preston and County of Lancaster Queen Victoria Royal Infirmary. After further directions, the order recited that the trustees desired to retain the wide powers and discretions conferred on them by the will. Until July 2, 1948, the trustees applied the income of the investments representing the £20,000 (hereinafter called “the trust fund”) for the maintenance of the infirmary. The Minister of Health claimed that on July 5, 1948 (the “appointed day” under the National Health Service Act, 1946), the trust fund was transferred to and vested in him by virtue of s. 7 (4) of the Act of 1946.

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HELD: the trust fund was not held by the trustees solely for the purposes of the infirmary within s. 7 (10) of the Act of 1946, but was held by them on trust to pay the income only to the infirmary for a limited period, subject (i) to the exercise of the trustees’ discretion so to pay, and (ii) to the absence of a further order of the court giving directions to apply the income to other charitable purposes, and, therefore, the trust fund was not an “endowment” within s. 7 (4) of the Act and did not vest in the Minister on the appointed day.

Re Marjoribanks’ Indenture ([1952] 1 All E.R. 191), applied.

FOR THE NATIONAL HEALTH SERVICE ACT, 1946, s. 7 (4), see HALSBURY’S STATUTES, Second Edn., Vol. 15, p. 342.

H

Cases referred to:

- (1) *Re Marjoribanks’ Indenture*, [1952] 1 All E.R. 191; [1952] Ch. 181.
- (2) *Minister of Health v. Fox*, [1950] 1 All E.R. 1050; [1950] Ch. 369; 2nd Digest Supp.

PETITION to determine whether the trustees of the will of William Wilding Galloway, deceased, (a) ought to transfer to the Minister of Health a trust fund constituted under the said will and the income arising therefrom since

July 5, 1948, or (b) ought to apply the trust fund and the income arising therefrom since July 5, 1948, for the benefit of poor persons residing in or in the neighbourhood of Preston, Lancashire.

E. W. Griffith for the plaintiffs (trustees of the will).

Gray, Q.C., and *H. C. Easton* for the Minister of Health.

Attorney-General of the Duchy of Lancaster and Queen's Attorney and Serjeant within the County Palatine of Lancaster (Milner Holland, Q.C.) and P. I. Bell. A

Cur. adv. vult.

April 22. **SIR LEONARD STONE, V.-C.**, read the following judgment. This petition raises a question regarding the effect of the National Health Service Act, 1946, s. 7, on £20,000, part of the residuary estate disposed of in favour of charity by the will, dated Apr. 12, 1933, to which there is a codicil dated Aug. 16, 1934, of William Wilding Galloway who died on Sept. 27, 1936. B

By cl. 17 of his will the testator gave his residuary estate, which amounted to upwards of £150,000, to his trustees

"Upon trust for such one or more charitable institutions objects or purposes established at the time of my death or to be established within twenty-one years after my death by my trustees or other persons in or within five miles from Preston aforesaid for the furtherance of or in connection with the maintenance or benefit of poor people residing in or in the neighbourhood of Preston aforesaid in such shares if more than one upon such terms and conditions in such manner in every respect as my trustees in their absolute discretion shall direct with power for them in that behalf to make or approve any settlements or dealings and to transfer any property to any person or corporation." C D

These proceedings were commenced in 1938 by the trustees of the testator's estate to obtain the assistance of this court in regard to the execution of these charitable trusts of residue, and to these proceedings Mr. Davies and Mr. Matthew, the honorary treasurers of the Preston and County of Lancaster Queen Victoria Royal Infirmary, were made defendants. On Apr. 4, 1938, the court made an order which must have a most material bearing on the question which I have to determine. The first operative part of that order is an undertaking by Mr. Davies and Mr. Matthew to apply the sum of £20,000 thereafter mentioned in or towards the erection and equipment of a new wing of the said Preston and County of Lancaster Queen Victoria Royal Infirmary to be used for the reception of poor persons requiring orthopaedic and other treatment and that the name of "Galloway" should be used in perpetuity in connection with such new wing. This is implemented by an order that the trustees be at liberty to pay to Mr. Davies and Mr. Matthew £20,000 out of the residuary estate. No question arises on that £20,000. It has, presumably, long ago been paid over and used in accordance with the undertaking, and, if this is so, the wing of the infirmary built and equipped with it vested on July 5, 1948, in the Ministry of Health under the National Health Service Act, 1946, s. 6. E F G

Then comes the part of the order relevant to the question I have to determine. It is:

"that the plaintiffs be at liberty to set aside out of the residuary estate of the testator a further sum of £20,000 and to invest the same in their own names and that the plaintiffs be at liberty until further order from time to time to pay or apply the whole or such part (if any) as they shall think fit of the income of such investments for the maintenance of the said infirmary." H

I will call the £20,000 here referred to "the second £20,000 fund." The order proceeds to deal with sums of £2,000 and £5,000, parts of the testator's residuary

estate which, on certain other defendants (who represented two other charities) executing respectively trust deeds as set out in schedules to the order, the trustees were to be at liberty to pay over to them. The order continues:

A "And the plaintiffs by their counsel declaring that it is their desire to retain the wide powers and discretions conferred upon them by the will of the testator in the administration and application of the funds subject to the trusts of his will . . ."

B There follow particulars of a sum of £10,000 mentioned in cl. 15 (a) of the testator's will and another sum of £10,000 part of the residuary estate of the testator proposed to be applied in the purchase, equipment and maintenance of playgrounds for the benefit of poor persons living in or in the neighbourhood of Preston. The order continues:

"And it is ordered that the plaintiffs be at liberty from time to time as they may be advised to bring into chambers schemes for the application of any other funds subject to the trusts of the will of the testator to be considered by the registrar and (if he shall think fit) settled by him."

C Lastly, after an order regarding costs:

"And it is ordered that the further hearing and further consideration of this petition be adjourned."

D The evidence is silent regarding schemes for other parts of the testator's residuary estate, and, no doubt, nothing turns on them. From April, 1938, until July 2, 1948, the plaintiffs as trustees applied the income from time to time of the second £20,000 fund to the use of the infirmary. In fact, they apportioned the income down to July 5, 1948, being the appointed day on which the vesting of voluntary hospitals in the Minister of Health under the National Health Service Act, 1946, took effect. On July 2, 1948, the plaintiff, Sir William Ascroft, on behalf of the testator's trustees, wrote the following letter to Mr. John Gibson who was at that time superintendent and secretary of the infirmary:

E "As the State takes over the Preston Royal Infirmary on the fifth instant, we enclose cheque for £173 14s. being the apportioned interest which the trustees were authorised to pay on £19,323 13s. 5d. 3½ per cent. Conversion stock in which the sum of £20,000 was invested, until further order of the court. The trustees have been advised by counsel that they have no power to pay over further income after the appointed day, so that this will, of necessity, be the last payment."

F Thereafter the Minister of Health demanded the transfer to himself of the second £20,000 fund, and it is whether that demand is well founded that I have to determine.

G By the National Health Service Act, 1946, s. 6 (1), it is provided:

H "Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not

including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section."

The words in that sub-section to which attention must be drawn are

"being interests held immediately before the appointed day . . . by trustees solely for the purposes of that hospital."

Sub-section (2) transfers all hospitals vested in local authorities immediately before the appointed day, and again it is property "held . . . solely for the purposes of those hospitals" which is to be transferred to and vested in the Ministry.

Section 6 having only embraced interests in or attached to land and any equipment, furniture, or other movable property, s. 7 deals with the endowments of any voluntary hospital. The first three sub-sections of that section deal with the endowments of hospitals designated as teaching hospitals. The Preston and County of Lancaster Queen Victoria Royal Infirmary is not a teaching hospital, and, therefore, it is sub-s. (4) which is applicable to the endowments (if any) of that infirmary. That sub-section provides that all endowments of voluntary hospitals to which the last foregoing section applies, other than a hospital to which the foregoing provisions of that section apply,

"being endowments held immediately before the appointed day, shall on that day be transferred to and vest in the Minister by virtue of this Act free of any trust existing immediately before that day; and the Minister shall establish a fund, to be called the Hospital Endowments Fund, to which he shall transfer all such endowments."

By sub-s. (10) an endowment is defined as follows:

"In this section the expression 'endowment,' in relation to a voluntary hospital, means property held by the governing body of the hospital or by trustees solely for the purposes of that hospital, being property of the following descriptions . . . (b) shares, stocks, bonds, debentures and other securities, and any other personal property held by way of an investment."

Again the expression "property held . . . by trustees solely for the purposes of that hospital" is used.

In this case there is no mention at all of the infirmary in the will of the testator and whether or not the second £20,000 fund was immediately before the appointed day held solely for the purposes of the infirmary must depend on the effect of the order of Apr. 4, 1938, and events which have since occurred. Let me say at once that the Attorney-General, who argued the case on behalf of charity generally, did not seek to make any point or place any reliance on Sir William Ascroft's letter of July 2, 1948, or on the attitude of the trustees in refusing to make further payments after the cheque for £173 14s. sent with that letter. Looking at the order of Apr. 4, 1938, as a whole, there is a marked distinction between, on the one hand, the first £20,000 fund, which was to be used to build and equip the new wing and with regard to which the honorary treasurers gave their undertaking, and the sums of £2,000 and £5,000 with regard to which the representatives of other charities were to execute trust deeds, and, on the other hand, the second sum of £20,000 which was to be invested in the names of the plaintiffs as trustees and in regard to the income of which, but not the capital, the testator's trustees were to

"be at liberty until further order from time to time to pay or apply the whole or such part (if any) as they shall think fit . . . for the maintenance of the . . . infirmary."

Unlike what happened in the case of the first £20,000 fund, the £2,000, and the £5,000, the trustees have not given up once and for all, or surrendered to the court, the discretions conferred on them by cl. 17 of the testator's will with regard to that slice of the testator's residuary estate.

But, even so, was the second £20,000 fund held by them immediately before the appointed day solely for the purposes of the infirmary? I am fortunate in having the authoritative guidance on this subject of the Court of Appeal in *Re Marjoribanks' Indenture* (1). True it is that the decision of the Court of Appeal was in regard to land so that s. 6 of the Act was material in that case. That makes, in my view, no difference, because, not only are the material words "held . . . solely for the purposes of that hospital" the same in s. 6 as in s. 7, but in *Re Marjoribanks' Indenture* (1) the Court of Appeal considered an earlier decision of WYNN-PARRY, J., in *Minister of Health v. Fox* (2) where WYNN-PARRY, J., had to deal with an endowment fund as well as with land. SIR RAYMOND EVERSHED, M.R., delivered the judgment of the court in *Re Marjoribanks' Indenture* (1), and said ([1952] 1 All E.R. 196):

"The arguments have presented us with a choice between two extreme views. And each has itself—quite properly—been subjected to the test of extreme cases with a view to showing that each, in such cases, tends to unreality or absurdity. Thus it is, in our judgment, the most formidable of the criticisms directed to the view of WYNN-PARRY, J., as expressed in *Minister of Health v. Fox* (2), that in a case in which land is held on trusts for the purposes of a hospital for some limited period and thereafter for some other public or private purposes, the effect of the Act would be to destroy those later interests, which, in the case of private interests, would be equivalent to an expropriation for which no kind of compensation is provided. Moreover, as it seems to us, the view taken in *Minister of Health v. Fox* (2), by WYNN-PARRY, J., appears to treat the word 'held' as equivalent to 'used in fact.' . . . On the other hand, the plaintiff's argument appears to have (at least) the effect of excluding from the Act altogether every case of hospital land held under the terms of a trust deed which contains any provision directed to the application of the trust property to some other purpose in the possible event of the discontinuance for any reason of the specified 'hospital' trust, and, unless, in looking for the existence of such possibilities, it is illegitimate to look outside the express provisions of the relevant trust instrument—notwithstanding the absence of any language in s. 6 (1) of the Act of 1946 requiring such a confinement of the search—the exempting effect of the phrase under discussion might well, under the doctrine of resulting trust, extend to a large proportion of the land held on July 4, 1948, on trust for the purposes of voluntary hospitals. Neither of the extreme views, when so examined and tested, appears readily to conform to the intention naturally attributable to Parliament. But, in our judgment, it is unnecessary for the court to choose between the two alternatives presented. The relevant words require, as we think, in each case the simple question to be asked and answered in reference to July 4, 1948: 'On that day, for what purposes did the trustees hold the land?' In the present case the proper answer would have been: 'For the purposes of the Royal Midland Counties Home for Incurables and no other.' In our judgment that answer would be plainly in conformity with common sense. Nor can we think that its faithfulness would in any sense be qualified by the presence of the remote remainder in favour of other charitable purposes determined by the committee and subscribers on the contingency of the home ceasing to continue or by the provision enabling income of the invested proceeds of sale to be applied in payment of pensions, for, in our view, the payment of such pensions, though distinct from the activities of the home as a physical entity, is nevertheless fairly to be regarded as a purpose of the home, whether regarded from its material or institutional aspect. It is a purpose so closely connected with, and so much a part of, the purposes of the home as such that it must, in our judgment, necessarily cease if for any reason the home itself ceased to exist."

Applying that test to the present case I must ask myself the question: "On July 4, 1948, for what purposes did the trustees hold this second £20,000 fund?" The answer must be: "For the charitable purposes set out in cl. 17 of the testator's will, these purposes being abridged until further order of this court to paying or applying the whole or such part, if any, as the trustees should think fit of the income of it for the maintenance of the infirmary." That seems to me to postulate payment of income only for a limited period subject to two contingencies:—(i) the exercise of the trustees' discretion to pay or apply the income for the maintenance of the infirmary, and (ii) the absence of any further order in this action ordering application of the fund itself or the income of it for some other charitable purposes within the scope of cl. 17 of the testator's will. In my judgment, neither of these contingencies can approximate to the remote remainder referred to by the Master of the Rolls in the passage in the judgment of the Court of Appeal which I have read, and it must follow that I must answer the question raised in this petition by declaring that the second £20,000 fund did not vest in the Minister of Health on July 5, 1948, under the provisions of s. 7 (4) of the National Health Service Act, 1946, and, accordingly, should not be transferred to the Minister under that sub-section.

Order accordingly.

Solicitors: *Wilson, Wright & Ascrofts*, Preston (for the plaintiffs); *Boote, Edgar & Co.*, Manchester, agents for the *Solicitor, Ministry of Health* (for the Minister of Health); *Buck & Dicksons*, Preston (for the Attorney-General of the Duchy of Lancaster).

[Reported by JAMES FITZHUGH, ESQ., *Barrister-at-Law.*]

Applied. CHURCH v. CHURCH.
[1952] 2 All E.R. 441.

RICHARDS v. RICHARDS.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.JJ.), May 7, 8, 1952.]

Divorce—Conduct conducing—Desertion by other spouse—Desertion by husband—Adultery of wife.

Divorce—Desertion—Termination—Adultery by deserted spouse—Effect on deserting spouse's mind.

The parties were married in May, 1947. Later in the year the husband, who was then in the army, heard that the wife was going about with other men, and in December, 1947, he left her. In 1949 the wife committed adultery, and asked the husband to take divorce proceedings against her. In December, 1950, he asked her to make a statement to enable him to start proceedings, but, instead of supplying the statement, she presented a petition for divorce against him on the ground of desertion. He presented a cross-petition for divorce on the ground of her adultery.

Held: (i) desertion, by itself, did not conduce to adultery, and there was no conduct on the husband's part conducing to the wife's adultery.

Observation of SIR BOYD MERRIMAN, P., in *Herod v. Herod* ([1938] 3 All E.R. 729), applied.

(ii) although the wife's adultery did not automatically terminate the husband's desertion, it would be held to be one of the causes of the subsequent desertion unless she could show that the husband's conduct was not affected by it; she had failed to discharge the burden of proof which was on her in that respect; and, therefore, the desertion ended when the husband learned of her adultery, and she was not entitled to a decree of divorce on the ground of his desertion.

Observation of LORD GREENE, M.R., in *Williams v. Williams* ([1943] 2 All E.R. 748), applied.

(iii) although the court had a discretion, under the Matrimonial Causes Act, 1950, s. 4 (2), proviso (iii), to dismiss the husband's cross-petition as he had deserted the wife before she committed adultery, the discretion should be exercised in his favour and a decree nisi should be granted to him.

AS TO DESERTION, see HALSBURY, 1951 Supp., Divorce, paras. 963-965, and para. 1019; and FOR CASES, see DIGEST, Supp., Husband and Wife, Nos. 2977b, 2977c, and 2nd Supp., *ibid.*, No. 2912a.

Cases referred to:

- (1) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; Digest Supp.
- (2) *Callister v. Callister*, (1947), 63 T.L.R. 503; 2nd Digest Supp.
- (3) *Parry v. Parry*, [1896] P. 37; 73 L.T. 759; *sub nom. Parry v. Parry Millis v. Millis & Brown*, 65 L.J.P. 35; 27 Digest 359, 3433.
- (4) *Williams v. Williams*, [1943] 2 All E.R. 746; 113 L.J.P. 18; 169 L.T. 375; 2nd Digest Supp.
- (5) *Jeffreys v. Jeffreys & Smith*, (1864), 3 Sw. & Tr. 493; 33 L.J.P. M. & A. 84; 10 L.T. 309; 164 E.R. 1366; 27 Digest 356, 3404.

APPEAL by the husband from an order of Mr. Commissioner REWCASTLE, K.C., dated Jan. 21, 1952, whereby he granted a decree nisi of divorce to the wife on the ground of the husband's desertion and dismissed a cross-petition by the husband for divorce on the ground of the wife's adultery.

On May 31, 1947, the parties were married, while the husband, who was then serving in the army, was on leave, and they lived together for two days. In November, 1947, having heard that the wife was going about with other men, the husband obtained compassionate leave to visit her for a week-end. Although he accepted her explanation at the time, he did not return to her, and, in December, 1947, he wrote a letter to her showing that he then had an intention to leave her. When he was released from the army he saw her once or twice, but they did not live together. In 1949 the wife committed adultery, and, finding that she was pregnant, she informed the husband of the fact, through her solicitors, in October, 1949, and intimated that she would like the husband to begin divorce proceedings against her. He was unable to do so at that time, as three years had not passed since the date of the marriage. In December, 1950, he wrote to the wife's solicitors asking if the wife and the co-respondent would make statements to enable him to commence divorce proceedings, but, instead of supplying the statements, the wife presented a petition for divorce on the ground of the husband's desertion. The husband thereupon put in a cross-prayer for divorce on the ground of the wife's adultery.

The learned commissioner found that the husband had deserted the wife from December, 1947, and that the wife's adultery did not terminate the husband's desertion as the husband's conduct had conduced to the adultery.

Seuffert for the husband.

Kee for the wife.

SINGLETON, L.J.: I will ask DENNING, L.J., to give the first judgment.

DENNING, L.J., stated the facts, and continued: The law in such a situation was stated by SIR BOYD MERRIMAN, P., in *Herod v. Herod* (1), in terms which have been repeatedly approved in this court. The wife's adultery does not automatically terminate the desertion. It is, however, a serious prejudice to any hope of reconciliation—so serious, indeed, that it will be held to be one of the causes why there was no reconciliation and, therefore, one of the causes

of the subsequent desertion, unless she can show that the husband's conduct was not affected by it. If she can show that he did not know of it, or that he would never have come back to her again in any event, his desertion continues, but, if there is some chance of his coming back and her conduct destroys that chance, his desertion comes to an end when he gets to know of it because he then has good cause for staying away. It is very different if his conduct has conduced to her adultery because, as SIR BOYD MERRIMAN, P., said ([1938] 3 All E.R. 732):

"I do not think that a spouse could be heard to say that adultery at which he or she had connived, or to which his or her conduct had conduced, was a reasonable excuse for desertion."

That passage was approved and applied in this court in *Callister v. Callister* (2).

In the present case, therefore, the first question is whether the husband's conduct conduced to the wife's adultery. Conduct only conduces to adultery when it is such conduct "as is proved to have brought about the adultery": see per SIR BOYD MERRIMAN, P. (*ibid.*, 729) in *Herod v. Herod* (1). There must be conduct which is closely and directly connected with the adultery, such as exposing a wife to known and obvious dangers. Applying this test, I am clearly of opinion that desertion by itself is not conduct conducing to adultery. It would be a deplorable thing if desertion by one party were thought to be an excuse for the other party to commit adultery. It may explain the adultery, but it does not excuse it. During the war it often happened that, when the husband was serving abroad, his wife at home committed adultery, and in the pension cases it was always held that the wife's adultery was not caused by the separation, but was due to her own personality and conduct. So, it seems to me, in these cases, when there is desertion and nothing more, and then the wife commits adultery, her adultery is due, not to the desertion, but to her own weakness of character, or, as, no doubt, she would prefer to put it, because she fell in love with another man. That is the case here. A year after the desertion the wife fell in love with another man and committed adultery with him. The adultery is due to her own weakness of character and not to the desertion. In *Parry v. Parry* (3) there was a separation without any fault on the part of the husband. A jury found that his conduct conduced to the adultery, but GORELL BARNES, J., doubted whether he would have found that there was conduct conducing, and I think that his doubts were well founded. I should have thought there was no evidence in that case of conduct conducing to adultery.

Counsel for the wife contended that in the case now before us there was something more than desertion, but it is significant that in the pleadings it is not alleged that the husband's conduct had conduced to the adultery. That does not prevent the court from considering it, and it may have to do so, but, if the wife does not allege it, it goes to show that there is no substance in that suggestion. The wife was not left destitute. After her husband deserted her, she lived at home with her parents and went out to work to earn her living in the same way as she had done before the marriage. She said in evidence that she did not take proceedings before the justices against her husband for desertion because she did not want money. In those circumstances, it seems to me to be plain that his conduct did not conduce to her adultery. I, therefore, find myself unable to agree with the finding of the commissioner on that point.

Once it is found that the husband's conduct did not conduce to the wife's adultery, it follows that her adultery terminated his desertion unless she can show that it did not. The burden is on the wife to show that her adultery had no effect on the husband's conduct. In the words of LORD GREENE, M.R. ([1943] 2 All E.R. 748) in *Williams v. Williams* (4), it must be shown that her adultery did not affect the husband's attitude towards her "in the way of impeding a possible reconciliation in future." The commissioner found, in effect, that

she had not discharged that burden of proof. He said that the adultery "may have had some effect on his state of mind". The husband gave evidence that it did. He said that, when he found that she was bearing the child of another man, there was no possibility of his going back. On that finding of fact by the commissioner (which is amply supported by the evidence), the wife has failed to prove that her adultery had nothing to do with his subsequent desertion. So the result of the case is this. There was desertion by the husband in December, 1947, the wife committed adultery in the middle of 1949, and, when the husband got to know of it, his desertion ended, because he then had good cause for staying away. She cannot, therefore, succeed on her petition for divorce on the ground of his desertion.

The remaining question is whether the husband should succeed on his cross-petition for divorce on the ground of the wife's adultery. The adultery is established, but, as he deserted her first, that is a ground on which this court has a discretion to refuse his petition: Matrimonial Causes Act, 1950, s. 4 (2), proviso (iii). We have been referred to several of the old cases, and among them to *Jeffreys v. Jeffreys & Smith* (5), decided in 1864. In those days the court refused to grant a decree of divorce to the husband in such circumstances, but discretion is now exercised very differently from what it was in 1864. The wife wants a divorce so that she can marry the other man whose child she has. In the interests of the child—and, indeed, of everyone, since the married life has come to an end—the right course is that the court, in the exercise of its discretion, should grant a divorce on the cross-petition of the husband. In my opinion, the appeal should be allowed, the wife's prayer should be rejected, and the husband's cross-prayer for divorce should be granted.

HODSON, L.J.: I agree.

SINGLETON, L.J.: I also agree.

Appeal allowed.

Solicitors: *Smiles & Co.* (for the husband); *Edward Fail & Co.* (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NESTLÉ CO., LTD. v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), May 1, 1952.]

Company—Stamp duty—Exemption—Capital duty—Increase of capital to acquire shares in Northern Ireland company—"Existing company"—Finance Act, 1927 (c. 10), s. 55 (1) (b).

The appellant company, incorporated under the laws of Great Britain, increased its capital with a view to the acquisition of not less than ninety per cent. of the issued share capital of a company incorporated under the laws of Northern Ireland. On the question whether the increase of capital was exempt from stamp duty,

HELD: the words "any particular existing company" in s. 55 (1) (b) of the Finance Act, 1927, referred only to a company regulated by the laws of Great Britain, and, accordingly, the appellant company was not entitled to exemption from stamp duty.

FOR THE FINANCE ACT, 1927, s. 55, see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 935.

Cases referred to:

- (1) *Lumsden v. Inland Revenue Comrs.*, [1914] A.C. 877; 84 L.J.K.B. 45; 111 L.T. 993; 42 Digest 623, 238.
- (2) *A.-G. v. London Stadiums, Ltd.*, [1949] 2 All E.R. 1007; [1950] 1 K.B. 387; 2nd Digest Supp.
- (3) *Colquhoun v. Heddon*, (1890), 25 Q.B.D. 129; 59 L.J.Q.B. 465; 62 L.T. 853; 2 Tax Cas. 621; 42 Digest 687, 1007.

CASE STATED by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

The appellant company presented a statement of increase of nominal capital to the commissioners for their opinion as to stamp duty chargeable in respect of that capital. The commissioners were willing to admit that so much of the increase as was referable to the acquisition of shares of certain companies incorporated under the laws of Great Britain was exempt from stamp duty under the provisions of s. 55 (1) (A) of the Finance Act, 1927, but as regards the balance, referable to the acquisition of shares of companies incorporated under the laws of Northern Ireland, they refused exemption.

Grant, Q.C., and *Senter* for the appellant company.
Pennyquick, Q.C., and *J. H. Stamp* for the Crown.

DANCKWERTS, J.: The question in this case is whether stamp duty is payable by the appellant company, on an increase of its capital, under s. 112 of the Stamp Act, 1891. The immediate point, however, is whether there is an exemption available in the circumstances of the case under s. 55 of the Finance Act, 1927.

The kinds of transactions with which s. 55 is concerned are what are loosely called schemes for the reconstruction of or the amalgamation of companies. In the present case a company formed under the law of Great Britain passed a resolution on Mar. 7, 1951, increasing its capital, which was already £2,300,000, by an addition of £3,410,000, divided into 3,410,000 shares of £1 each. The resolution records that the increased capital was authorised for the purpose of acquiring shares in four companies, Nesmilk, Ltd., Nesfood, Ltd., Nestlé's Food Products (Northern Ireland), Ltd., and Ulster Farm Products, Ltd. Two of those companies were formed and incorporated in England. The last two companies were incorporated under the laws of Northern Ireland—in the one case in the year 1947 and in the other case in 1946. It is the fact of incorporation under the laws of Northern Ireland which produces the controversy in the present case. The matter was somewhat complicated by the rather artificial manner in which

the share capital of these companies was held. Paragraph 9 and part of para. 10 of the Case states:

"Immediately before the execution of the agreement referred to in the next paragraph :— (i) Unilac Inc., a company incorporated under the laws of Panama was the registered holder of all the issued shares except one in each of the subsidiary companies, and Food Products Holdings Inc., another company incorporated under the laws of Panama, was the registered holder of the remaining one share in each of the subsidiary companies . . . (10) . . . Under the agreement the consideration was to be satisfied by the issue to Unilac Inc., of 3,410,000 shares of £1 each of the appellant company credited as fully paid."

That was carried out.

The whole question is whether the exemption from duty is applicable only in part in the present case by reason of the fact that two of the companies were formed under the law of Northern Ireland. There is no question as regards that part of the increase of capital which was for the purpose of taking over the shares of the two English companies, because it has been accepted by the commissioners that the exemption applies in so far as the shares of those two companies were taken over. They rejected the claim simply as regards the amount of the increase of capital referable to the taking over of the shares of the two companies formed in Northern Ireland.

That being the position, I turn first to the provisions of s. 112 of the Stamp Act, 1891. That section provides:

"A statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the Registrar of Joint Stock Companies in England, Scotland, or Ireland, and a statement of the amount of any increase of registered capital of any company now registered or to be registered with limited liability shall be delivered to the said Registrar, and every such statement shall be charged with an ad valorem stamp duty of two shillings for every one hundred pounds and any fraction of one hundred pounds over any multiple of one hundred pounds of the amount of such capital or increase of capital as the case may be."

That section is headed: "Charge of duty on capital of limited liability companies," and it is quite plainly concerned with the stamp duty on companies formed under the law of Great Britain. Section 113 deals with another case and is headed: "Charge of duty on capital of companies with limited liability otherwise than under the Companies Acts."

Section 55 of the Finance Act, 1927, deals with certain exemptions which can be obtained on what is called reconstruction or amalgamation. It provides:

"(1) If in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any companies it is shown to the satisfaction of the Commissioners of Inland Revenue that there exist the following conditions, that is to say—(a) that a company with limited liability is to be registered, or that since the commencement of this Act a company has been incorporated by letters patent or Act of Parliament, or the nominal share capital of a company has been increased; (b) that the company (in this section referred to as 'the transferee company') is to be registered or has been incorporated or has increased its capital with a view to the acquisition either of the undertaking of, or of not less than ninety per cent. of the issued share capital of, any particular existing company."

Pausing there, I may say that the appellant company in the present case is the "transferee company", and that, if all four of the companies whose shares the appellant company is acquiring are companies of a kind that falls within the words "particular existing company", there is no doubt that the conditions of

the section are satisfied, because the whole of the share capital of these companies is being acquired. Then:

"(c) that the consideration for the acquisition (except such part thereof as consists in the transfer to or discharge by the transferee company of liabilities of the existing company) consists as to not less than ninety per cent. thereof . . . (ii) where shares are to be acquired, in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company; then, subject to the provisions of this section . . ."

Then we find some provisions which are set out under (A) and (B). Taking (A) first, it is provided:

"The nominal share capital of the transferee company, or the amount by which the capital of the transferee company has been increased, as the case may be, shall, for the purpose of computing the stamp duty chargeable in respect of that capital, be treated as being reduced by either—(i) an amount equal to the amount of the share capital of the existing company . . ."

That is the same company as that described in the early part of the section as "any particular existing company." Then, as originally passed, the section continued

". . . in respect of which stamp duty has been paid, or, in the case of the acquisition of a part of an undertaking, equal to such proportion of the said share capital as the value of that part of the undertaking bears to the whole value of the undertaking."

That was the wording of the provision as originally passed, but the words "in respect of which stamp duty has been paid", were eliminated by s. 41 of the Finance Act, 1930, and there were added in a retrospective manner the words "or relief has been allowed under the provisions of this section." Under (B) it is provided,

"Stamp duty under the heading 'Conveyance or transfer on sale' in sched. I to the Stamp Act, 1891, shall not be chargeable on any instrument made for the purposes of or in connection with the transfer of the undertaking or shares nor shall any such duty be chargeable under s. 12 of the Finance Act, 1895, on a copy of any Act of Parliament, or on any instrument vesting, or relating to the vesting of, the undertaking or shares in the transferee company."

Then there are certain provisos. I need only refer to proviso (b) which says:

"in the case of an instrument made for the purposes of or in connection with a transfer to a company within the meaning of the Companies (Consolidation) Act, 1908, the provisions of para. (B) of this sub-section shall not apply unless the instrument is either—(i) executed within a period of twelve months from the date of the registration of the transferee company or the date of the resolution for the increase of the nominal share capital of the transferee company, as the case may be; or (ii) made for the purpose of effecting a conveyance or transfer in pursuance of an agreement which has been filed, or particulars of which have been filed, with the registrar of companies within the said period of twelve months."

There is no definition of company in the sub-section, but in sub-s. (8) one finds:

"In this section, unless the context otherwise requires—References to the undertaking of an existing company include references to a part of the undertaking of an existing company: The expression 'shares' includes stock."

The real point at issue is the meaning of that phrase "any particular existing company", and the same phrase repeated in the clause beginning with (A): "the existing company." It is whether it refers to a company formed in any

part of the world under the law of any country, or whether it is limited to a company formed under the law of Great Britain. At the time when the Stamp Act was passed, it would be the United Kingdom, but, at the time when the Finance Act, 1927, had been passed, the Government of Ireland, 1920, had come into operation and Northern Ireland had for this purpose been constituted as a separate country.

- A It is said on behalf of the appellant company that the words must bear their natural meaning, and that "company," in its natural meaning, means any company formed anywhere. I have been referred to certain quotations from VISCOUNT HALDANE, L.C., in *Lumsden v. Inland Revenue Comrs.* (1) which are contained in *A.-G. v. London Stadiums, Ltd.* (2), a decision on this s. 55 of the Finance Act, 1927, though the point with which the Court of Appeal in that case were concerned is not the same as that in the present case. The question in that case was whether, as regards the provisions which are to be found under (B) in the section, a partial transfer of the shares acquired under the scheme of arrangement or amalgamation was sufficient to prevent the benefits of the exemption any longer applying. TUCKER, L.J., quotes from VISCOUNT HALDANE, L.C. ([1914] A.C. 892) the following observation ([1949] 2 All E.R. 1011):

- C " . . . it is no doubt true that there are cases of construction where the natural meaning of the words of a statute is rejected, and another meaning not expressed by the words taken in their ordinary sense is read in. That occurs where the context and scheme of the statute requires that this should be done in order that the language of the statute as a whole may be read as consistent. But a mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words it has used if they be literally interpreted is no sufficient reason for departing from the literal interpretation . . . I said at the beginning that the duty of judges in construing statutes is to adhere to the literal construction unless the context renders it plain that such a construction cannot be put on the words. This rule is especially important in cases of statutes which impose taxation."

- D When I examine the judgments of the learned lords justices to ascertain the view which they reached, I come to the conclusion that they did not apply LORD HALDANE's more general statement that the natural meaning should be applied, but put on the words in this part of the section a more limited meaning, so that they came to the conclusion that some other meaning than the strictly literal meaning was required in the particular case.

- E There is another case to which I was referred, *Colquhoun v. Heddon* (3). The headnote reads:

- G " By the Income Tax Act (16 & 17 Vict. c. 34), s. 54, provision is made for the deduction from assessments under sched. D. of the premium paid by the person assessed for an insurance on his life with any insurance company registered as therein mentioned; and by 16 & 17 Vict. c. 91, s. 1, the benefit of the provision is extended to any person who shall have insured his life 'in or with any insurance company . . . registered pursuant to 7 & 8 Vict. c. 110'."

- H It was held by the Court of Appeal that that provision did not apply to an insurance with a foreign company, the New York Assurance Company, even though that company was in existence on Nov. 1, 1844, and had an office in England. FRY, L.J., did not feel as confident in the result as the other two members of the court, and I find some of the reasoning of the majority a little difficult to follow, because what they were concerned with in that case was not the affairs of any foreign company, but whether a British taxpayer should receive exemption or deduction from his taxable liability in respect of a premium which

was paid by him and which was paid out of his income, whether it was paid to a company formed in this country or to a company formed somewhere else. *FRY*, L.J., says (25 Q.B.D. 140):

"It has been strongly pressed upon us that the words 'any insurance company existing on Nov. 1, 1844,' must *prima facie* mean a company constituted according to the laws of the United Kingdom, and the Master of the Rolls has taken that view. I confess that I am not able to follow him in that conclusion. I think that, in construing an Act of Parliament, we ought to look at the scope and object of the enactment. I have not the least doubt that, if the words, 'any insurance company' were used in an Act which required the registration, or which regulated the constitution, of such companies, or which asserted any right, or proposed to do anything which, according to the comity of nations, could be imposed by a government only upon those who are subject to its legislation, the words would *prima facie* mean an insurance company constituted according to the laws of the United Kingdom. But we are not now dealing with a case of that kind. The Act is conferring a benefit on persons—Her Majesty's subjects and others—who are liable to the payment of income tax. It creates an exemption in favour of persons who are making provision for their families by means of insurances on their lives. In such a case it does not seem to me very material whether the insurance company is a foreign one or one regulated by the laws of the United Kingdom. The legislature were thinking about the person who makes the payment, and the purpose of the payment, and were not, as it seems to me, at all concerned with the nature and constitution of the company to which the payment was to be made. But, although I am unable to agree with the argument, I nevertheless feel the pressure of the difficulties in the construction of the Act which have been insisted upon for the appellant, because it is anomalous to confer a benefit by reason of a payment made to a foreign company which existed on Nov. 1, 1844, and not to confer the same benefit in the case of a similar payment to a foreign company which came into existence after that date. If I had been left to my own unaided intellect, I should probably have thought the sounder construction was, to take the words in their full and literal meaning, however startling the anomalies which might result from so doing."

But, as the other learned judges reached a different conclusion, he concurred.

Those are the two most relevant authorities on the question which I have to decide, and in them are to be found, no doubt, the principles which I have to apply, but I must confess as regards the issue which I have to determine on the words of this particular section for the present purpose, I am largely left to my unaided intellect.

The first thing which is clear is that the imposition of stamp duty by s. 112 of the Stamp Act, 1891, must be only on companies which are subject to the law of Great Britain and formed under that law, because the comity of nations requires that a government must tax only those people who are under the control of its own laws. Therefore, manifestly the imposition of tax is limited to companies of that kind. Then, when I come to the construction of the relieving s. 55 of the Finance Act, 1927, I find that companies are referred to. Presumably, they are companies which would otherwise have to bear the burden of a particular tax on the increase of their capital. Therefore, I should rather suppose that I was dealing with the same sort of company as that which was being taxed. In the case of a transferee company that condition is satisfied if the company is in fact formed under the law of this country, but when I come to companies which are on the other side of the transaction, so to speak, the matter gives rise to a good deal more difficulty. Taking the words "any particular existing company" and "the existing company", it is true that on the literal meaning of the words the company referred to may be a company of any sort,

but I cannot help thinking that, in a relieving statute of this kind, it is not likely that in passing the statute the legislature was concerning itself particularly with a company formed in the Far East or somewhere else abroad. It is much more likely that it was considering transactions in regard to companies existing under the laws of this country. Moreover, it seems to me there are certain indications which compel me to come to that conclusion. Particularly, under

A (A) in sub-s. (1) I find the following provisions:

“The nominal share capital of the transferee company, or the amount by which the capital of the transferee company has been increased, as the case may be, shall, for the purpose of computing the stamp duty chargeable in respect of that capital, be treated as being reduced . . .”

B There is an indication that some stamp duty which has been imposed is to be reduced by something which is covered by these words:

“an amount equal to the amount of the share capital of the existing company in respect of which stamp duty has been paid,”

as it originally read.

C It has been said by counsel for the appellant company that, as those words have been repealed, they are no longer relevant. I do not accept that argument. It seems to me that, when you are trying to find out what the meaning of the section is, you have to look at the section as it originally was, to see what words were in it and consider why those words have been removed. It seems to me that, as originally drafted, it is plain the legislature had in mind a company

D the shares of which were being taken over in respect of which stamp duty had already been paid, and the object of the exemption was to prevent stamp duty being levied anew when there was merely an increase of capital for the purpose of the acquisition of existing shares—not strictly a reconstruction or an amalgamation, but very often so referred to under a loose use of those terms. Plainly, in my view, that was the object of the section. When I find that in 1930 those words are repealed,

E am I to conclude that the legislature at that date was desirous of extending this relief in respect of tax on the taking over of shares of a company in any part of the world? I should be a little surprised if that were the intention of the legislature, and I have been supplied by counsel for the commissioners with a reason explaining the purpose of that provision. He says that it was due to the fact that companies had been formed or had increased their capital before the Customs and Inland Revenue Act, 1888, introduced the stamp duty in question,

F and, consequently, companies of that kind would not have paid any stamp duty, so it was thought hard that they should be compelled to pay stamp duty on an acquisition of shares merely by reason of the fact that they had not paid a duty that was not exacted at the date when they were formed. That seems to me to be a sensible explanation, and I come to the conclusion that the Act does not refer to companies outside those regulated by the law of this country. It was

G urged on me that this view paid no attention to the provisions contained in the section under the heading (B). It is true that the argument which I have accepted does not depend on, or, indeed, deal with, the provisions which are contained in that part of the section, but I do not think that there is anything in that point. If I come to the conclusion, after considering (A), that the results which have been reached must follow, it does not matter whether or not (B) has been taken into consideration. No doubt, certain consequences will follow under (B), but that does not seem to me to affect the argument which has been based on the provision which one finds in (A). Accordingly, I do not think that affects the view which I have taken.

H There was a further argument which I must mention, based on the provisions of the Government of Ireland Act, 1920. It is put as an alternative argument on the acceptance of the position that the word “company” in s. 55 bears a more limited meaning than “any company”. It is urged, by reason of the provisions

of the Government of Ireland Act, 1920, and the Orders in Council which were made under the provisions of that Act, that the provisions of the Companies Acts and the Stamp Acts on the formation of Northern Ireland as a separate entity were carried into and formed part of the law of Northern Ireland, and, therefore, a company operating under those laws is a company which is within the terms of s. 55. It is true that there are to be found in the Act of 1920 and in the Orders in Council made under it provisions which continue for the time being the provisions of the English Companies Acts and Stamp Acts, but, in my opinion, that does not carry the matter through to the point to which it is necessary for the purposes of the argument in question. It seems to me that all these provisions did was to make the current Act of the United Kingdom operative in the new entity of Northern Ireland as part of the domestic law of Northern Ireland. In particular, it seems to me in the present case that the point breaks down, because, in 1932, there was passed in Northern Ireland an Act regulating companies which did away with the effect of the former English Companies Acts in Northern Ireland and established a new Act there. It is under the new Act that the two Northern Ireland companies with which I am concerned were formed. Consequently, it seems to me that this point does not enable exemption to be claimed. Accordingly I reject that argument also.

Appeal dismissed.

Solicitors: *McKenna & Co.* (for the appellant company); *Solicitor of Inland Revenue* (for the Crown).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

MIDGLEY ESTATES, LTD. v. HAND.

[COURT OF APPEAL (Somervell, Jenkins and Morris, L.JJ.), May 8, 9, 1952.]

Estate Agent—Commission—Agreement to pay commission on purchaser signing legally binding contract—Contract signed, but purchaser unable to complete.

The question in cases in which estate agents claim commission depends on the construction of each particular contract, but, prima facie, the intention of the parties to a transaction of this type is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. The vendor puts his property into the hands of an agent for sale, and, generally speaking, he contemplates that, if a completed sale results, and not otherwise, he will be liable for the commission, which he will then pay out of the purchase price. That is, broadly speaking, the intention which, as a matter of probability, the court should be disposed to impute to the parties. It follows that general or ambiguous expressions, purporting, for instance, to make the commission payable in the event of the agent "finding a purchaser", or "selling the property" have been construed as meaning that the commission is only to be payable in the event of an actual and completed sale resulting, or, at least, in the event of the agent succeeding in introducing a purchaser who is able and willing to purchase the property. That is the broad general principle in the light of which the question of construction should be approached, but this does not mean that the contract, if its terms are clear, should not have effect in accordance with those terms even if they do involve the result that the agent's commission is earned and becomes payable although the sale in respect of which it is claimed for some reason or another turns out to be abortive.

On June 23, 1950, the plaintiffs, a firm of estate agents, having been instructed by the defendant to dispose of his property, wrote to him acknowledging his instructions and adding: "The following conditions of sale are taken as agreed on by both parties. Commission at the rate of five per cent. to be paid to the company as soon as our purchaser shall

have signed a legally binding contract effected within a period of three months from this date." The defendant accepted these terms and the plaintiffs introduced M. who, on July 6, 1950, signed a binding contract to purchase the property, paid a deposit, and was let into possession. Owing to financial difficulties, M. was unable to complete the purchase with the result that he forfeited his deposit and the defendant regained possession. On a claim by the plaintiffs for commission,

HELD: on construction of the letter of June 23, the plaintiffs, having introduced a person who within the time specified had signed a legally binding contract to purchase the property, were entitled to commission notwithstanding that the sale was never completed.

AS TO REMUNERATION OF AGENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 257-263, paras. 432-436; and **FOR CASES,** see DIGEST, Vol. 1, pp. 488-528, Nos. 1664-1861.

Cases referred to:

- (1) *Luxor (Eastbourne), Ltd. v. Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.
- (2) *James v. Smith* (1921), [1931] 2 K.B. 317, n; 100 L.J.K.B. 585, n; 145 L.T. 457, n; Digest Supp.
- (3) *Poole v. Clarke & Co.*, [1945] 2 All E.R. 445; 2nd Digest Supp.

APPEAL by the plaintiffs from an order of His Honour JUDGE HAROLD BROWN made at Liverpool County Court on Mar. 6, 1952.

The plaintiffs, who were estate agents, claimed £95 commission on the sale by them of property owned by the defendant. By the terms of the agreement between the parties commission at the rate of five per cent. was to be paid to the plaintiffs "as soon as our purchaser shall have signed a legally binding contract effected within a period of three months from [the date of the agreement]". The plaintiffs introduced a purchaser who signed a binding contract, but was unable to complete. The county court judge held that in view of the purchaser's inability to carry out the contract the plaintiffs had not earned their commission.

A. Rankin for the plaintiffs.

G. Newman for the defendant.

SOMERVELL, L.J.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J.: This is an appeal from a judgment of His Honour JUDGE HAROLD BROWN at Liverpool County Court on Mar. 6, 1952, dismissing the claim of the plaintiffs, who are estate agents, for commission in respect of the sale of a property known as the Railway Supper Bar, Rock Ferry, Cheshire, belonging to the defendant. The learned judge held that on the true construction of the letters constituting the agency contract, read in the light of the numerous authorities bearing on contracts of this kind, the plaintiffs had not earned their commission.

On June 20, 1950, the defendant, Mr. Hand, wrote to the plaintiffs, Midgley Estates, Ltd., in these terms:

"Dear Sirs, I enclose herewith particulars of the above business [the Railway Supper Bar] and should be glad if you would endeavour to dispose of the same on my behalf as soon as possible. I shall be pleased to furnish any further information you may require."

The enclosed particulars gave details of the property and added:

"Price inclusive of property £1,800 with stock, fixtures and fittings at valuation . . . N.B. Fully sixty-six per cent. of the price asked can be arranged on mortgage if so desired."

To that the plaintiffs replied on June 23:

"Dear Sir, re Property known as Railway Supper Bar, 99, Bedford Road, Rock Ferry, Cheshire. We thank you for your written instructions to sell

the above property and would confirm that we shall be very pleased to act for you in this respect. The following conditions of sale are taken as agreed on by both parties. Commission at the rate of five per cent. to be paid to the company as soon as our purchaser shall have signed a legally binding contract effected within a period of three months from this date. In the event of the company receiving written instructions from you to withdraw the property from sale or that the property has been sold other than through our agency, we agree to cancel your instructions to sell forthwith and make no charge."

Those terms were accepted by the defendant. The plaintiffs succeeded in introducing a Mr. Mahon, and on July 6, 1950, he signed a binding contract to purchase the property. That contract was superseded by another more formal and elaborate document dated Oct. 2, 1950, and by it Mr. Mahon agreed to purchase the property for £1,900. There is no doubt, therefore, that a person introduced by the plaintiffs did enter into a legally binding contract for the purchase of the property. Mr. Mahon paid £380 deposit and he was let into possession of the property. He was in possession for a considerable time—something like eighteen months, but the sale was never completed, Mr. Mahon not being able to find the whole of the £1,900. In those circumstances the defendant brought proceedings against Mr. Mahon for possession of the property and forfeiture of the deposit. The result of those proceedings was that the deposit was forfeited and the defendant resumed possession of the property. He was thus £380 in pocket. The question then arose whether the plaintiffs were entitled to the amount of the commission stipulated for by their letter of June 23, 1950. The defendant disputing their claim, the plaintiffs sued him in the Liverpool County Court to recover the amount of their commission, namely, £95. That claim was rejected by the learned judge, and from his order the plaintiffs now appeal.

Contracts of agency between owners of property and estate agents have been many times before these courts. We have been referred to a large number of authorities including, in particular, the well-known case in the House of Lords of *Luxor (Eastbourne), Ltd. v. Cooper* (1), and *James v. Smith* (1921) (2). I hope I will not be thought disrespectful to the careful judgment of the learned judge or to the very full argument which has been presented to us if I refrain from referring to the numerous authorities in detail. As has been pointed out over and over again in the reported cases, an agency contract of this sort, just like any other contract, must be construed according to its terms. One has to look at the contract and see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened in which the commission is expressed to be payable. So far as any general principle is deducible from the authorities, their effect may, I think, be thus summarised. The question depends on the construction of each particular contract, but, *prima facie*, the intention of the parties to a transaction of this type is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. The vendor puts his property into the hands of an agent for sale, and, generally speaking, he contemplates that, if a completed sale results, and not otherwise, he will be liable for the commission, which he will then pay out of the purchase price. That is, broadly speaking, the intention which, as a matter of probability, the court should be disposed to impute to the parties. It follows that general or ambiguous expressions, purporting, for instance, to make the commission payable in the event of the agent "finding a purchaser" or "selling the property" have been construed as meaning that the commission is only to be payable in the event of an actual and completed sale resulting, or, at least, in the event of the agent succeeding in introducing a purchaser who is able and willing to purchase the property. That is the broad general principle in the light of which the question of construction should be approached, but this does not mean that the contract, if its terms are clear, should not have effect in accordance with those terms even if they do involve

the result that the agent's commission is earned and becomes payable although the sale in respect of which it is claimed for some reason or another turns out to be abortive.

Returning to the letter in the present case of June 23, it thanks the defendant for his written instructions to sell and then says: "The following conditions of sale are taken as agreed on by both parties", and the vital sentence is this: "Commission at the rate of five per cent. to be paid to the company as soon as our purchaser shall have signed a legally binding contract effected within a period of three months from this date". It seems to me that those words say in reasonably plain terms that the agent's function is to introduce a person who agrees to purchase the property and furthermore binds himself to do so by a legally binding contract. If the agents succeed in producing that result within the stipulated period of three months, the event has happened on the happening of which their commission is to be payable. They have earned the commission and the subsequent fate of the contract of sale does not affect their right to it. That seems to me to be the natural and reasonably clearly expressed meaning of this contract according to the language used. It should, therefore, in my view, be given that effect, and the learned judge, who, as I understand his judgment, was inclined to take a view similar to mine on the construction of the letter of June 23, erred in holding himself bound by authority to take a different view and to conclude that, in view of Mahon's inability to carry out the contract, the commission was not earned.

I have said I did not propose to refer in detail to the authorities, but I should, perhaps, mention *Poole v. Clarke & Co.* (3), because strong reliance was placed on it by counsel for the defendant. The contract which SINGLETON, J., had to construe in that case was in very peculiar, and, to my mind, ambiguous, terms. It was ([1945] 2 All E.R. 446):

"I hereby instruct you to find a purchaser for my business, the particulars of which are to the best of my knowledge and belief correctly stated as above. I also instruct you to receive any deposit paid by such purchaser and to apply same on the signing of the contract, as far as possible, towards payment of your expenses and commission as agreed hereunder . . . Amount of commission and expenses: (a) Commission of ten per cent. on the total purchase price (minimum twenty-five guineas) and expenses."

Then there was added:

"The vendor agrees to pay any out of pocket expenses up to and not exceeding £10 10s."

Strong reliance was placed by counsel for the agents on the fact that the agents were authorised to receive any deposit paid by the purchaser and to apply the same towards payment of their commission. The argument was to the effect that this provision showed that the commission was to be considered as earned so soon as a contract was signed and a deposit was paid. The learned judge rejected that contention. He held that the commission was not earned until the agents had carried out the vendor's request to them to find a purchaser. Inasmuch as the expression "find a purchaser" had been construed in the authorities as meaning a purchaser able and willing to purchase, the learned judge held that the commission had not been earned, and, consequently, that the provisions for applying the deposit in payment of it could not have the effect contended for. It seems to me that the language of the contract in that case was so very different from the language in the present case that it is of no assistance as regards the contract we have here to construe. The contract here suggests no independent obligation on the agents to "find a purchaser". The payment of the commission is made to depend simply on the signing of a binding contract. The circumstance that the person who is to sign is described by the plaintiffs as "our purchaser" cannot, in my view, affect the result. As already indicated, I think it is reasonably plain that "purchaser" in the context of

this letter means no more than a person who agrees to purchase the property and enters into a legally binding contract so to do. For these reasons it seems to me that on the true construction of this particular contract in the events which happened the agents did earn their commission, and, accordingly, in my view this appeal should succeed.

I should add that, as pointed out by counsel for the plaintiffs, this cannot by any means be said to be a case where the owner of property has found himself exposed to a claim for commission on the strength of a contract of sale negotiated by his agents with a mere man of straw. It seems to me on the evidence that, though the contrary ultimately proved to be the case, there was good reason for supposing that Mr. Mahon would, in the event of his entering into a binding contract as he did, be able to carry it through. He paid a deposit of £380 and came near to raising the balance of the purchase money. His inability to do so seems to have been, in part at all events, due to the fact that in the end the defendant was not disposed to advance on mortgage any substantial proportion of the price. I would, therefore, allow this appeal.

SOMERVELL, L.J.: I agree with the judgment which has just been delivered and with the reasons which JENKINS, L.J., has given for the conclusion at which he arrives. I only want to add one observation, and that relates to a paragraph in the learned judge's judgment in which he sets out the argument of counsel for the plaintiffs to this effect:

"In the course of that argument, Mr. Rankin was constrained to put his case as high as this, namely, that even had a man of straw been introduced and had signed a legally binding contract, the plaintiffs would, in the absence of fraud have been entitled to commission."

It is unnecessary to consider whether in addition to fraud some question of negligence might in certain circumstances arise. All I wish to point out is that under a contract of the kind which we are construing the commission is not earned until there is the signing of a legally binding document and there would be ample opportunity, one would think, for the vendor to make such inquiries as he thought necessary to satisfy himself as to the ability of the person who had been introduced to complete the contract which was to be put before him for signature. If the vendor were not satisfied with the result of his inquiries, he would not, of course, be under any obligation to accept the person whom the estate agents had introduced as a possible purchaser.

MORRIS, L.J.: I agree. The case depends on the construction of the words used in the letter of June 23 as those words are found in their context. In my judgment, by accepting those words, the vendor agreed to pay commission as soon as the purchaser introduced by the agents should have signed a legally binding contract providing that took place within three months from June 23. The agents, therefore, will have earned their commission, and are entitled to be paid it, as soon as a person introduced by the agents enters, in the capacity of a purchaser, into a legally binding contract with the vendor within the time specified. As my Lord has said, it is to be observed that no allegations of bad faith or imputations of negligence are made. In my judgment, the admitted facts show that the commission had been earned.

Appeal allowed.

Solicitors: *Cardew-Smith & Ross*, agents for *Geoffrey Warhurst & Co.*, Liverpool (for the plaintiffs); *Field, Roscoe & Co.*, agents for *Berkson & Berkson*, Birkenhead (for the defendant).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

GILLETT v. GILLETT AND ANOTHER.

[COURT OF APPEAL (Singleton, Denning and Hodson, L.JJ.), May 6, 7, 1952.]

Divorce — Pleading — Petition — Allegation of condoned adultery — Relevancy — Amendment at a late stage.

In January, 1951, a husband presented a petition for divorce on the ground that in 1945 his wife had committed adultery with a named man. In her answer the wife pleaded that that adultery had been condoned. In 1952, after the case had been set down, the husband applied for leave to amend the petition by adding an allegation that the wife had committed adultery with another named man during the years 1944 to 1948 and that that adultery had been condoned.

HELD: a condoned adultery might be relevant to the general issue in the case, or in ancillary proceedings for maintenance or custody, and, therefore, the amendment was relevant.

Per HODSON, L.J.: Whether at a late stage a party might be given leave to amend by adding something which he knew all about before the petition was presented, was essentially a matter in the discretion of the judge with which the Court of Appeal should not interfere.

AS TO AMENDMENT OF PETITION, see HALSBURY, Hailsham Edn., Vol. 10, p. 695, para. 1035.

INTERLOCUTORY APPEAL by the wife from an order of COLLINGWOOD, J., dated Apr. 3, 1952, dismissing the wife's appeal from an order of a registrar allowing an amendment of the petition by alleging a condoned adultery.

Hylton-Foster, Q.C., and *H. S. Law* for the wife.

Syms for the husband.

SINGLETON, L.J.: In his petition the husband alleged that the wife had committed adultery with a named man in April and May, 1945. In her answer the wife admitted that adultery, but pleaded that the husband had condoned it. The husband now wishes to amend the petition by adding an allegation of adultery with another man, which is said to have extended over a long period of years, and he says that he condoned that adultery. The application for leave to make that amendment was allowed by the registrar, and COLLINGWOOD, J., dismissed an appeal. Counsel for the wife has submitted to this court that the proposed amendment was wholly irrelevant, and ought not to have been allowed.

The husband originally alleged adultery in 1945. The adultery which he now seeks to allege by way of amendment covers the years 1944, 1945, 1946, 1947 and 1948—adultery which, he admits, he condoned. On one view of the case that may be irrelevant; on the other hand, when this petition comes to be heard it may be a part of the history which should be before the judge and some of those matters alleged may become relevant on the issue which has to be tried. I do not think it is possible to say at this stage whether or not the matters dealt with by the proposed amendment will be relevant on the trial. No doubt that is the view which COLLINGWOOD, J., took when he dismissed the appeal from the registrar. In any case, it was a matter for his discretion. I think he was right in dismissing the appeal.

So far as I can see, if the proposed amendment is allowed, it may be necessary for the petition to be served on someone else. That may mean further delay, but not the slightest harm can be done to the wife by the amendment. The husband is not seeking any remedy in respect of the adultery which he seeks to include in the amendment, because he condoned it. I am satisfied that this appeal ought to be dismissed.

DENNING, L.J.: I agree. If this woman did commit adultery which has been condoned, I am clear that the court ought to be informed about it. No relief is claimed against her or the man in respect of it, because it was condoned; nevertheless, it may well be relevant to the general issues in the case. Furthermore, it may well be relevant in any ancillary proceedings which follow thereafter for maintenance or custody, and, therefore, I think it was right for it to be pleaded. I do not mean to say that in a divorce case the court cannot be told of condoned adultery, or cannot receive evidence of it, unless it is pleaded. That may be a matter for the discretion of the court, but I can understand a court saying on some occasions that it will not receive the evidence unless notice is given to the named man. That being so, it is better that that notice should be given beforehand, as is proposed by this amendment. In my opinion, COLLINGWOOD, J., was right in the course he took.

HODSON, L.J.: The first point taken by the wife was that the husband should not at this late stage, in 1952 (the petition having been presented in 1951), and after the case has been set down, be permitted to amend by adding to his petition something which he knew about before the petition was presented. That seems to me to be essentially a matter which is in the discretion of the judge who allowed the amendment and one on which I think this court should not interfere. To my mind, the only substantial question on this appeal is whether or not the proposed amendment is relevant. I think it is. It is unnecessary to discuss whether it would be more appropriate to include it in the reply rather than in the petition. The issue has been clearly raised by the wife in her answer, namely, that her adultery as alleged in the petition was condoned.

In dealing with the issue of condonation, it seems to me impossible for the court to be shut out from ascertaining exactly what, if anything, was condoned. The husband is bound at some stage to say that what he did condone was not the adultery which the wife says he condoned, but some other adultery, namely, the adultery with the man named in the proposed amendment, and, therefore, that adultery is relevant to be considered on the issue of condonation raised in the pleadings as they stand unamended. Moreover, apart from the pleadings, the court has a duty under s. 4 of the Matrimonial Causes Act, 1950, to satisfy itself as to the absence of condonation, and that arises whether the suit is defended or not and whether the parties raise the issue or not, so it is impossible on any view of the case to say that this amendment is irrelevant. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Preston, Lane-Claypon & O'Kelly* (for the wife); *Corsellis & Berney* (for the husband).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

END OF VOLUME ONE.



